# SUMMARY OF THE CASES DELIVERED BY THE CONSTITUTIONAL COURT IN THE 1st SEMESTER OF 2017

In the period from 1 January 2017 to 30 June 2017, the Constitutional Court resolved 993 cases, issuing 492 decisions.

The time of the constitutional review/Powers in the exercise of which the aforementioned acts were issued

In this regard we note the following:

- 10 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;
- 477 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:

- 10 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;
- 2 decisions were 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;

**Solutions pronounced:**

By the above decisions, the following solutions were pronounced:

- 24 solutions of admission of the objection/exception/referral/request;
- 335 solutions of dismissal as unfounded of the objection/exception/referral/request;
- 85 solutions of dismissal as inadmissible or dismissal as having become inadmissible of the objection/exception/referral;
- 48 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:

- 1 referral belongs to the President of Romania;
- 12 referrals belong to MPs or to the presidents of the two Chambers of Parliament;
- 4 referrals belong to the Advocate of the People;
- 860 referrals belong to courts/parties to the proceedings.

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

**1.Decisions issued within the *a priori* constitutional review of law [Atricle 146 (a) first sentence of the Constitution]**

**The Constitution allows for the adoption of an interpretative law with effects for the future. Its regulatory content must be clear, accurate and foreseeable. The interpretative law must be adopted following the same procedure as the interpreted law. Therefore, it cannot be accepted that, while interpreting a law referring to the status of Deputies and Senators, law including non-criminal provisions, passed in a joint sitting of the two Chambers, the legislator actually infringed the sphere of applicability of the norms contained in the Criminal Code. Moreover, the interpretative law cannot depart from the regulatory content of the interpreted law.**

**Keywords:** *quality of the law, clarity of the law, foreseeability of the law, referral to the Chambers, interpretative law, joint sitting of the two Chambers, separate sittings of the two Chambers, criminal policy, effects of the decisions of the Constitutional Court.*

**Summary**

**I. As grounds for the objection of unconstitutionality**, it was claimed that the impugned law, which was an interpretative law, could lead to a legal conflict of a constitutional nature between Parliament and the High Court of Cassation and Justice, thus, in violation of Article 1 (4) of the Constitution.

It was considered that the interpretative law produced retroactive effects, considering that its effect resulted in a contradiction between the provisions of the general law (Law no. 161/2003) and of the special law (Law no. 96/2006), in the sense that, with respect to the conflicts of interest affecting Deputies and Senators, it retroactively reduced the scope of the general law.

It was argued that the impugned law provided for a retroactive impunity clause, being a discreet retroactive decriminalisation and a genuine amnesty for the MPs having hired family members before the date of entry into force of this ban, provided for in Article 38 (11) of Law no. 96/2006 on the status of Deputies and Senators. Therefore, by the effect of the interpretative law, they can no longer incur criminal liability for having committed the criminal offense of conflict of interest provided for in Article 301 of the Criminal Code.

**II. With respect to these please, the Court held that:**

The Constitution does not prohibit the adoption of an interpretative law, i.e. of a law that does not bring any innovative elements compared to the interpreted law, so that, by this legislative mechanism, the Parliament can provide an official and authentic interpretation of the interpreted law. It is a legislative act adopted either to clarify an interpretable/unclear, vague law, lacking foreseeability in the sense of indicating/clarifying the will of the legislator, or to put an end to the constant interpretation that the administrative or judicial authorities give to a law, in contradiction with the legislator's intention or goal upon the adoption of the law in question, situation that could lead to the cessation or modification of an administrative or judicial practice, including of the effects of the decision delivered for the purpose of unifying

judicial practice or solving legal issues. The interpretative law is a mechanism that should be used with great care, its adoption being, in itself, a measure confirming the exceptional nature of such a normative act. The fact of accepting, in the case-law of the Court, the possibility to adopt an interpretative law means, on the one hand, that the Parliament does not infringe upon the powers of the executive or judicial power, in compliance with the provisions of Article 1 (4) of the Constitution referring to the principle of separation and balance of State powers, and, on the other hand, that the interpretative law produces effects for the future.

But the Court must make sure that the impugned law is truly an interpretative one, in order to prevent legitimising, from the constitutional point of view, the lack of correspondence between its object of regulation, as qualified by the legislator, and its regulatory content; in other words, the Court verifies, pursuant to Article 1 (5), corroborated with Article 61 (1) of the Constitution, whether or not the law analysed includes any innovative element compared to regulations existing up to the date of entry into force of Law no. 291/2013, more specifically in relation to Article 38 (11) of Law no. 96/2006. Indeed, in order to ascertain whether or not the interpretative law departs from the regulatory content of the interpreted law, the Court must first ascertain whether or not the legislator has met the quality requirements of the law, and, to the extent that the interpretive law complies with these requirements, the Court shall be able to establish and, consequently, verify whether or not the legislative solution envisaged is a genuine interpretative law or, on the contrary, it includes innovative elements compared to the normative act interpreted, situation in which it cannot be considered interpretative.

The Court found that, although it was intended to refer only to the civil legal status of Deputies and Senators, in fact, by its wording, instead of representing a normative benchmark for clarifying the problem of the application in time of Law no. 219/2013, the interpretive law generated serious uncertainties as to its substantive scope. The Court found that, although it seemed to interpret a legal text referring to the legal status of Deputies and Senators, in fact, the effects of the impugned legislative solution were likely to affect the criminal field as well, which led to the Court's irrefutable conclusion that the law analysed was unclear and that the object of the adopted regulation was vague.

As to the accuracy of the impugned legal provisions, the Court held that the evasive and vague language used did not make it possible to establish the exact field of applicability of the interpretative law. In addition, the Court found that the legislative solution put forward was not predictable from the point of view of the effects that it might have in judicial practice, since, although adopted exclusively in civil matters, it had consequences in criminal matters as well; thus, it could be considered both as a decriminalisation law, within the meaning of Article 4 of the Criminal Code, and a legislative measure producing similar effects to an amnesty before or after conviction. Therefore, from the point of view of its criminal legal nature, it could be characterised as a decriminalisation law within the meaning of Article 4 of the Criminal Code and a cause of removal of criminal liability within the meaning of Article 152 of the Criminal Code. In these circumstances, the Court found that the regulatory act subject to its analysis represented a civil law with *sui generis* effects applicable in criminal matters, which is unacceptable. Or, a legislative act must be comprehensible, unequivocal and transparent as to its regulatory content, in order to make citizens trust the parliamentary activity, an essential aspect of the rule of law and of the democratic nature of the Romanian State.

The Court also pointed out that it fell within the exclusive competence of the legislator to establish and organise the State's criminal policy, but that, when adopting regulations of a criminal nature, the legislator was bound by formal requirements contained in Article 65 (1), Article 73 (3) (h), Article 75 and Article 76 (1) of the Constitution. In other words, the adoption and debate of regulatory acts in criminal matters must be conducted in separate sittings of the two Chambers of Parliament, in accordance with Article 65 (1) of the Constitution, which means that the rules for referring to the Chambers, as provided for in Article 75 of the Constitution, must also be respected, i.e. these cannot be adopted in a joint sitting of the two Chambers of Parliament.

Any measure related to criminal policy must be taken through a clear, transparent, unambiguous substantive criminal rule, expressly assumed by the Parliament.

With regard to the effects of its decision, the Court also held that, when, during the *a priori* constitutional review, it ascertained the unconstitutionality of a law as a whole, the delivery of such a decision had a definitive effect on the normative act in question, leading to the cessation of the legislative process concerning the regulation in question. The review, more precisely the bringing in line with the decision, applies only when the Court has found the unconstitutionality of some of the provisions thereof, and not when the unconstitutionality refers to the regulatory act as a whole, otherwise, this would be contrary to Article 147 (2) of the Constitution.

**III. For all these reasons**, the Court found that the provisions of the Law interpreting Article 38 (11) of Law no. 96/2006 on the status of Deputies and Senators were unconstitutional.

*Decision no. 619 of 11 October 2016 on the objection of unconstitutionality of the provisions of the Law interpreting Article 38 (11) of Law no. 96/2006 on the status of Deputies and Senators, published in the Official Gazette of Romania, Part I, no. 6 of 4 January 2017.*

**It is the exclusive right of the legislator to grant additional salary rights, besides the basic benefits or wages. The wage supplement thus granted must retain its distinct legal nature, without becoming part of the basic benefits or wages. Otherwise, this would lead to the establishment of a series of privileges for certain socio-professional categories in regard to which this wage supplement, although called differently, functions, in reality, as a basic benefit or wage against which the other additional salary rights are calculated.**

**Keywords**: *equal rights, wage policy.*

**Summary**

**I. As grounds for the objection of unconstitutionality**, it was pointed out that the impugned law violated Article 16 (1) and Article 138 (5) of the Constitution, concerning the awarding of a 50% wage supplement for neuro-psychic risk and overload to the staff of the National Agency of Civil Servants, including dignitaries, supplement that is calculated based

on the monthly basic salary, is a part thereof and represents the basis of calculation for wage supplements and other rights granted based on the basic salary.

As regards the violation of Article 16 of the Constitution, it was claimed that this wage supplement represented a new salary right compared to the rights governed by the Framework Law no. 284/2010 on the unitary wage scale for staff paid from public funds, discriminatory in relation to the staff of other public authorities and institutions. Its introduction in Law no. 188/1999 on the Status of civil servants creates the premises for similar requests from the other public institutions and authorities, as well as legal proceedings by public servants aimed at them being granted this supplement as well. Moreover, the impugned text does not indicate the specific activity for which this salary right is granted.

With regard to the violation of Article 138 (5) of the Constitution, it has been shown, on the one hand, that the impugned law did not indicate the sources of financing to support the regulated salary increase, which was tantamount to an unconstitutionality flaw thereof, and, on the other hand, that the legislative initiative did not contain any information about the financial effects on the consolidated general budget, i.e. about changes in the budgetary expenditures, as well as about the calculations on which these changes were based. It was also pointed out that the "ESA deficit" for the year 2016 was already estimated at 2.95% of the gross domestic product, for the year 2017, at 2.89% of the gross domestic product, while the level of the budget deficit provided for in the Maastricht Treaty on European Union was of 3% of the gross domestic product, at the most. As a result, there is the risk that the additional impact generated by the implementation of this measure may not be covered by the approved budget, which creates the premises for a fiscal imbalance. Moreover, the exceeding of the level of the budget deficit provided for by the Maastricht Treaty on European Union leads to the initiation of the excessive deficit procedure.

**II. With respect to these pleas, the Court held that:**

The wage policy applying to the staff paid from public funds is established by the legislator, the legislative authority having the competence to develop legislative policy measures in the field of wages in accordance with the economic and social conditions existing at a given time and decide on the wage policy. This is why the drafting of the wage system for the budget sector is a right and an obligation of the legislator. Thus, the legislator is entitled to modify the wage system in place or to replace it with another one, considered more appropriate in order to achieve the aim pursued, while also taking into account the financial resources available during different periods.

The Court ruled that wage supplements, premiums and other bonuses granted to dignitaries and other employees, through regulatory acts, represented additional salary rights, and not fundamental rights, enshrined and guaranteed by the Constitution. The difference between the basic benefits and wages of dignitaries and other employees in the budget sector represents the free choice of the legislator, considering the importance and complexity of the different functions. Also, the legislator is entitled to establish certain supplements to the basic benefits and wages, periodic premiums and other bonuses, which it can differentiate depending on the categories of staff to whom they are granted, which it can modify throughout different periods of time, which it can suspend or even cancel. Moreover, the introduction and reduction of wage supplements, their granting during a certain period of time, the modification or

cessation of their granting, the establishment of the categories of staff benefiting from them, as well as of other granting conditions or criteria fall within the exclusive competence and option of the legislator, the only constitutional requirement being that the measures ordered cover all categories of staff in an identical situation.

The Court held that the wage policy relating to staff paid from public funds, including both the establishment of the wage system and the additional salary rights, was the legislator's responsibility. The Court does not have the role or the competence to establish the elements of this policy by itself, but to verify the observance of the constitutional requirements inherent to the regulatory acts adopted by the legislator in this field, and not the opportunity of a wage policy-related measure.

In response to the pleas of unconstitutionality with reference to Article 16 (1) of the Constitution, the Court analysed the following criteria, namely: the category of persons to whom the wage supplement for neuro-psychic risk and overload is granted; whether or not the wage supplement in question may be granted through the single wages act and through other regulatory acts, like the one governing the status of a staff category, and whether or not the wage supplement in question retains its distinct legal nature, without confusing it with the basic wages/benefits.

As for the category of persons to receive this wage supplement, the Court held that this was represented by the staff of the National Agency of Civil Servants, authority including a maximum of 198 job positions, including dignitaries and positions within the cabinet of the President of the Agency. More specifically, given the purpose of the basic law, the wage supplement applies only to the staff category of the Agency's civil servants. It follows that the impugned legal text accurately established the category of persons to whom the wage supplement for neuro-psychic risk and overload is granted.

As to the following criterion, the Court found that there was nothing to prevent the Parliament from regulating salary rights through distinct laws, including through the law on the status of a certain professional category.

As regards the third criterion, the Court held that the wage supplement for neuro-psychic risk and overload granted to the staff already benefiting from it was a wage supplement calculated based on the basic monthly benefits, without becoming a part of it, whereas, in this case, the wage supplement, applied to the monthly basic salary, became a part of it, thus constituting a privilege as to the method of calculation, in the end, of basic wage/benefits. All the more so as Article 160 of Law no. 53/2003 - the Labour Code, republished in the Official Gazette of Romania, Part I, no. 345 of 18 May 2011, is unequivocal: "*The salary includes the basic salary, the benefits, the supplements, as well as other bonuses*", thereby distinguishing between the basic salary and the additional elements thereto, including supplements. The non-compliance with this distinction leads to the situation that other wage supplements be calculated in relation to the neuro-psychic risk and overload wage supplement as well, which is tantamount to the calculation of a "supplement's supplement". However, such a regulatory act represents a genuine privileged treatment as to the recipients of the norm compared to the overwhelming majority of the wage earning staff subject to the general regulations in the Labour Code relating to the structure of benefits/wages. Thus, the implementation of such a treatment as to the wages of the staff of the National Agency of Civil Servants represents a privilege with regard to the establishment of benefits/wages. Consequently, it is unacceptable

that this wage supplement in itself represented a part of the basic benefits/wage, based on which other supplements provided by the law are calculated as percentages, as well as a salary bonus for the proper compensation of the working conditions for which it is granted.

The Court found that, by the way in which the risk and neuropsychic overload wage supplement was regulated, the legislator introduced a privileged legal treatment for the staff of the National Agency for Civil Servants, contrary to Article 16 (1) of the Constitution. Instead of referring to the general rules on the structure of the salary and on the legal nature of the wage supplements, by introducing this wage supplement, it chose to increase precisely the basic benefits/wages, thus modifying, in a simulated manner, on the one hand, the legal nature of this wage growth and, on the other hand, the legal nature of the wage supplement.

As to the invoking of Article 138 (5) of the Constitution, the Court held that it had no jurisdiction to rule on the sufficiency of the financial resources, because such an operation was not based on Article 138 (5) of the Constitution, being an exclusive matter of political expediency concerning, in essence, the relations between Parliament and the Government.

**III. For all these reasons,** by a majority vote, the Court upheld the objection of unconstitutionality filed and found that the phrase "*is a part thereof and represents the basis of calculation for wage supplements and other rights granted based on the basic salary*" in Article I (2) [with reference to the last phrase of Article 21 ($2^2$)] of the Law amending and supplementing Law no. 188/1999 on the Status of civil servants was unconstitutional.

*Decision no. 667 of 9 November 2016 on the objection of unconstitutionality of the provisions of Article I (2) [with reference to Article 21 ($2^2$)] of the Law amending and supplementing Law no. 188/1999 on the Status of civil servants, published in the Official Gazette of Romania, Part I, no. 57 of 19 January 2017.*

**It is the exclusive right of the legislator to grant exemptions/facilities/instalments for the payment of the claims from European funds, but, within the framework of this power, the legislator is bound to observe the principle of equality as to the persons to whom reports were issued ascertaining the irregularities and establishing the debts. The mere payment, by the State, of undue premiums cannot be a reason for an exemption from the reimbursement thereof, as the exemption has to take into account an objective and reasonable criterion based on an essential condition under which the contract would have been approved or not.**

**Keywords**: *equal rights, mandatory acts of the European Union.*

**Summary**

**I. As grounds for the objection of unconstitutionality,** it was stated that the impugned law provided that the amounts representing the premiums for the beneficiaries of the Natura 2000 areas granted for the production losses occurred as a result of the enforcement of the

aqua-environmental commitments that they had to reimburse following the debt instruments issued by the Directorate General – the Managing Authority for the Operational Program for Fisheries 2007-2013, including the late penalties, of 19 560 747,07 lei, would no longer be recovered and would be paid by the State budget.

It was considered that, in view of Article 30 (5) of Council Regulation (EC) no. 1198/2006 of 27 June 2006 on the European Fisheries Fund, of Article 25 (1) of Government Emergency Ordinance no. 66/2011, as well as of the conclusions of the audit mission carried out by the Audit Authority of the Court of Auditors for the financial years of 2010 and 2011, the Intermediary body, the Directorate General for Control, Antifraud and Inspection initiated the ascertaining of the amounts unduly paid and the individualisation of the debits for each economic operator benefiting from the project. In these circumstances, the exemption of the economic operators concerned from the payment of the amounts indicated is contrary to Article 16 of the Constitution, which is discriminatory in so far as, in the absence of sound justifications, the provisions of the "draft law" apply only to a limited category of entities. It is also alleged that the recipients of these amounts are not exempt from the payment thereof, even if they were in good-faith.

**II. With respect to these pleas, the Court held that:**

It is the exclusive right of the legislator to grant exemptions/facilities/instalments for the payment of the claims from European funds, but, within the framework of this power, the legislator is bound to observe the principle of equality as to the persons to whom reports were issued ascertaining the irregularities and establishing the debts, individualised in terms of beneficiary and transaction. According to Article 25 of Government Emergency Ordinance no. 66/2011, the system irregularities or the deficiencies in the management and control systems, potential generators of systemic irregularities with financial consequences require the application of a unitary legal treatment even in the case of categories of persons in different situations. As Article 25 of Government Emergency Ordinance no. 66/2011 provides that these budgetary claims are to be recovered from the beneficiaries of the projects and that the amounts relating thereto have been unduly received, the legislator may exempt from the reimbursement thereof, the beneficiaries having undertaken essential services in consideration of the amount paid by the managing authority. In other words, by granting exemptions/facilities, the legislator is bound by a condition of reasonableness (*est modus in rebus*), in the sense that the application of a differential legal treatment – as in this case – must be justified, and the criterion that must be considered when assessing this nature is actually related to the obligations of the contract that the parties have agreed on.

Thus, there are essential conditions based on which the parties agree to enter into a contract, since the purpose of the financing contract is to provide future services by the parties, whereas, in this case, there are situations in which the essential conditions for obtaining financial assistance from the European Union, in the form of compensations for the losses caused by fish-eating birds, are aimed at the past, and not at the future provision of services by the beneficiary/applicant. For example, the premium provided for by the regulation was cashed in for the years 2008 and 2009 following the mere registration of the legal entities in question with activities in the field of aquaculture before the establishment of the NATURA 2000 zone as provided for in the Applicant's Guide. In other words, the amount received, although called

allowance/premium, is a compensation, which means that it has the legal nature of a compensation. In these circumstances, it cannot be claimed that the beneficiary of the financing application, submitted after 23 April 2010, considered, mainly, when the application was lodged, the activities following the signing of that application, but the premium/compensation paid by the EFF and the national budget for losses caused in the past by fish-eating birds (for the years 2008 and 2009).

The exemption from the reimbursement of the premium, since it has not been paid for future activities under a contract and for which the beneficiary has filed the financing application, amounts to a violation of the principle of equality, the exemptions being applied only to the recipients of amounts unduly paid under the contract and for which the parties have agreed to sign the contract. The Court found that the exemption concerned a premium for past situations, prior to the start of the project session aimed at compensating for losses caused by fish-eating birds, in which case the exemption was not justified, presenting itself rather in the form of a privilege granted by the legislator to the beneficiaries of the projects whose conclusion, at the time of submission of the financing application, did not depend essentially on the future benefits undertaken by the parties. Therefore, applying such exemptions to these situations amounts to a violation of the principle of equality between project beneficiaries, representing the regulatory premise for the unjust enrichment of the beneficiaries of the impugned law.

The situation of the beneficiaries of the law subject to constitutional review is essentially different from that of the beneficiaries of financing contracts including future benefits obtained by taking into account the object of the contract; those entitled to such facilities are those included in the last category, but only to the extent that the State considers such a measure to be necessary. Consequently, the mere payment, by the State, of undue premiums cannot be a reason for an exemption from the reimbursement thereof, as the exemption has to take into account an objective and reasonable criterion based on an essential condition under which the contract would have been approved or not. Therefore, by the measure adopted, ignoring the criteria set out in paragraph 35 of this decision, the State favoured the category of beneficiaries of allowances paid under Article 30 (5) of Regulation no. 1198/2006, compared to other beneficiaries of support through European funds, who found themselves in the situation described in Article 25 (1) of Government Emergency Ordinance no. 66/2011.

The Court also held that agriculture and fisheries fell within the shared competences of the European Union with the Member States, so that, irrespective of the way in which the Regulation above was interpreted, the legislator may not intervene in such a field that falls within the scope of European law, even in the form of granting additional aid or exemptions from the payment of aid already granted. Consequently, the Court also finds the violation of the provisions of Article 148 (4) of the Constitution from the perspective of the Parliament's failure to fulfil its obligation of discretion as to the scope of the compulsory act of the European Union, i.e. Regulation no. 1198/2006.

**III. For all these reasons,** by a majority vote, the Court upheld the objection of unconstitutionality filed and found that the provisions of the Law on certain measures referring to the payments made to the beneficiaries of the Natura 2000 areas were unconstitutional.

*Decision no. 683 of 23 November 2016 on the objection of unconstitutionality of the provisions of the Law on certain measures referring to the payments made to the beneficiaries of the Natura 2000 areas, published in the Official Gazette of Romania, Part I, no. 56 of 19 January 2017.*

**Bicameralism does not mean that both Chambers decided on an identical legislative solution, in the sense that within the decision-making Chamber there may be inherent differences compared to the form adopted by the Chamber of reflection, without, however, this changing the essential object of the draft law/legislative proposal.**

**Keywords:** *principle of bicameralism, separation of State powers, notification of Parliament, budgetary expenditures, sources of funding.*

**Summary**

**I. As grounds for the objection of unconstitutionality,** it was stated that the impugned law was contrary to Article 1 (5) of the Constitution, by establishing a legal regime in a form contrary to the Constitution and the other laws in force

With regard to the violation of the principle of bicameralism, it was stated that the legislative proposal adopted by the Senate, as the first Chamber referred to, provided for a derogation from Article 41 (1) of Law no. 165/2013, in that the payment of the amounts established as compensation of up to 50 000 lei be made in a single instalment. On the other hand, the Chamber of Deputies adopted the law under scrutiny with a wording completely different from the wording of the initial legislative proposal, ignoring the form adopted by the Senate. Comparing the two forms of the law adopted by the Chamber of Deputies and the Senate, it follows that there is a visible, blatant and substantial difference in content, which means that there has been a violation of the principle of bicameralism.

Another allegation referred to a violation of the provisions of Article 111 of the Constitution, according to which, if a legislative initiative implies the amendment of the provisions referring to the State budget or of the State budget for social security, it is mandatory to inform the Government about this. Whenever such information does not accompany a legislative initiative, there is a violation of Article 1 (4), Article 111 and Article 138 (5) of the Constitution.

**II. With respect to these pleas, the Court held that:**

The Parliament’s law-making activity cannot, in itself, be contrary to Article 1 (4) of the Constitution, considering that the matter of a violation of the reference text mentioned above only arises as concerns the solutions chosen while fulfilling its role provided for by Article 61 (1) of the Constitution. Even if the Government draws up the draft State budget, this does not mean that the Parliament cannot adopt legislative measures that would require the Government

to initiate a draft law/emergency ordinance amending the current budget or to initiate the draft budget for the year following the adoption of the law setting budgetary expenditures, this being taken into account while preparing the draft law relating to the State budget. Therefore, the Court did not find a violation of Article 1 (4) of the Constitution for the mere fact that the Parliament has exercised its role, as provided for by Article 61 (1) of the Constitution.

By examining the two forms of the law adopted by the two Chambers of Parliament, the Court found that the Senate had made only one amendment to Law no. 165/2013, which referred to the granting of the compensation approved by the Central Compensation Committee, in the form of a deed of compensation/approved file, and of that established by court rulings, become final and irrevocable before the entry into force of Law no. 165/2013 [Article 41]. On the other hand, the Chamber of Deputies decided to modify two working hypotheses, namely (1) the implementation of the point compensation decisions issued by the National Committee for the Compensation of Buildings [Article 31] and (2) the granting of the compensation approved by the Central Compensation Committee, in the form of a deed of compensation/approved file and of that established by court rulings, become final and irrevocable before the entry into force of Law no. 165/2013 [Article 41].

The Court found that these amendments concerned, on the one hand, the increase in the value of an instalment relating to the value of the point compensation decision issued by the National Committee for the Compensation of Buildings and, on the other hand, the increase in the value of an instalment related to the deed of compensation issued by the Central Compensation Committee/to the file approved prior to Law no. 165/2013/to the amounts resulting from court rulings become final and irrevocable before 20 May 2013 [date of entry into force of Law no. 165/2013], regardless of its value, given that the original wording of the law, adopted by the Senate, referred to the granting, in one instalment, of compensation of up to 50,000 lei relating to the decision of the Central Compensation Committee.

With regard to these aspects, the Court found that there were no significant differences in content between the two wordings of the law adopted by the two Chambers. To this effect, it was noted that the second Chamber had acted correctly, in the form of a correlation between the amendment to be made to Article 41 of Law no. 165/2013 and the corresponding amendment to Article 31 of the law. Thus, in the event of a change concerning the granting of the compensation established before the entry into force of Law no. 165/2013, the question necessarily arising referred to whether or not this should apply also to the enforcement of the decisions delivered after the entry into force of the law. Such an operation had to be carried out in a corroborated manner considering that, at the time when the law was adopted, it was established that compensation instalments should be equal [5,000 lei], regardless of the date of issuance of the compensation decision. Moreover, with the amendment of Article 31 (2) of Law no. 165/2013, by Law no. 103/2016, the time limit for the enforcement of the decisions of the National Committee for the Compensation of Buildings is of at least five years, which was the maximum time limit for the compensation established before the entry into force of Law no. 165/2013. Therefore, there is a certain correlation between the manner of granting compensation established before and after the entry into force of Law no. 165/2013, the decision-making Chamber having the right to carry it out.

The Court also held that bicameralism did not mean that both Chambers decided on an identical legislative solution, meaning that within the decision-making Chamber there may be

inherent differences compared to the form adopted by the Chamber of reflection, without, however, this changing the essential object of the draft law/legislative proposal. To deny the possibility of the decision-making Chamber to depart from the wording voted by the Chamber of reflection would be to limit its constitutional role, and the decision-making nature associated therewith would become illusory. Mimicry would thus be achieved in the sense that the second Chamber would identify itself with the first Chamber, as to its legislative activity, without being able to deviate in any way from the legislative solutions preferred by the first Chamber, which is contrary, after all, to the very idea of bicameralism.

Therefore, a violation of the principle of bicameralism cannot be alleged given that the law adopted by the decision-making Chamber addresses the general aspects envisaged by the law proposal/draft law in its wording adopted by the Chamber of reflection. To this effect, the changes brought to the wording adopted by the Chamber of reflection must include a legislative solution that retains its overall conception and they must be appropriately adapted thereto, by establishing an alternative/a complementary legislative solution that does not derogate from the wording adopted by the Chamber of reflection, while being more comprehensive or better articulated within the law, while achieving certain correlations specific to any modification.

In view of the above, the Court found that the impugned legal provisions were not contrary to Article 61 (2) of the Constitution; on the other hand, the way in which the impugned law was adopted represents an application of the principle of bicameralism, characterised by a close cooperation between the two Chambers of Parliament.

With regard to the pleas of unconstitutionality referring to the failure to indicate the source of funding for the budgeted expenditure, the Court found that the legislative amendments made would come into force on 1 January 2017, whereas the law was adopted on 18 October 2016. Thus, given that the State budget law for the year 2017 has not yet been adopted, the plea of unconstitutionality is premature, and the impact of the impugned law on the budget construction cannot be assessed at this point in time. Considering the principle of constitutional loyalty, when preparing the draft State budget for 2017, the Government will also anticipate the expenditures generated by the new legal regulation, which, in itself, must be qualified as a priority with regard to the obligation of the Romanian State to comply with the position of the European Court of Human Rights expressed in the Pilot judgement of 12 October 2010 in the case of *Maria Atanasiu and others v. Romania* [in particular, paragraph 6 of the operative part of the judgment declaring that the respondent State must "take measures to ensure effective protection of the rights guaranteed by Article 6 § 1 of the Convention and Article 1 of Protocol No. 1, in the context of all the cases similar to present case, in accordance with the principles enshrined in the Convention", or in the Judgment of 29 April 2014, in the case of *Preda and others v. Romania* [e.g. paragraphs 125 to 133]. Therefore, with regard to this aspect, i.e. of the constitutional requirement referring to the moment of adoption of the law committing future budgetary expenditures, the legislator has complied with the case-law of the Constitutional Court [Decision no. 581 of 20 July 2016, paragraph 67], given that these expenditures refer to the budget year following that of the adoption of the impugned law.

The Court also ruled that, in accordance with the provisions of the last sentence of Article 111 (1), of the Constitution, if a legislative initiative implied budgetary changes, the request for information from the Government was mandatory. In this case, the Court found that the Senate had requested the Government, ever since 12 May 2015, in accordance with Article 111

of the Constitution, an information on the regulatory content of the legislative proposal, which, however, had not sent the financial statement. The Court recalled that it was not the obligation of Deputies or Senators to draw up the financial statement, but of the Government, given that Article 15 (2) of Law no. 500/2002 was very clear in this respect. However, to elevate this competence of the Government to the level of a constitutional rule implicitly admitted by Article 138 (5) of the Constitution would amount to a purely discretionary condition in the sense that any law with budgetary implications could only be adopted if the Government has prepared and sent to Parliament the financial statement. However, if the Government does not support the legislative initiative/does not agree with it and, therefore, does not send the financial statement, it cannot block the legislative process though an omission. The Court also held that the financial statement provided for in Article 15 (2) of Law no. 500/2002 should not be mistaken for the viewpoint issued by the Government under Article 11 ($b^1$) of Law no. 90/2001, the two documents produced by the Government having a different legal regime and, implicitly, different objectives. Therefore, when a legislative proposal has budgetary implications, the Government must submit both documents mentioned, i.e. the viewpoint and the financial statement.

**III. For all these reasons,** by unanimity, the Court dismissed as groundless the objection of unconstitutionality lodged and found that the provisions of the Law amending and supplementing Law no. 165/2013 on measures to finalize the process of restitution, in kind or by equivalent, of immovable property wrongfully seized by the State under the Communist regime in Romania were constitutional in relation to the pleas filed.

*Decision no. 765 of 14 December 2016 on the objection of unconstitutionality of the provisions of the Law amending and supplementing Law no. 165/2013 on measures to finalize the process of restitution, in kind or by equivalent, of immovable property wrongfully seized by the State under the Communist regime in Romania, published in the Official Gazette of Romania, Part I, no. 134 of 21 February 2017.*

**The promulgation of a law during the *a priori* constitutional review exercised by the Constitutional Court cannot impede the proceedings before it.**

**Keywords**: *constitutional review of laws before promulgation, subject-matter of the constitutional review of laws before promulgation, law promulgation, Parliament notification, budgetary expenditures, sources of funding.*

**Summary**

**I. As grounds for the objection of unconstitutionality,** it was indicated that the impugned legal provisions generated additional expenditures for the consolidated general budget, in violation of the provisions of Article 138 (5) of the Constitution. It was pointed out

that the legislative proposals had not been accompanied by the financial statements provided for by law.

**II. With respect to these pleas, the Court held that:**

In an unusual manner, the Romanian Government referred to the Constitutional Court with a single objection of unconstitutionality concerning two laws, namely the Law supplementing Article $4^1$ of Law no. 341/2004 on the gratitude for the victory of the Romanian Revolution of December 1989 and for the anti-Communist rebellion of the workers of Braşov of November 1987, as well as the Law amending and supplementing Law no. 341/2004 on the gratitude for the victory of the Romanian Revolution of December 1989 and for the anti-Communist rebellion of the workers of Braşov of November 1987. In principle, the referral must have as its subject-matter the unconstitutionality of a law or certain provisions thereof, and not of several laws or provisions of several laws. However, the Court identified both a logical connection between the two laws subject to constitutional review, from the point of view of the basic regulatory act subject to amendment and supplement, i.e. Law no. 341/2004, and an identity between the constitutional texts invoked, respectively between the grounds of the pleas of unconstitutionality, since the whole problem of the objection of unconstitutionality referred to the existence of sources of funding for the payment of compensation to persons having fought against the Communist regime, given the enlargement of this category of persons and the establishment of an earlier moment for granting them compared to the present one. In view of the foregoing, the Court found that, in the particular context of the case, it had been lawfully referred to and, consequently, it ruled on the objection of unconstitutionality in an unitary manner, by delivering a single decision.

The Court also held that, in breach of Article 16 (1) of Law no. 47/1992, the President of Romania had promulgated one of the two laws with which the Court had been referred to, i.e. the Law amending and supplementing Law no. 341/2004 on the gratitude for the victory of the Romanian Revolution of December 1989 and for the anti-Communist rebellion of the workers of Braşov of November 1987. The Court found that, although the objection of unconstitutionality had not been formulated within the term of protection, it referred to a law not yet promulgated. Such a situation does not represent a departure from the regularity of the referral to the Constitutional Court, the holders of the right of referral being able to appeal to the Court at any time before the promulgation decree is issued. The fact that, in Law no. 47/1992, the legislator provided for a term of protection, amounts to a guarantee associated with the right to appeal to the Constitutional Court, which implies a total prohibition to promulgate the law within this time limit. However, the time limit mentioned cannot be considered a period of limitation in the sense that it is only within this period of time that objections of unconstitutionality can be raised; by lodging the objection outside the time limit, its author is open to the possibility that, until the date of its lodging, the President promulgated the law but, once the Court has been referred to, and as soon as the latter informs the President that the law is subject to an *a priori* constitutional review, the President does not have the right to issue, within this period, the promulgation decree. The President's conduct is not opposable to the Constitutional Court, which cannot decline its jurisdiction by delivering a solution of inadmissibility of the objection of unconstitutionality for this reason. The issuance of such decrees, in violation of the first sentence of Article 146 (a) of the Constitution, given that the

President was informed that the law was subject to the *a priori* constitutional review, does not represent a reason for dismissing the objection as inadmissible. Therefore, the decree issued, devoid of inhibiting effects, cannot impede the exercise of the *a priori* constitutional review, so that the Court examined the objection within an *a priori* review, even if the law was promulgated.

With respect to the first law subject to constitutional review, the Court noted that it merely established another point in time from which the territorial pension funds were required to pay the compensation, i.e. the date of filing the documentation required in order to renew the certificates, and not the date of filing the application for the payment of the compensation. The Court held that the Parliament was fully competent to establish legal rights to the benefit of citizens, as well as the conditions under which the citizens could value them; moreover, the Parliament could adopt measures to correct, adapt and restructure the right thus guaranteed. On the other hand, the Government is responsible for implementing the measures adopted by the Parliament. The manner in which the objection of unconstitutionality is worded calls into question the competence of the Parliament to adopt laws that have even the slightest budgetary implication, the Parliament thus becoming an accessory of the Government, its role being reduced in a random manner. In these circumstances, the fact that Article 138 (5) of the Constitution is invoked, without the slightest justification for the absence of an indication of the source of funding [the source exists in theory, but the right is not valued from the moment of filing the renewal application, but from that of filing the application for compensation], demonstrates that the objection of unconstitutionality is not motivated , being contrary to Article 10 (2) of Law no. 47/1992, and, therefore, inadmissible, and will be rejected as such.

As for the second law, unlike the first one, the Parliament did not correct an unfair manner of valuing a legal right, but regulated a new legal right in favour of the people having taken part in the anti-Communist rebellion of the workers of the Jiu Valley-Lupeni – August 1977. The Court notes that, according to Article 111 of the Constitution, the Senate requested the Government to be notified about the legislative proposal examined. Therefore, the Parliament observed the last sentence of Article 111 (1) the Constitution, as Government representatives were clearly informed about the legislative amendments proposed.

The Parliament is competent to regulate legal rights that, inevitably, have budgetary consequences. By the way in which the plea of unconstitutionality is worded, the right of the Parliament to legislate in areas with budgetary consequences is called into question. According to the Government, since Senators and Deputies do not have the right to initiate the law on the State budget, this means that they do not have the right to initiate laws with budgetary implications. Such a perspective is unacceptable. Deputies and Senators enjoy the right of legislative initiative, which can be limited only by the wording of the Constitution. It is true that the initiative for the adoption of the law on the State budget and the law on the State social security schemes belongs exclusively to the Government [Article 138 (2) of the Constitution], but this is due to the fact that the Government is able to calculate and establish the budgetary consequences of the regulatory acts adopted by Parliament. Even if they have all the information on the budget execution for the current year or on the forecasts for the following years, the Deputies and the Senators have the right of legislative initiative and the Parliament, as sole legislative authority of the country is, alongside the Government, in terms of legislative delegation, entitled to adopt regulations with or without budgetary implications.

As to the budgetary source, the Court held that it must necessarily be created. However, the law was adopted on 4 October 2016 and, if the President of Romania had not already promulgated it, it would most probably have come into force in December 2016. In this context, it could have been taken into consideration when structuring the State budget for the year 2017. In these circumstances, the Court found that the Government and the Parliament had at their disposal enough time to establish a budgetary source capable of covering the expenditures of the budget of the Ministry of Labour, Family, Social Welfare and the Elderly. The Court recalled that it was not incumbent upon Deputies or Senators to draw up the financial statement, but upon the Government, Article 15 (2) of Law no. 500/2002 being very clear in this respect. Raising this competence of the Government to the level of a constitutional rule implicitly admitted by Article 138 (5) of the Constitution would be tantamount to a purely potestative condition in the sense that any law with budgetary implications could be adopted only if the Government drew up and sent to the Parliament the financial statement. If the Government does not support/disagrees with the legislative initiative and, therefore, does not send the financial statement, it cannot impede the legislative process by an attitude of omission. The Court also noted that the financial statement provided for in Article 15 (2) of Law no. 500/2002 should not be mistaken for the point of view issued by the Government in accordance with Article 11 ($b^1$) of Law no. 90/2001, the two documents generated by the Government having a different legal regime and, implicitly, different purposes. Therefore, when a legislative proposal has budgetary implications, the Government has to present both documents mentioned, therefore both the point of view and the financial statement.

The Court emphasized the fact that it could not have an global view of the influences on the gross domestic product of all legislative drafts/proposals since it was referred to selectively, with respect only to certain regulatory acts. These must be presented to the Parliament because it is the only one (of course, beside the Government) to have a global view of the influences that the various measures adopted by it have on the gross domestic product. Therefore, these aspects must be examined as a whole, and not selectively and sequentially, only in relation to certain regulatory acts.

**III. For all these reasons,** by unanimity, the Court dismissed as inadmissible the objection of unconstitutionality of the provisions of the Law supplementing Article $4^1$ of Law no. 341/2004 on the gratitude for the victory of the Romanian Revolution of December 1989 and for the anti-Communist rebellion of the workers of Braşov of November 1987, and as groundless the objection of unconstitutionality of the provisions of the Law amending and supplementing Law no. 341/2004 on the gratitude for the victory of the Romanian Revolution of December 1989 and for the anti-Communist rebellion of the workers of Braşov of November 1987

*Decision no. 767 of 14 December 2016 on the objection of unconstitutionality of the provisions of the Law supplementing Article $4^1$ of Law no. 341/2004 on the gratitude for the victory of the Romanian Revolution of December 1989 and for the anti-Communist rebellion of the workers of Braşov of November 1987, as well as of the Law amending and supplementing Law no. 341/2004 on the gratitude for the victory of the Romanian Revolution of December*

*1989 and for the anti-Communist rebellion of the workers of Braşov of November 1987, published in the Official Gazette of Romania, Part I, no. 131 of 21 February 2017.*

**Reasonable period of time granted for the response by the Government to Parliament as to the request for information. Budgetary impact of the elimination of taxes.**

**Keywords:** Informing Parliament, principle of separation of powers, cooperation of State powers, principle of legality, quality of the law, foreseeability of the law, implementing domestic policy, budgetary expenditure, source of funding**.**

**Summary**

**I. As grounds for the objection of unconstitutionality**, its author – the President of Romania - considers that the Law on the abolition of fees and charges, and amending and supplementing certain legislative acts is contrary to the provisions of Article 1 (4) and (5), Article 102 (1), Article 111 (1) and Article 138 (2) and (5) of the Constitution. In essence, it was pointed out that, as it is a law which implies budgetary changes, the law examined was adopted without giving the Government a reasonable deadline for providing the information requested by Parliament. Thus, the legislative proposal was received by the Senate on 10 October 2016, the same day being requested the Government's viewpoint. Without the information requested, the Senate adopted the law on 17 October 2016. Although at the debate in the plenary, the Secretary of State in the Ministry of Public Finance took the floor, the constitutional requirement to inform Parliament was not fulfilled, the first Chamber not being able to effectively carry out its legislative function without a representation on the budgetary impact of the changes proposed. It was held the the information mentioned in Article 111 (1) of the Constitution cannot be purely formal in nature, having as object not the legislative act itself, but the effects of the legislative measures envisaged by the draft legislative act in question on the State budget and the State social insurance budget, so that technical information that only the Government is able to offer are required. However, the mere Parliament's request, in the absence of actual information from the Government, does not achieve the aim pursued by the constituent legislator in Article 111 of the Constitution, namely to ensure effective collaboration between the two public authorities. Having regard to the paramount importance of State Budget and the State social insurance budget recognised by the regulation, under Article 111 (1), of a special procedure for the adoption of this law, it can only be concluded that the information provided here must be interpreted as meaning that the Government must be allowed to also effectively draft the content of the information note. Otherwise, it could be understood that whenever Parliament calls on the Government for information on a legislative initiative with budgetary impact, Parliament could immediately enter the draft on its agenda, requiring only the mandatory presence of a member/representative of the Government in the debate and the final vote of the law and might consider fulfilled the condition laid down in Article 111 (1) of the Constitution based on the opinion expressed by the Government's

representative during such debate and vote. However, such an interpretation deprives of content the provisions of Article 111 (1) and (2), departing from the letter and the spirit of the Constitution. As regards the period within which the Government must submit the requested information — which must be reasonable, it was pointed out that Article 11 $b^1$) of Law no. 90/2001 stipulates 60 days and Article of 167 (5) of the Senate's Rules of Procedure stipulates 10 days. These deadlines were established to enable the Government to carry out a full and responsible examination of the respective amendments with budgetary impact, the measures necessary to cover the newly created budget deficit being subsequently adopted; only such an approach ensures the achievement of the constitutional guarantee of collaboration between the Parliament and the Government. Therefore, these deadlines are prohibitive in nature in the sense that, within these deadlines, Parliament is obliged to wait for the Government's viewpoint or the expiry of the period laid down by law. Otherwise, the adoption of that act is carried out in breach of the duties and role of the Government, as well as of the principle of the separation and balance of powers enshrined in Article 1 (4) of the Constitution and of the constitutional principle of loyalty, consistently highlighted in case-law of the Constitutional Court.

As regards the claim of unconstitutionality in relation to the provisions of Article 1 (5) and Article of 138 (5) of the Constitution in conjunction with the provisions of the Fiscal Responsibility Law no. 69/2010 and Law no. 338/2015 approving the ceilings of indicators specified in the fiscal framework for 2016, it was claimed that the law subject to review of constitutionality does not foresee a time-limit after entry into force, so that the adopted measures aimed at attracting the direct and indirect increase of budgetary expenditure, and revenue decrease, will have immediate consequences for both the implementation of the current budget, and securing and maintaining fiscal discipline. From another perspective of the principle of legality under Article of 1 (5) of the Constitution, it was claimed that the law lacked foreseeability and consistency because it does not include legislative solutions on all the effects produced by the initiated measures.

As regards the alleged breach of Article 138 (2) of the Constitution, it was claimed that the legislator was supposed to actually identify also the source of funding required for the application of the law. The author of the referral stressed the fact that the simultaneous abolition of a significant number of duties involves a significant reduction in budget revenues, while public services for which such were paid need to be provided further. By eliminating only duties and not also the provision of services, the law determines the indirect increase in public budgets expenditure. Also in this case, the legislator was bound by constitutional provisions — Articles 111 (1) and 138 (5) — and legal provisions (Article 15 of Law no. 500/2002, Article 7 and Article (15) of Law no. 69/2010) and to respect the parameters established by the settled case-law of the Constitutional Court.

**II. Having examined the exception of unconstitutionality**, the Court noted that the provisions of Article 138 (2) of the Constitution establish the Government's task to draw up the draft annual State budget and State social insurance budget. The subject matter of the present referral is, however, not the State budget or the State social insurance budget, but a law which amends a number of other legislative acts in terms of eliminating taxes/charges levied against

the provision, for the benefit of Romanian natural or legal persons, of services by different public authorities and public bodies or structures thereof. There is no doubt that law examined has an impact on budget revenue and, implicitly, on the State budget and the State social insurance budget execution, but he provisions of Article 138 (2) of the Constitution can only be deemed relevant in case of drafting of the State budget/State social insurance budget. Moreover, in order to claim, in the present case, that there was an infringement of Article 102 (1) in conjunction with Article 138 (2) of the Basic Law, would mean that Parliament — the sovereign legislative power, in accordance with Article 61 (1) of the Constitution — was the one who performed the task of the Government — representative of the executive power — to draft the State budget/State social insurance budget, which is not the case here.

As regards the alleged infringement of a statutory time limit in which the Government is obliged to respond to the Parliament's request for information pursuant to Article 111 (1) of the Basic Law, the Court observed that, according to Article 15 (1) and (3) of Law no. 500/2002 on public finances, where proposals are made to develop draft *legislation/measures/policies which result in revenue lowering or expenditure increase approved through the budget*, the Government is required to prepare and transmit to the Chamber of Deputies or the Senate, where appropriate, within *45 days* of the date of receipt of the request, a *financial statement*, which shall comply with the conditions laid down in the Fiscal Responsibility Law no. 69/2010. Moreover, according to Article 167 (4) and (5) of the Senate’s Rules of Procedure — First Chamber seised in this case — requesting information is mandatory if a legislative initiative involves amending the provisions of the State budget or the State SOCIAL INSURANCE BUDGET, and the authorities concerned are obliged to respond *within 10 days* In exceptional cases where the reply requires additional information, they are obliged to declare in writing that the public interest does not allow them to respond timely and to request a further period, which may not exceed 30 days. In the light of those legal provisions, the Court held that the financial statement, as provided for by Article 15 (1) of Law no. 500/2002 and Article 21 of Law no. 69/2010 is a document which is separate from the *point of view* formulated by the Government in accordance with Article 11 ($b^1$) of Law no. 90/2001 and which concerns the legislative proposals in general, initiated in compliance with the Constitution, the Government having the obligation to send such viewpoint to Parliament within 60 days from the date of the request. Both the terminological distinction and the difference in scope of the two mentioned legal deadlines — 45 and 60 days — indicate precisely the distinction between legislative acts on which the Government is obliged to sent an information note to Parliament, at the latter’s request, on draft legislation/measures/policies which result in revenue lowering or expenditure increase approved through the budget being governed by a shorter period of 45 days, but also another type of document with mainly technical and more detailed contents, namely the *financial statement*, which only the Government is able to produce. Furthermore, the Court held that the lack of the financial statement cannot be replaced by the presence of a representative of the Government before the Parliament in the law-making specific phases (at specialised committees and during debate). In the present case, the Court found that the Government did not submit the financial statement, although a request to that effect had been made on the same day. Indeed, the Senate adopted the legislative proposal 7 days later, but, by that time, the Government had not sent any request, pursuant to Article 167 (5) of the Senate’s

Rules of Procedure, that the period of 10 days be extended to 30 days. It is true that, in principle, one must agree that reasonable time must be granted to the Government to prepare its response, in the form of a *financial statement*, but, however, one can neither rely on in the absence of due diligence on the part of the executive to formulate a reasoned request for more permissive time limit. In addition, the Court found that the draft law in question was discussed in emergency procedure in light of the provisions of Law no. 500/2002, which governs the strict deadlines for drawing up and submitting for adoption the draft law on the State budget and the State social insurance budget in the years in which parliamentary elections take place, aspect obviously known by the Government and which constitute decisive grounds for drawing up the financial statement as soon as possible, as a matter of urgency, and not within the general time limit of 45 days. Furthermore, the Court observed that, during the adoption procedure before the Chamber of Deputies, the Government sent the 'its point of view' and that, during the debates procedure, the Government's representative stated that he supports the adoption of the draft law only upon acceptance of the comments and proposals contained in point II of the Point of view, without, however, such being reflected in the adopted law. In such case, the Court found that no allegation as to the infringement of the reasonable deadline for information can be accepted, since the Government has complied, finally, with the requirement imposed by Article 111 (1), the information note being sent prior to the adoption of the law. In addition, the fact that the draft law was discussed and adopted in the First Chamber seised — the Senate — in lack, at that time, of the information requested to the Government pursuant to Article of 111 (1) of the Constitution cannot affect the whole procedure of adoption, since in this case, this requirement was met before the debate and adoption, by final vote, of the law by the decision-making Chamber — the Chamber of Deputies. Even though it was formulated within a time interval considered by the author of the referral as being very short, the Court notes that point of view is substantiated in detail (it consists of 19 pages), the relevant documents originating from the Romanian Television Corporation and the Romanian Broadcasting Corporation being also attached thereto, all of which were taken into account when the final debate and vote on the law took place.

The Court also found that the alleged mismatch between the provisions of Article 15 (1) of Law no. 500/2002, relating to the 45 days time limit and those of Article 167 (5) of the Senate's Rules of Procedure, relating to the 10 days time limit, in terms of a clear regulation of a prohibitive time limit within which the Government has an obligation to give an answer to the request for information under Article of 111 (1) of the Constitution, is an issue which cannot constitute a ground of unconstitutionality of the examined law, as it is in fact the legislator's duty to develop a consistent legal framework in common, strictly determined matters.

As regards the granting of a reasonable deadline by which Parliament should await the information requested from the Government pursuant to Article 111 (1) of the Constitution, the Court held that, in the absence of a text provided strictly for this purpose in the Basic Law, qualification as reasonable of a certain period of time necessary for formulating that answer is purely relative, and variable. In such a case, it would mean that Parliament would be required to suspend the legislative procedure until Government sends its point of view, the delay in response or even the lack of such response becoming an insurmountable obstacle against law-making, which is inadmissible.

The Court also noted that the Government's representative was present at the debates and rendered conditional the executive's consent to the inclusion into the law of the notes and proposals contained in the Point of view, which are not, however, included in the adopted law. In the author’s view, this matter determines the violation of Article 111 of the Constitution, having regard to Constitutional Court's Decision no. 515/2004. Compared to those complaints, the Court found that by establishing these fundamental rules, the Romanian constitutional legislator sought to ensure that Parliament’s request to obtain information from the Government, also mandatory if a legislative initiative involves amending the provisions of the State budget or the State social insurance budget will not remain without result. The obligation incumbent on the Government was established by virtue of the main desideratum on which the entire construction of the Basic Law is founded, i.e. desideratum related to the cooperation between public authorities and institutions of the State. In the light of this principle, the constitutional provision invoked concerns the specific situation of legislative initiatives with budgetary implications, in the light of the need that the two powers work together — the executive, the Government, amongst whose main tasks are the drafting of the State budget and of the State social insurance budget and the legislator — Parliament, the supreme representative body of the Romanian people and the sole legislative authority of the country. However, it would be contrary to Article of 61 of the Constitution to assess that, in the event of disagreement between the two public authorities on a draft law, Parliament would be obliged, in its law-making activity, to be subject to the Government's exclusive will, as this would create the basis for an institutional deadlock, in the sense that the Parliament would be unable to legislate, i.e. to perform its fundamental role, as sole legislative authority. At the same time, it is not possible to identify within the Basic Law a text establishing Parliament’s constitutional obligation to legislate on the basis of the Government's exclusive will. This is because this would be in breach with both the principle of the separation and balance of powers, which is a general principle of the Romanian State and with the capacity of Parliament as *supreme representative body of the Romanian people*, exponent of national sovereignty, a supreme value of the Romanian State, enshrined in Article 1 (1) of the Constitution. In this context, the Court recalled the importance of the principle of loyalty as a constitutional status as established by constitutional case-law (see, to that effect, Constitutional Court Decisions nos. 356/2007 or 1431/2010).

The Court declared unfounded also the criticism of unconstitutionality concerning the alleged infringement of Article 1 (5) of the Constitution, which enshrines the principle of legality. The fact that the Government did not submit the financial statement until the moment of adoption of the draft law by the Senate as first Chamber seised, but only its point of view on the legislative proposal, during the urgency procedure for its adoption at the Chamber of Deputies, and that the comments and proposals expressed therein and to which the Government's representative referred to during the debates were not appropriated by the decision-making Chamber, cannot constitute grounds of unconstitutionality of the law examined in terms of infringement of Article 1 (5) of the Constitution. Furthermore, the Court has held that both the Ministry of Finance's advisory opinion and the Fiscal Council's advisory opinion cannot be invoked against the Parliament in its law-making activity so that their absence or their negative opinion cannot represent an insurmountable obstacle to the adoption

of the law. These opinions are mandatory only for the Government and are necessary solely for drawing up the financial statement whereas, through its opinion, the Ministry of Public Finance certifies that it has registered the possible financial changes to the Draft Budget.

Finally, the Court has stated that the matching and corroboration of the relevant legislation are to be carried out by the Government pursuant to Article XV of the examined law within 30 days of the date of entry into force of the law, for the purposes of amending accordingly, by decision, the legislative acts implementing the provisions contained therein.

The Court examined the unconstitutionality criticism concerning the lack of foreseeability and coherence of the law under examination, which, according to the author's allegations, does not include legislative solutions on all the effects produced by the enacted measures in conjunction with those relating to the alleged unconstitutionality with reference to Article 138 (5) of the Basic Law, which states that "*No budgetary expenditure may be approved without establishing its financing sources*". Noting, first of all, that the law which is the subject of constitutional review aims at *removing* a number of different taxes or charges levied for services provided by public authorities or institutions, the Court found that the effect of the law is not primarily the *increase in budgetary expenditure*, in which case Article 138 (5) of the Constitution could be relied on, but the *decrease in budgetary revenues* used either for funding the State budget or the local budgets, or for establishing a special fund intended to finance programmes and projects for the protection of the environment, or, where applicable, ensuring part of the revenues of certain public institutions. Therefore, it cannot be relevant the case-law relied on in the statement of reasons for the referral, with reference to the interpretation of Article 138 (5) of the Constitution.

Given that the elimination of duties and the provision of the same public service free in charge leads, however, to certain expenditure on these services, the Court found that, in some cases, the impugned legislative act explicitly indicates the source of financing, i.e. that the financing of certain expenditure will be made from funds from the Ministry of Justice (Article I point 3 and Article XIII, points 1 and 2 of the law) or from the State budget. As to the obligation to indicate the source, the Constitutional Court held, in its case-law, that the text of the Article 138 (5) of the Constitution speaks only about indicating the source of financing *before approving the expenditure*, and not about the obligation to indicate *in the law* that source (in this respect, Decision no. 173 /2002, Decision no. 320/2013 or Decision no. 105/2014) and that the lack of specific indication of the source of financing does not implicitly entail the lack of a source of financing (Decision no. 1056/2007, Decision no. 320/2013, Decision no. 1.092/2008 or Decision no. 1093/2008). With regard to the sufficiency of the financial resources, the Court has consistently held in its case-law that it does not have the power to assess the sufficiency of the financial resources, that such an operation does not have its basis in Article 138 (5) of the Constitution and it is a matter exclusively of political expediency, which concerns, in essence, the relationship between Parliament and the Government (see, in this respect, Decision no. 22/2016). This was, however, what constituted the subject of the criticism: decrease in budget revenues compared to the increase in budgetary expenditure for maintaining the same public services provided free of charge in the context of fiscal relaxation measures set up by the Fiscal Code. The Government, under its government programme

approved by Parliament at its investiture, and domestic policy, has the full freedom to propose financial compensatory measures, based on impact studies and analyses which are exclusively related to its own tasks of drafting the State budget and the State social insurance for the year 2017. Thus, the Government is able to establish, within the draft budget for the year 2017, a number of other financial measures to balance this budget, either by lowering costs or by increasing budgetary revenues from other sources. Moreover, the Court held in its case-law that, if the Government does not have sufficient financial resources, it may propose any amendments necessary to ensure the same, by virtue of its right of legislative initiative (see Decision no. 47/1993 or Decision no. 64/1993).

As regards the complaints relating to the adverse effects in terms of the functioning of the Romanian Broadcasting Corporation and the Romanian Television Corporation, i.e. elimination of the radio and TV tax, the Court has held that the autonomy and independence of these services, mentioned both in Article 31 (5) of the Basic Law and in Law no. 41/1994 on the organisation and functioning of the Romanian Broadcasting Corporation and the Romanian Television Corporation, relates to a neutrality or political autonomy, firstly, in that, through the dissemination of information and air time is not affected or privileged one or other of the political factors or social and political groups. This is the essential feature of those public services, in exercising their role of impartial information to citizens. Therefore *not the financial autonomy or independence* is crucial in ensuring this task within the limits of the Constitution, but the political autonomy. However, in relation to the *Explanatory Memorandum* to the contested law , the Court found that it lays down another real, certain source of financing, to such a budgetary allocation being introduced in the draft State budget for 2017. In conclusion, the Court dismissed the challenges of unconstitutionality relating to the provisions of Articles 1 (5) and 138 (5) of the Constitution.

Finally, the Court pointed out, in the specific context of the considerable increase in the number of legislative acts adopted by Parliament with a budgetary impact as well as of the referrals of the Constitutional Court on the same, that the Constitutional Court cannot have a general overview on the impact of all legislative proposals/drafts on the gross domestic product since it is selectively notified only with regard to certain legislative acts. They must be submitted to Parliament because only the latter (together with the Government) can have a general overview on the impact of the various measures which they adopt on GDP.

**III. For all these reasons**, by a majority vote, the Court dismissed an objection of unconstitutionality and found that the Law on the abolition of fees and charges, and amending and supplementing certain legislative acts is constitutional, in relation to the criticism brought.

*Decision no. 795 of 16 December 2016 on the objection of unconstitutionality of the Law concerning the abolition of fees and charges and amending certain legislative acts, published in Official Gazette of Romania, Part I, no. 122 of 14 February 2017*

**According to Article 115 (1) to (3) of the Constitution, the Parliament has the constitutional right to adopt a special law enabling the Government to issue ordinances. This enablement covers only the fields of ordinary laws, and the Government cannot adopt such ordinances in the field of organic laws.**

**Keywords**: *delegation of legislative powers, Government ordinances, enabling law, ordinary law, principle of separation and balance of State powers.*

**Summary**

**I. As grounds for the objection of unconstitutionality,** it was considered that the Law enabling the Government to issue ordinances was contrary to the provisions of Article 1 (4) of the Constitution, considering that the Government apparently received powers equal to those of the legislator. A violation of the provisions of Article 1 (5) of the Constitution was also alleged, in its component referring to the quality of the law, with reference to the provisions of Law no. 24/2000 on the rules of legislative technique for the elaboration of regulatory acts, while considering that the law includes unclear standards, of a general nature, which do not accurately establish the delegated legislative measures. The delegation of the legislative prerogatives requires an exact identification of the powers of the Government, because, otherwise, its ability to choose legislative interventions in a discretionary manner would be tantamount to transforming the Government into the legislative authority, concurring with the Parliament.

The authors of the objection also claimed a violation of the provisions of Article 115 (1) of the Constitution as to the prohibition on the Government to regulate in the field of organic laws through Government ordinances adopted by virtue of a special enabling law. To this effect, it is considered that there is a possibility that the Government modified certain legal regulations of an organic nature referring to autonomous administrative authorities, which would be in violation of the provisions of Article 117 (3) of the Constitution. Moreover, through the express reference to Law no. 95/2006 on the healthcare reform, the violation of the legal provisions on the prohibition to legislate in the field of organic laws is certified. It is also indicated that other regulations of the impugned law fall within the scope of organic laws, in accordance with Article 73 (3) (n) of the Constitution, considering that they concern regulatory acts on the "general organization of the education system".

**II. With respect to these pleas, the Court held that:**

The provisions of Article 115 (1) of the Constitution do not set a limit to the extent of the delegation; it belongs exclusively to the legislator to assess the fields to be governed through ordinances. On the other hand, there can be no question of a transfer of competence from the Parliament to the Government, as long as, according to Article 115 (3) of the Constitution, the ordinances are subject to Parliament's approval through law, within a deadline established in the actual wording of the enabling law. The Parliament may adopt a special enabling law, whether or not the Parliament is in session, the reason behind such a solution deriving from the role of the Government, as provided for in Article 102 (1) of the Constitution. Thus, on the one hand, it ensures the continuity of the legislative act throughout the year and, on the other hand,

the Government is given the opportunity to effectively adopt primary regulatory acts for the implementation of its governing program. It follows that the adoption of an enabling law is not, *per se*, contrary to Article 1 (4) of the Constitution, the constitutional basis for this legislative delegation being Article 115 (1) to (3) of the Constitution.

The Court stated that the provisions of Article 115 (1) and (2) of the Constitution referred, in general, to the fields in which the Government was authorized to issue ordinances, respectively the positioning of these fields outside the scope of organic laws, and not to express provisions of regulatory acts or to individualized legislative measures. Consequently, it is clear that a regulatory field cannot have the same precision or clarity as an express provision, the regulatory field being represented by the category of social relations covered by the regulation, while the delegated legislative measures represent the concrete regulatory solution contained in the provisions of the regulatory act governing the social relations aimed at. Thus, the enabling law must be sufficiently general to allow the Government to determine, individualize and regulate the measures that will be the object of the ordinances issued by it. It is true that the analysis of the provisions of the law subject to constitutional review shows an apparently non-unitary regulation, the provisions establishing the concrete fields in which the Government is enabled (regulatory acts expressly listed as susceptible to amendments through ordinances) alternating with provisions that only indicate the category of the social relations to be governed, but such a structure is not likely to undermine the enabling law as a whole in terms of the requirements of clarity and foreseeability, representing an element that may fall within the scope of the legislative technique.

As to the arguments of the authors of the objection of unconstitutionality referring to the fact that the purpose of adopting such “unclear standards” is to avoid parliamentary debate on the necessity of the solutions envisaged by the adoption of the ordinances or that there is no parliamentary control prior to the adoption of the ordinances, the Court found that the Parliament debated and expressed itself, through vote, both with regard to the fields in which the Government would be competent to issue ordinances, and to the approval or rejection thereof, once issued. Therefore, the existence of a violation of legal certainty, a component of Article 1 (5) of the Constitution, cannot be alleged by the mere adoption of a special enabling law that, through its content, expressly establishes the field of delegation.

The Court held that the purpose of the legislative enablement was to vest in the Government the component of establishing legislative measures which, however, did not affect, in any way, the fields reserved to organic laws. Therefore, from a substantive point of view, the enabling is limited, not only by the purpose of the enabling law, but also by the constitutional prohibition of going beyond the scope of ordinary laws by an interference with the field of organic laws. The fields reserved to organic laws are exhaustively and expressly enumerated in the Constitution, and the intervention of the constitutional court while examining the constitutionality of the enabling laws is likely to ensure that legislative delegation does not interfere with the limit established by the provisions of the Basic Law. Also, the constitutional review does not count, among its components, the possibility of extending its limits beyond the strict observance of the constitutional texts, as formulated in the Basic Law, without being able to rest its censorship on mere eventualities.

This is why the pleas lodged must be examined from a double perspective: to what extent the wording of the enabling law gives expression to a violation of the constitutional texts

invoked and if the provisions of the impugned law are deemed, by the authors of the referrals, as contrary to the Basic Law, only from the perspective of future and hypothetical provisions of the ordinances to be issued, which would obtain a content specific to organic laws, thus becoming unconstitutional. With regard to the second aspect, it is certainly obvious that an ordinance exceeding in any way the limits imposed by the Constitution is contrary to it and will be subject to the rigors imposed on it following the constitutional review. Hence, although some fields in the enabling law are not indicated rigorously enough, as consistently held in the Court's case-law, the Government is bound, when issuing an ordinance based on an enabling law, to strictly observe the fields reserved to organic laws, although such a detailed presentation does not expressly result from the enabling law.

The Court is competent to ascertain the unconstitutionality of the provisions in the enabling law only to the extent that the phrases used therein expressly or implicitly cover fields within the scope of regulation of organic laws.

As regards the plea of unconstitutionality of the legal provisions that do not distinguish between the central public authorities forming the specialised public administration and the autonomous administrative authorities, the Court found that certain components of the specialised public administration had indeed to be governed through organic laws. In this context, it is up to the Government to refrain from intervening, by the ordinances that it adopts, in the fields that, by definition, fall within the scope of organic laws. On the other hand, for the other fields, the Government may issue ordinances. Thus, the Government is bound, while exercising the prerogatives granted by the enabling law, to strictly observe the fields reserved to organic laws, any ordinance provision violating this limit being unconstitutional. Although such a detailed presentation does not expressly result from the enabling law, it is implicit and indisputable with respect to the constitutional provisions.

With regard to the plea of the unconstitutionality of the provisions referring to social protection measures, the Court held that organic laws were adopted in order to regulate the general social protection system, and an improvement of the quality of the life of retirees could imply occasional and specific social measures, without these being qualified as a general system, but as components thereof.

With regard to the plea of unconstitutionality of the provisions referring to problems related to pre-university education, scientific research, higher education or the financing thereof, as well as to the assurance of quality at the level of higher education, the Court held that these could only cover other aspects, different from those related to the general organisation of the education system, which, according to the Constitution, were governed only by organic laws. The Court held that the aspects listed did not identify, in all their components, with the general organization of the education system, but pursued, by their aims and methods of implementation, the improvement of the national educational process and quality thereof, within the general framework of the education system and in accordance with the provisions of the legislation in force. Thus, within the constitutional review of the provisions of the enabling law, the Constitutional Court cannot rest its solution on considerations relating to a hypothetical content of the ordinances to be issued by the Government based on the enabling law.

The Court emphasized the importance of the general constitutional principle of fair conduct, deriving from the provisions of Article 1 (4) of the Constitution and guaranteed by

paragraph (5) of the same constitutional article; therefore, it is primarily the task of the public authorities to apply it and to observe it in accordance with the values and principles of the Constitution, including in relation to the principle enshrined by Article 147 (4) of the Constitution, on the generally binding nature of the decisions of the constitutional court.

**III. For all these reasons,** by unanimity, the Court dismissed as groundless the objection of unconstitutionality filed and found that the provisions of the Law enabling the Government to issue ordinances were constitutional in respect to the pleas lodged.

*Decision no. 1 of 12 January 2017 on the objection of unconstitutionality of the provisions of the Law enabling the Government to issue ordinances, published in the Official Gazette of Romania, Part I, no. 57 of 19 January 2017.*

**The lawyer-client relationship is a privileged one both from the perspective of Article 26 of the Constitution and of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, since it concerns the client's right of defence. Thus, the legislator is entitled to regulate a guarantee associated to this relationship and to protect it appropriately.**

**Keywords**: *right of defence, right to a fair trial, lawyer, equal rights, private life, secrecy of correspondence.*

**Summary**

**I. As grounds for the objection of unconstitutionality,** it was stated that, since the provisions of the Criminal Procedure Code and of the Criminal Code governed the conditions for taking provisional measures, for removing objects and documents, as well as those of the safety measure of seizure, it appeared as excessive to regulate the exemption of the lawyer, considering his/her relationship with the client, from the application of the provisions on the removal of documents that might prove the commission of an offense or from those relating to confiscation.

It was deemed that the law did not punish lawyers' conduct in almost all the situations in which they had information relating to the commission of intentional offenses. It is stated that the Criminal Code provides for and punishes the criminal offense of non-reporting, as well as the cases of excuse from criminal liability, so that the introduction of special provisions for lawyers, in the sense of non-reporting the criminal offenses that they learn about while exercising their profession is not justified, the current regulations being sufficiently clear and complete. Subsequently, it was argued that the impugned text excused from criminal liability the lawyers who did not report certain criminal offenses, such as those provided for in Articles 190 and 191 of the Criminal Code and those against national security.

It was stated that the establishment of a derogatory regime in the case of lawyers, with respect to the offense of non-reporting referred to in the Criminal Code, unduly established a special and discriminatory regime for lawyers.

A violation of the provisions of Article 1 (3) of the Constitution was alleged, by annulling the obligations of a State governed by the rule of law towards its citizens by favouring lawyers to the detriment of the public interest and of the quality of the public act or service that the State provides through them.

**II. With regard to these pleas, the Court held that:**

In order to carry out a complete analysis of the pleas of unconstitutionality in relation to Article 16 (1) of the Constitution, the Court examined the regulatory acts governing the lawyer-client relationship, as well as the professional secrecy characterising this relationship. Thus, according to Article 29 (1) and to Article 36 (1) of Law no. 51/1995 for the organisation and practice of the lawyer's profession, republished in the Official Gazette of Romania, Part I, no. 98 of 7 February 2011, "*A lawyer appearing on the Bar's table is entitled to assist and represent any natural or legal person, based on a contract concluded in a written form [ ...]*" and "*The contact between a lawyer and his/her client cannot be hindered or controlled, directly or indirectly, by any State body*". Furthermore, "*The lawyer is obliged to provide legal assistance in the cases in which (s)he was appointed ex officio or free of charge by the Bar*" (Article 41 of the law). According to Article 11 of the same law, "*The lawyer is bound to keep the professional secrecy regarding any aspect of the case entrusted to him/her, unless otherwise expressly stipulated by law*".

Consequently, under the legal assistance contract, rights and duties specific to the lawyers' profession arise, given the essential role of lawyers as defenders of the rights and interests of litigants, which is why the relationship between them must be characterised by trust. In this context, the Court emphasized that an effective defence could only be obtained if there was a relationship based on complete trust between the party and the lawyer representing the latter's interests, considering that the party would entrust the lawyer with personal information, based on which (s)he shall build a proper defence.

With regard to the client-lawyer relationship, the European Court of Human Rights ruled that the search of a law firm (while the lawyer was not suspected of any criminal offense) was not accompanied by any safeguard against violations of professional secrecy, such as the prohibition to remove documents covered by the lawyer-client privilege or the supervision of the search activity by an independent observer capable of identifying, independently of the investigation team, which documents were covered by professional secrecy. The verification and confiscation of documents covered by professional secrecy constitutes a disproportionate interference with the secrecy of correspondence. The Court recalled that a breach of professional secrecy (of the lawyer) could have consequences on the proper administration of justice and, automatically, on Article 6 of the Convention (Judgment of 7 June 2007, delivered in the case of *Smirnov v. Russia*, §§ 46 and 48 and, to the same effect, with regard to lawyer-client privilege, see also the Decision of inadmissibility of 19 September 2002 in the case of *Tamosius v. United Kingdom* or the Judgment of 22 October 2015 in the case of *Annagi Hajibeyli v. Azerbaijan*, §§ 69 et seq.). The Court pointed out that Article 8 of the Convention protected the secrecy of correspondence between individuals, but granted increased protection

to lawyer-client exchanges. This is justified by the fact that lawyers have a fundamental mission in a democratic society: to defend litigants. A lawyer cannot perform this basic task if unable to guarantee to those that (s)he defends that their correspondence remains confidential. Thus, the relationship of trust between them, which is essential for fulfilling this mission, comes into play. The observance of the litigants' right to a fair trial, particularly as regards the right of any "accused" not to contribute to his/her own accusation indirectly, but necessarily, depends on this [Judgment of 6 December 2012, in the case of *Michaud c. France*, § 118; see also the Judgment of 23 April 2015, in the case of *François v. France*, § 51, in which the Court also recalls that the specific status of lawyers places them in a central position as concerns the administration of justice, as intermediaries between litigants and the courts of law; they play a key role in ensuring public's confidence in the activity of the courts of law, which is a fundamental aspect in a democratic State governed by the rule of law]. Consequently, lawyers' professional secrecy – which mainly involves a series of obligations on their part – is specifically protected by Article 8 of the Convention (§ 119).

The Constitutional Court considered that the legal assistance provided by a lawyer implied a relationship of trust between him/her and the client, based on professional secrecy, a paradigm where confidentiality plays a leading role. Professional secrecy derives from the client's right of defence, which, in turn, constitutes a guarantee of the right to a fair trial. The correspondence between them contributes, essentially, to the organization of the client's defence, thus being an intrinsic element of the fundamental right of defence, enshrined in Article 24 of the Constitution; this is why the lawyer-client relationship is deemed to be a privileged one. Consequently, the analysis of the constitutional court must start from the privileged status of the lawyer-client correspondence, which also enjoys a specific legal treatment, without assimilating it to ordinary correspondence between individuals. Thus, the State must develop a regulatory framework that should provide additional protection to this type of correspondence.

The impugned law only indicates the documents drafted as part of the legal assistance provided by the lawyer that are exempt from the measure of document removal, taken during a search (Articles 156 to 168 of the Criminal Procedure Code) or forced removal of documents (Articles 169 to 171 of the Code of Criminal Procedure), and of seizure (Article 112 of the Criminal Code). Specific safeguards, such as the one examined above, that accompany the privileged client-lawyer relationship, do not apply if the lawyer is the one having committed the criminal acts. The privileged client-lawyer relationship persists under all conditions and circumstances, but the commission of criminal acts by the lawyer exceeds this relationship, situation in which the norms of general law in the field shall apply.

In view of the foregoing, the Court found that there was no violation of the equality between lawyers – as active subjects of certain criminal offenses – and any other citizen, since lawyers too are subject to general criminal and criminal procedure norms. Obviously, they do not find themselves in the same legal situation when preparing/holding documents as part of the legal assistance provided and, in this case, taking into account the client's right of defence, guarantee of the right to a fair trial, these documents enjoy a different legal treatment.

The Court noted that, if a lawyer learned about the commission of criminal offences outside or by exceeding the legal assistance provided, (s)he shared the same criminal liability for non-reporting as any other person. However, when learning about the commission of

criminal offences within the limits and during the legal assistance provided, the legal treatment applying to the lawyer shall be different from that applied to the other persons, because (s)he is subject to a relationship of trust granted by his/her client, characterized by confidentiality. A general obligation of the lawyer to report any criminal offence under general law would undermine the client's right of defence, because the relationship between them would be characterized by fear, lack of sincerity and trust, by a feeling of vulnerability on the part of the client, their cooperation thus becoming partial, ineffective and formal.

The Court also held that the legislator had set a high standard for the protection of the professional secrecy specific to the legal assistance provided by lawyers and had given the client the opportunity to have an open relationship with the lawyer, without the fear of exposing himself/herself to other criminal charges following the lawyer's obligation to denounce him.

The Court held that, while providing legal assistance, lawyers could not have an active attitude, aimed at determining the client to commit certain acts/to sign certain documents, his/her role being only to assist/represent/advise the client; otherwise, the lawyer's activity would violate the relationship of legal assistance with his/her client and, if this is contrary to the criminal standards, it shall be deemed as such according to the lawyer's criminal participation.

Consequently, lawyers are not in the same legal situation as other persons with respect to criminal liability for non-reporting only when they provide specific legal assistance, so that the legislator has constitutional jurisdiction to establish a specific regime for their criminal liability in case of non-reporting.

**III. For all these reasons,** by a majority vote, the Court dismissed as groundless the objection of unconstitutionality filed and found that the provisions of Article I (14) [relating to Article 35 $(1^1)$] and (19) [relating to Article 46 $(4^3)$] of the Law amending and supplementing Law no. 51/1995 for the organisation and practice of the lawyer's profession were constitutional in relation to the pleas lodged.

*Decision no. 23 of 18 January 2018 on the objection of unconstitutionality of the provisions of Article I (14) [relating to Article 35 $(1^1)$] and (19) [relating to Article 46 $(4^3)$] of the Law amending and supplementing Law no. 51/1995 for the organisation and practice of the lawyer's profession, published in the Official Gazette of Romania, Part I, no. 235 of 5 April 2017.*

**The adoption of interpretative administrative acts is contrary to the principle of stability of legal relations. The finding of the unconstitutionality of the provisions relating to the substance of the law leads to the unconstitutionality of the law as a whole, which leads to the end of the legislative process.**

**Keywords**: *interpretative administrative acts, stability of legal relations, interpretative laws and ordinances, parliamentary standing orders, effects of the decisions of the Constitutional Court.*

**Summary**

**I. As grounds for the objection of unconstitutionality**, it was pointed out that the regulation of the processes and procedures for interpreting regulatory acts could not be the subject of a law, since the interpretation activity, specific to the issuer of the norm or to the enforcing authority, cannot be subject to decision-making. The distinction between the different types of interpretation already exists: the official one, which is mandatory, and the unofficial one, which is optional. It is also emphasized that the interpretation of legal norms remains a subject belonging to the general theory of law, which cannot be regulated by the adoption of a law. It is stated that the legislator may adopt an interpretative law to ensure a maximum degree of predictability of the legal norm, a circumstance in which the adoption of the interpretative norm must follow the same procedure as that by which the norm that it interprets was adopted, thus making the procedure for the drafting and adoption of interpreted normative acts applicable.

A violation of the provisions of Article 102 (1) of the Constitution was also pointed out, since the obligation of the relevant ministry to issue a draft interpretative regulatory act, which the Government is bound to adopt, is regulated. Since this same obligation is incumbent upon the local public administration authorities, it is considered that Article 23 (1) of the law violates Article 120 (1) of the Constitution, for the same reasons, but also other principles underlying the functioning of the entire administration.

It is also alleged that the vague, obscure, confusing and imprecise wording of the impugned law violates Article 3 (1), Article 6 (1) and Article 13 (a) of Law no. 24/2000, thus being described as having an unforeseeable nature.

**II. With respect to these pleas, the Court held that:**

In its case-law, the Court accepted the jurisdiction of Parliament to adopt interpretative laws and, for the same reasons, when the Government acts by virtue of a legislative delegation, this finding is necessary in the case of interpretative ordinances (ordinances issued under a special enabling law/emergency ordinances). It must also be retained that the body competent to verify the truly interpretative nature of the interpretative law and the fact that the interpretation chosen respects the limits of the Constitution is the Constitutional Court, therefore, a different authority than the one called to apply the law in a direct manner. The interpretative law is taken into account by the constitutional court in order to determine and evaluate the meaning of the norm interpreted within the constitutional review of the latter, so that, in this case, the solution of unconstitutionality or, on the contrary, of constitutionality, shall apply to the original norm, in the interpretation given by the legislator. In addition, the interpretative law is mandatory both for the authorities of the central/local public administration, and for the courts of law and other authorities, as the case may be.

The administration can adapt its activity through specific means, which led to a unitary interpretation of the administrative norm, without being necessary to formalize it in an interpretative regulatory act, and the official judicial interpretation, on a case by case basis, is a remedy not only sufficient, but also effective to impose a certain interpretation that can be given to the administrative norm in question. If the administration considers that the courts of law have applied an interpretation that deviates from its intention, it can modify/supplement

the norm in question with effects for the future and in compliance with the acts superior to the level in question. It is a flexible regulatory system that does not include elements likely to destabilize the entire administration mechanism. The introduction, in this normative paradigm, of the notion of interpretative norm as well would imply a relativisation of the previously indicated mechanism, with unpredictable effects on the security of legal relations. These acts are, in any case, characterized by a high degree of instability or inaccessibility (see also, to this effect, Decision no. 17 of 21 January 2015, paragraphs 67 and 94, or Decision no. 51 of 16 February 2016, paragraph 47), and to add the category of administrative interpretative acts would be tantamount to accentuating this situation. Therefore, considering the multitude of legal subjects holding the right to issue such interpretative administrative acts, aspect corroborated with the possibility of even having non-unitary interpretations of the provisions of Article 3 of the impugned law (governing the situations in which interpretative acts may be rendered, situations with a fairly high degree of generality from the perspective of the wording of these legal provisions) and with the possibility of these authorities issuing vague/general/imprecise administrative acts in order to be able to be interpreted according to certain circumstances, which can double the regulatory activity of the authorities of the public administration, the Court found the unconstitutionality of the legal provisions referring to the introduction of the power of administrative authorities to issue interpretative administrative regulatory acts, these being contrary to the principle of legality enshrined in Article 1 (5) of the Constitution, in its component relating to the stability of the legal relations established under the interpreted act.

The Court also found the unconstitutionality of the procedure for the interpretation of the laws on the grounds that this procedure is specific to parliamentary standing orders, of the procedure for the interpretation of laws approving ordinances, which, in turn, is specific to parliamentary standing orders, as well as of the procedure for the interpretation of regulatory administrative acts, on the grounds that such a procedure is in itself contrary to Article 1 (5) of the Constitution. Consequently, the Court held that the sole object of the law would thus become the definition of the methods of interpretation, as it was carried out in Articles 7 to 9 of the law. Or, the object of the regulation, as defined in Article 1 of the law and mentioned in the title of the law, is the procedure for the interpretation of regulatory acts, and not the methods of interpretation. Although these represent elements of the operative part of the regulatory act, they cannot be the exclusive object of a law, the general provisions having the role of guiding the entire regulation, of determining its purpose and principles, and not of becoming substantive provisions of the regulatory act.

Therefore, since the legal provisions related to the substance of the regulation were found to be unconstitutional, namely the procedure for the drafting and adoption of interpretive regulatory acts, one arrives, of course, to the irrefragable conclusion that the law in itself can no longer regulate only general provisions or general principles. In fact, one of the fundamental elements of the law disappears, and it can no longer regulate the social relations suggested from its very title and object, drafted, in turn, in a deficient manner, considering the concrete regulatory content of the regulatory act under examination. However, a law containing only general principles, respectively, in this case, the definition of the methods of interpretation, does not fall within the concept of law, so that it does not justify a regulatory stand-alone existence of such a law. Consequently, the legislator cannot adopt a basic regulatory act whose

sole object is to regulate the methods of interpretation, since these cannot have an isolated or singular existence, proving their regulatory reason only if integrated in a regulatory act whose content refers to rules/principles and methods of interpretation. Therefore, if it considers it necessary, from the regulatory point of view, to conceptualize them anyway, the legislator can regulate them in a separate article in the text of Law no. 24/2000. Moreover, the Court notes that, even in the absence of an express regulation thereof, these apply with the same force and the same value, since the methods of interpretation do not depend on a regulatory existence *per se*, being rational operations, not regulatory provisions.

The Court found that the flaws of unconstitutionality were both extrinsic and intrinsic in nature, and that, by their gravity and size, they were directed at the law as a whole. Under these conditions, the legislative process unfolded concerning the law under examination shall stop.

**III. For all these reasons,** by unanimity, the Court upheld the objection of unconstitutionality raised and found that the provisions of the Law on the procedure for the interpretation of regulatory acts were unconstitutional.

*Decision no. 61 of 7 February 2017 on the objection of unconstitutionality of the provisions of the Law on the procedure for the interpretation of regulatory acts, as a whole, as well as, specifically, those of Article 3 (1) by reference to Articles 10 to 24, of Article 4, of Article 10, of the second phrase of Article 14, of Article 16, of the first phrase of Article 21 (1) and of the first phrase of Article 23 (1) of the law, published in the Official Gazette of Romania, Part I, no. 219 of 30 March 2017.*

**The incidence of the principle of monetary nomination in Swiss franc-denominated credit agreements does not impede the application of the hardship mechanism if its conditions for its application are met, ascertained or subject to review by a court.**

**Keywords:** principle of bicameralism, currency conversion, principle of nomination, theory of hardship, judicial review

**Summary**

**I. As grounds for the objection of unconstitutionality**, the Government contended that the legislative act introducing the obligation for the creditors of Swiss franc-denominated credit agreements to convert the balance of the loans provided in Swiss francs into lei at the "exchange rate of the National Bank of Romania valid at the date the conclusion of the contract / credit agreement in Swiss francs" is against the constitutional provisions of Article 1 (5) which enshrine the obligation to comply with the law and the Constitution, Article 11 (1) and (2) concerning international law and national law, Article 15 (2) concerning the principle of non-retroactivity of civil law, and Article 16 on equal rights of citizens.

**II. With respect to those complaints, the Court held as follows:**

Having examined the regulatory content of the act subject to Parliament's approval, the Court noted that ***the legislative procedure did not comply with the constitutional requirements enshrining the principles of bicameralism***, according to which the parliamentary debate on a legislative proposal cannot disregard its assessment in the plenary of the two Chambers of Parliament.

By the amendments brought, the Chamber of Deputies regulated provisions which had never, and in any way, been put forward for the Senate's debate, as first Chamber. These changes are significant in many respects, the most important of which are: lack of consent in relation to credit agreements conversion operations; the credits covered are exclusively those in Swiss francs; the extension of the scope of the law also to credit contracts subject to outsourcing or under foreclosure procedure; the conversion at the exchange rate Swiss franc/leu valid on the date of conclusion of the credit agreement and not on the date of conversion; the possibility of returning to the contract in Swiss francs at the request of the consumer.

Assuming that the law is, with the specific contribution of each Chamber, the work of the whole Parliament, the Court noted that the legislative authority must respect the constitutional principles by virtue of which a law may not be adopted by a single Chamber. The Court, from the review of the provisions to the review of constitutionality, found that the solutions adopted by the Chamber of Deputies have not been subject to the legislative initiative and have not been debated in the Senate. In other words, the Chamber of Deputies, adopting the Law supplementing Government Emergency Ordinance no.50/2010 on credit agreements for consumers, removed from the debate and adoption of the first Chamber amendments related to key aspects of the structure and philosophy of the law, contrary to Article 61 of the Constitution. The Court also found that the law adopted by the Chamber of Deputies departs from the purpose intended by its initiators, namely granting the credit consumers the right to demand the conversion into lei or into any other foreign currency of the credits contracted in euros or in other foreign currencies without creating differentiated, unequal or discriminatory treatment, with a uniform application over outstanding loans and future loans, respecting the rules and principles of equal rights, as well as from the aim of creating a unitary framework, based on clearly defined legal concepts governing certain aspects of contractual relations between traders and consumers.

For these arguments, the Court held that the law was adopted by the Chamber of Deputies in breach of the rules of bicameralism, since on the one hand it reveals the existence of major differences in the legal content between the forms adopted by the two Chambers of Parliament and, on the other hand, it departs from the objectives pursued by the initiators of the legislative proposal and complied with by the first Chamber.

Having examined the criticism about the regulatory content of the act subject to review, the Court held that, by virtue of the principle of monetary nomination, the amount of the loan must be repaid as such, irrespective of its valuation or devaluation. Of course, under the convention to the parties, amounts representing costs associated with the granting of the loan — interest and fees stipulated in the contract are to be added to this amount. The same principle applies in the concrete case of the credit agreement (which is nothing but another type of interest-bearing consumer loan type agreement), as long as the granting of credit in foreign currency is allowed in accordance with the law and as long as the borrower has an obligation

to return items of the same quantity and quality. The contractual clause stipulating that the repayment of the credit is to be made in the currency in which the credit was contracted, even in case of appreciation/depreciation of that currency compared to the national currency, constitute a translation of the law on contract, i.e. the principle of monetary nomination, no legislative act prohibiting the granting and reimbursement of loans in foreign currency. In such a case, both parties undertake the risk that in the course of the contract the amount returned by the borrower will be worth less or more at the time of refund than at the moment of granting, in relation to another currency deemed to be the benchmark, or, more objectively, in relation to gold.

With the signing of the contract, parties reach an agreement fully agreeing to the conditions stipulated in this legal act. The choice for a loan in a foreign currency is expressed consciously and knowingly by the debtor after considering the advantages that this loan would provide in relation to other credit products offered by both the lender and other providers of banking products (lower cost, access to a higher amount of money, possibility to make more substantial investments, etc.). While identifying the advantages of this type of loan, the borrower has the possibility to identify also its disadvantages, including the risk to pay a higher amount of lei to return the loan in foreign currencies compared to the loan in lei (if this is the currency of the primary income).

The obligation to reimburse what has been borrowed — the sum of the loan — which is the subject of the contract imposes an obligation on the borrower to purchase by the maturity of the borrowed currency in the amount of the borrowing due — fungible and consumable thing — and return this sum to the lending bank. This obligation is an essential obligation of the borrower, being expressly regulated by the law and imposed by fundamental principles of law: the principle of binding force of the contract: the principle of the mandatory force of contract — Article 969 of the old Civil Code/Article 1270 of the current Civil Code — the principle of the discharge of obligations in good faith — Article 970 of the old Civil Code/Article 1170 of the current Civil Code — and the principle of unjust enrichment, according to which no one can enrich himself at the expense of another person. Therefore, the terms on the loan return in the same currency in which it was granted regulate the essential obligation of the borrower, owing to the main subject of the contract.

The inherent currency risk is an element of the price of the loan granted in foreign currency, as long as the borrower is required to repay the loan in the same currency. As a result, the differences between the amounts of monthly instalments arising from the application of exchange rates between the loan currency and the currency in which the borrower obtains his/her income are part of the contract price and implicitly included in the scope of the contract.

In its analysis of the legal provisions in force (Government Emergency Ordinance no.52/2016), the Court found that the mechanism of conversion of loan agreements in foreign currencies sets forth a consumer's right to request the conversion of the loan agreement in an alternative currency, usually the one in which the consumer receives the income or holds the assets that finance the payment of the loan or that of the Member State of the European Union in which the customer was residing at the time when the loan agreement was entered into, or resides at the time of the conversion request. The exchange rate at which the conversion takes place is the market exchange rate applicable on the day of the conversion. Government Emergency Ordinance no.52/2016 provides the lending institution's obligation to inform the

debtor about the increase of the total amount payable by him/her or of the periodic rates by more than 20 % compared to the amount of the same if the exchange rate valid at the time of the conclusion of the contract were applied, as well as the right of the consumer to repay in advance the converted loan. The legislative act also provides for the application of the conversion provisions also to outstanding credit agreements at the date of its entry into force.

As regards Swiss franc-denominated credit agreements, the law subject to constitutional review establish a different legal regime in relation to the general regime, derogating from the latter. Under the legal rules subject to criticism, the creditor is under an obligation to do, i.e. the obligation to replace the balance of the amount due in a foreign currency with the equivalent amount in lei, but not at the rate of exchange applicable on the date of the conversion, but at a rate established before the transaction, considered more favourable to one of the parties, i.e. to the consumer. In these respects, the Court examined to what extent the new provisions were compatible with the constitutional principles relied on by the author of the referral, and with the existing infra-constitutional legislation.

The Court found that the incidence of the principle of monetary nomination in Swiss franc-denominated credit agreements does not impede the application of the hardship mechanism if its conditions for its application are met,. The court has thus jurisdiction and an obligation to apply the hardship principle if all the conditions for it are met, so that the situation of the consumers of Swiss francs loans finds a viable judicial remedy, which is such as to remove the effects of the change in circumstances leading to the borrowing. It has the possibility to effectively interfere with the contract, either by ordering the termination of its performance, or by adapting it to new conditions, with legal effects only for the future, the benefits already executed remaining gained under the contract. The adaptation to the new conditions may also be effected by means of a conversion of payment instalments into national currency at an exchange rate that the court may establish according to the concrete circumstances of the case for the purpose of rebalancing the obligations, which may be that of the date of signing of the contract, of the date of the unforeseeable event or of the date of conversion.

The law which is subject to the constitutionality review governs a case of hardship applicable *ope legis*, specifically establishing the obligation of the creditors of credit agreements granted in Swiss francs to convert into lei the balance of the credit balance denominated in Swiss francs at the ‘National Bank of Romania’s exchange rate valid on the date when the Swiss franc-denominated credit agreement/convention was signed’. In these circumstances, the incidence of the theory of hardship, as set by the Constitutional Court by Decision no. 623 of 25 October 2016, entailing effective control by the court of the state of affairs, i.e. the cause and effects of the change in circumstances for the performance of the contract, is removed.

Thus, for the arguments previously held, the Court has found that the criticised law is also in breach of Article 1 (3) on the rule of law, Article 21 (3) on the right to a fair trial, and Article 124 on the administration of justice.

**III. By unanimity**, the Court upheld the objection of unconstitutionality and found that the Law for supplementing Government Emergency Ordinance no.50/2010 on consumer credit agreements is unconstitutional in its entirety.

*Decision no. 62 of 7 February 2017 on the objection of unconstitutionality of the provisions of Law no.50/2010 on credit agreements for consumers, published in Official Gazette of Romania, Part I, no. 161 of 3 March 2017.*

**Law amending and supplementing Government Ordinance no. 22/1999 on the management of ports and waterways, use of shipping infrastructure belonging to the public domain and conduct of shipping activities in ports and inland waterways should have been adopted as an organic law rather than an ordinary law; furthermore, the procedure for the adoption of this law was conducted in breach of the bicameralism principle**

**Keywords:** management of ports and waterways, use of shipping infrastructure belonging to the public domain, conduct of shipping activities in ports and inland waterways; organic law; ordinary law; law adoption procedure; bicameralism principle

**Summary**

**I. As grounds for the objection of unconstitutionality** against the provisions of the Law amending and supplementing Government Ordinance no. 22/1999 on the management of ports and waterways, use of shipping infrastructure belonging to the public domain and conduct of shipping activities in ports and inland waterways, the Government formulated objections of extrinsic unconstitutionality relating, on the one hand, to the fact that the law should have been adopted as an organic law and not as an ordinary law and, secondly, that the adoption of the law took place without taking into account the bicameralism principle requirements. Furthermore, the arguments put forward in the grounds of the objection of unconstitutionality concerned the intrinsic unconstitutionality of the contested law, as well as the mismatch between its provisions and the provisions of other legislation by reference to the provisions of Article 1 (5) of the Constitution, on the principle of legality, and, especially, the quality of the law.

**II. With regard to the complaints of extrinsic** unconstitutionality expressed by reference to the provisions of Article 76 (1) of the Constitution on the adoption of organic laws, it was claimed, in the statement of reasons for the objection of unconstitutionality that the contested law contains provisions governing the concession or rental of assets in public ownership, provisions which may be adopted only by an organic law. However, the impugned law was adopted by the Chamber of Deputies as an ordinary law.

Looking at the Law amending Government Ordinance no. 22/1999, the Court observed that it contains numerous provisions regulating various issues relating to the concession, sub-concession, contracting out and rental of immovable property that is in the public property of the State or of the public administrative units in the context of the specific area of maritime and inland navigation, operations which, as provided by Article 136 (4) of the Constitution, can be regulated only by rules of the organic law nature.

In the present case, the law subject to review of constitutionality is an ordinary law, as is clear from its final words, attesting that "*the Law has been adopted by the Parliament of Romania in compliance with Article 75 and Article 76 (2) of the Romanian Constitution, as republished*."

The verbatim report of the plenary session of the Chamber of Deputies shows that the law was adopted with a number of votes falling within the proportion required for an absolute majority, half plus one of the total number of Deputies, under the requirements of Article 76 (1) of the Constitution for the adoption of organic laws, but that fact does not legitimise the qualification as an organic law therefore does not remove the defect of unconstitutionality arising from its adoption as an ordinary law in accordance with Article 76 (2) of the Constitution. This is because the Court has held that regulation in an area which par excellence belongs to the organic laws must be subject to the provisions of Article 76 (1) of the Constitution, regardless of the voting majority in both Chambers of Parliament, the importance of the reference to the nature of the law contained in the formula attesting the legality of the adoption consisting in the fact it is the essential indication as to the compliance with the procedure for the adoption of laws. Thus, the order in which the two Chambers of Parliament will discuss the draft law or legislative proposal depends on the characterisation of the law as organic or ordinary, such characterisation determining the Chamber competent to adopt the Law as a reflection Chamber, and the decision-making Chamber, pursuant to Article 75 (1) of the Constitution. Therefore, the *ab initio* classification of the law to be adopted as organic or ordinary has a decisive influence on the legislative process, automatically determining the path undertaken by the draft law or legislative proposal. In the present case, the law was considered as belonging to the category of ordinary laws, which attracted the Senate's competence as first Chamber seised, according to Article 89 (7) point 1 of the Senate's Standing Rules, and the Chamber of Deputies's competence as decision-making Chamber in accordance with Article 92 (9) point 1 of the Chamber of Deputies' Standing Rules. The defect of extrinsic unconstitutionality generated by the classification of the law subject to constitutional review as an ordinary law was also highlighted by the fact that, according to Article 75 (1) of the Constitution, organic laws shall be subject to the Chamber of Deputies for discussion and adoption as the first Chamber seised, as referred to in Article (117 (3) of the Constitution, under which autonomous administrative authorities may be established by organic law, the Senate being, accordingly, the decisional Chamber. The Court noted that this case covers a whole chapter of the law adopted by the Chamber of Deputies as decisional Chamber, i.e. that relating to the Supervisory Council in the Shipping Sector, whose establishment has been proposed by an amendment in the Chamber of Deputies and has been adopted by it, although, according to the Constitution, the Senate had decision-making power. Such reveals the disregard to the provisions of Article 75 (4) and (5) of the Constitution, which lay down that, should the decisional Chamber adopt some provision which falls under competency of the primary Chamber, the law is returned to the primary Chamber, and that one shall finally decide in an urgency procedure in respect of that provision alone. However, in the case at hand, this procedural succession laid down in the Basic Law was not followed.

Examining the complaint that the establishment, within the Competition Council, of the Supervisory Board in the Shipping Sector, is unconstitutional whereas, by an ordinary law, is

carried out an amendment that can only be made by means of an organic law, i.e. the Competition Law no. 21/1996, the Court held that, in the spirit of Article 117 (3) of the Constitution, which establishes that the "*Autonomous administrative authorities may be established by an organic law"*, the Competition Council was established as an autonomous administrative authority by the Competition Law no. 21/1996. However, introduction, by the impugned law, of a new body within the Competition Council's structure, structurally affects the internal architecture of this authority, determining the reconfiguration of its legal physiognomy, a circumstance likely to impose its creation by organic law and not by ordinary law.

The Court also examined the complaints concerning the breach of the principle of bicameralism enshrined in Article 61 in conjunction with Article of 75 of the Constitution, on the grounds that the legislative proposal was adopted by the Chamber of Deputies as decisional Chamber in a wording different from the content of the original legislative proposal, submitted to the Senate's vote, as primary Chamber. In this respect, the Court found that there are a number of differences, of such a kind as to lead to the conclusion that the constitutional principle of bicameralism was disregarded by Parliament. They concerned, for example, the classification of ports, users' association, the regime of the amounts obtained from rents, royalties and fees provided for in service contracts, shipping infrastructure charges, as well as the charges for other activities and services provided by administrations, pilotage, towage, agency services. Thus, the Court found the existence of a different vision of the deciding Chamber in relation to the reflection Chamber on some elements of the substance of the law through the intervention of the Chamber of Deputies on the form which the Senate had taken in discussion, modifying key regulations, which reshape the legislative vision on concepts, rules and principles applicable to maritime and inland navigation.

Having regard to the ascertained existence of defects of extrinsic unconstitutionality arising from infringements of the provisions of Article 61 (2) and Article 76 (1) of the Basic Law, the Court held that there is no longer any need to examine the challenges of intrinsic unconstitutionality raised by the author of the objection of unconstitutionality.

**III. On those grounds**, the Court upheld the objection of unconstitutionality and found that the Law amending and supplementing Government Ordinance no. 22/1999 on the management of ports and waterways, the usage of freight water transport infrastructures in the public domain and the development of freight water transport in ports and inland waterways is unconstitutional in its entirety.

*Decision no. 89 of 28 February 2017 on the objection of unconstitutionality of the provisions amending and supplementing Government Ordinance no. 22/1999 on the management of ports and waterways, the usage of freight water transport infrastructures in the public domain and the development of freight water transport in ports and inland waterways, published in the Official Gazette of Romania, Part I, no. 260 of 13 April 2017.*

**The legislative solution enshrining the hiring, in healthcare facilities and social welfare institutions and establishments, of specialised medical and social assistance staff proficient in the language of the national minorities in the administrative-territorial units where the national minority citizens represent more than 20% of the number of inhabitants or where their number is at least 5,000, is constitutional.**

**Keywords:** *national minorities, use of mother tongue, principle of non-discrimination.*

**Summary**

**I. As grounds for the objection of unconstitutionality**, the MPs having signed the referral claim that the introduction of a new alternative criterion, based on which medical care facilities in Romania are bound to provide specialised medical or social staff proficient in minority languages, i.e. the criterion of the number of inhabitants, which must be of at least 5,000, is contrary to the principle of legality, enshrined in Article 1 (5) of the Constitution, as well as to principle of equal rights, referred to in Article 6 and Article 16 (1) of the Constitution, as it conflicts with other legal provisions in force (Article 19 of Law no. 215/2001 on local public administration), which stipulate a single criterion for providing staff with knowledge of national languages in the administrative-territorial units, namely a share of more than 20% of the number of inhabitants.

**II. With respect to these pleas, the Court held that:**

The rules contained in the impugned law, referring to the use of the mother tongue of national minorities, particularises the rules established by Law no. 282/2007 to the specific areas of public health and social assistance. This particularisation is not, however, a mere conversion of the general rules to the mentioned field. By the impugned law a new rule is introduced, different from that established by the framework regulation, namely the threshold of at least 5,000 persons, alternatively to that of over 20% of the existing population. In this respect, the Constitutional Court has held, in its case-law, that whenever a new law derogates from another law or amends it, it should have at least the same legal force as the previous law (see, in that regard, Decision no. 442 of 10 June 2015, published in Official Gazette of Romania, Part I, no. 526 of 15 July 2015, paragraph 29). Therefore, the rules to be introduced in Law no. 95/2006 on the healthcare reform, as well as those of Law no. 292/2011 on social assistance, by the impugned law, must have at least the same legal force as those for whose detailing and supplementing are enacted, respectively Law no. 282/2007. In other words, the changes to the two regulatory acts may be achieved by a regulatory act adopted under Article 76 (2) of the Constitution.

As for the requirements of clarity, precision and predictability of the law, the Constitutional Court held that the impugned rules set the hiring, in healthcare facilities and social welfare institutions and establishments, of specialised medical and social care staff proficient in the language of the national minorities in the administrative-territorial units where the national minority citizens represent more than 20% of the number of inhabitants or where their number is at least 5,000. In other words, in all the administrative-territorial units in which a national minority exceeds one of the thresholds established by law, the public institutions

provided for in the legal rule have the obligation to undertake steps in order to ensure communication with citizens belonging to that minority, in their own language, through qualified staff with knowledge of that language. Thus, the competent bodies in these institutions must do everything in order to create appropriate positions for the employment of new staff, on the one hand, and the conducting of the statutory procedures with a view to occupy them, on the other hand. These steps should be taken so as to effectively and cumulatively ensure both the respect for the minority's right to use their mother language in its relation with the public institution and the access to high quality medical or social assistance, thus complying with the requirements of professional competence laid down in the job description.

Obviously, the obligation must be fulfilled by ensuring qualified personnel proficient in minority languages for all the national minorities that meet, each in their turn, the threshold condition in that administrative-territorial unit. Taking into account that the medical and socio-medical services are characterised by a high degree of personalisation, that these are services in which patient-physician and beneficiary-carer communication plays an overwhelming role, which might even make a difference between life and death, the right of the patient, respectively of the socially assisted person, to be informed about his/her health condition, about treatments on which his/her agreement is required, to have access to social assistance must be ensured in the language he/she knows. From this perspective, the purpose of the law is achieved if, in compliance with the legal obligation, the public institutions hire staff proficient in the national minority/minorities' language(s), being irrelevant if a person knows one or more minority languages or if (s)he belongs to a national minority or to the Romanian majority. The Court found that any contrary interpretation would lead to discrimination on grounds of nationality between Romanian citizens, expressly prohibited by Article 4 of the Basic Law. Therefore, this objective is reached if, in addition to the professional skills required by the job description, the staff have the language skills necessary for using the minority language in the relations between the public institutions and the citizens belonging to national minorities.

Moreover, the Court held that, in application of the provisions of the European Charter for Regional or Minority Languages, which Romania has ratified through Law no. 282/2007, the Romanian legislator could freely establish the criteria based on which the State is bound to provide protection to the Romanian citizens belonging to national minorities. Such criteria are adopted considering the specific conditions and historical traditions of the different regions of the State and represent the foundation of the measures aimed at promoting equality between the users of minority languages and the rest of the population. The legislator's option so as to preserve/amend the threshold already set by the legislation in force or to introduce an alternative threshold is not contrary, in itself, to the constitutional provisions invoked by the authors of the referral, insofar as the amendments made are not likely to affect the rights of the Romanian citizens belonging to national minorities. Furthermore, as established by the European Charter for Regional or Minority Languages in principle, the adoption of any special measures in favour of the regional or minority languages cannot be deemed as an act of discrimination towards the users of the majority language, but are aimed precisely at ensuring equal opportunities in their relations with the public authorities, being intended to promote the principle of equality and non-discrimination in relation to the other Romanian citizens. Moreover, the Court notes that, by using the phase "specialised medical or social assistance

staff", the legislator set, as a prerequisite for hiring staff proficient in minority languages, the meeting of the professional competence criteria, established in compliance with the tasks/powers/requirements listed in the job description. This legal condition observes the right of every citizen, regardless of their nationality, to receive high-quality medical or social assistance, but also the right of the national minority to use their mother tongue in their relation with the institution providing the medical or social assistance public service.

**III. For all these reasons,** by unanimity, the Court dismissed as groundless the objection of unconstitutionality raised by 124 Deputies belonging to the parliamentary groups of the National Liberal Party, the Save Romania Union and the People's Movement Party and found that the Law supplementing Law no. 95/2006 on the healthcare reform, as well as Article 41 of Law no. 292/2011 on social assistance, was constitutional in relation to the pleas raised.

*Decision no. 328 of 10 May 2017 on the objection of unconstitutionality of the provisions of the Law supplementing Law no. 95/2006 on the healthcare reform, as well as Article 41 of Law no. 292/2011 on social assistance, published in the Official Gazette of Romania, Part I, no. 424 of 8 June 2017.*

## II. Decision issued within the *a posteriori* review

### 2. Exception of unconstitutionality [Article 146 (d) of the Constitution]

**The Constitutional Court found, by means of an interpretative decision, that certain provisions of Law no. 77/2016 on the datio in solutum of certain immovable property for the settlement of obligations undertaken under credit agreements are constitutional insofar as the court verifies the conditions concerning the existence of hardship. These provisions were conferring to the debtor the right to forcely transfer the mortgaged property in lieu of repayment of the loan, the creditor being obliged to accept it in lieu of the debt, the debt being thus deem extinguished. Thus, the law was instituting the mechanism of an unforseeable situation applicable *ope legis* to all ongoing credit contracts.**

**Right to property**

**Keywords:** rule of law; quality of the law; fair trial; right to private property; administration of justice

**Summary**

**I. As grounds for the exception of unconstitutionality**, its authors argued, in essence, that the contested provisions are unconstitutional, whereas Law no. 77/2016 was adopted as an ordinary law. However, whereas the law in question established a regime derogating from the general regime of ownership [which is regulated, according to Article 73 (3) (m) of the

Constitution, by organic law], also such derogation should have been be operated by organic law.

In addition, at the time of the signing of the credit agreement, the parties stipulated all rights and obligations arising on the basis of the credit agreement and the arrangements for its termination, these being supplemented, as far as they were compatible, with the legislation in force at the time, by virtue of the principle of tempus regit actum. The security of the civil circuit is threatened due to the effects of this law because the effects of a credit agreement entered into under the law which was in force at that time are retroactively modified/suppressed. Moreover, free access to an economic activity is hindered and the freedom of trade is infringed, and since the bank loses its right to claim held under the agreement signed, and the mortgaged property is forcedly transferred to the bank's patrimony, together with the guarantees and liens set up by other creditors, the credit institution turns from a creditor into a guarantor of the debtor.

Having examined the provisions of Law no. 77/2016, one can conclude that this changes the very nature of the bank loan contract concluded between a bank and a customer. Law no. 77/2016 lays down not only a means of extinguishing obligations, but essential changes the legal relationship arising from the contract by changing the entire legal regime which was applicable at the time of the conclusion of the contract.

It was also argued that the Datio in Solutum Law, by the way in which it operates and the effects which it produces, impermissibly interferes with the right of property the bank has on debts arising from credit agreements. Thus, on the one hand, when the claim is replaced by another asset against the right holder's will - as in the case of the author, the object of the debtor's consideration corresponding to the bank’s right to claim is changed from a sum of money to an immovable property — there is an intervention of the impermissible intervention of the legislator under the constitutional framework and, on the other hand, bearing in mind that the value of the immovable property is less than the amount payable by the customer to the bank, the decrease in the bank’s assets is manifest.

The authors of the objection of unconstitutionality claimed that the Datio in Solutum Law undermine the right of mortgage, since it indirectly deprives of effects this right; whenever it will wish to execute the mortgage, the bank will be forced to take over the property. Although apparently this is not an injurious situation for the bank, in reality, it is manifestly unjust. If the loan is secured by a 1st rank mortgage on the immovable property and the bank is bound by the customer to take over the property in lieu of payment, the right to mortgage shall implicitly be extinguished. Thus, there is a possibility that another creditor of the customer who had a 2nd rank mortgage to go up in rank and seek to satisfy his claim by enforcing the property part of bank’s assets now.

The interference with the right to property must not only pursue a legitimate aim in accordance with the general interest, but also to maintain a reasonable relationship of proportionality between the means employed and the intended purpose. The need to ensure a fair balance between the requirements of the general interest of the community and the

requirements of the protection of the individual's fundamental rights materialises in the need for a reasonable relationship of proportionality between the means used and the aim pursued.

It is pointed out that between the right to property and the economic freedom there is correlation for the purpose to emphasise that the bank cannot be obliged to become owner of the property against its will. The property is a right and the fact that the exercise of this right requires compliance with certain obligations is subsequent to the right. The conversion of the right into an obligation to take property over another good affects economic freedom by forcing banks to become owners of certain immovable property; furthermore, Romanian legislation does not identify those cases where a subject governed by private law might be obliged to become owner against its will.

It was also argued that Articles 4 and 7 of Law no. 77/2016 do not ensure the constitutional safeguards of the right to a fair trial and of the right of defence since they entitle debtors of bank and non-bank financial institutions to change the subject-matter, the price and the risk of the contract at their own will and without prior checks on compliance with the objective and subjective conditions for the application of the protection.

**II. With respect to those complaints, the Court held as follows:**

As regards the claim of extrinsic unconstitutionality, with regard to the law as a whole, the Court held that the authors of the exception of unconstitutionality argue, in essence, that the contested provisions are unconstitutional, whereas Law no. 77/2016 was adopted as an ordinary law. However, since they establish a special regime to the general regime of ownership [which is regulated, according to Article 73 (3) (m) of the Constitution, by organic law], this derogation must be operated again by organic law. In this context, it was mentioned, by way of example, Article 8 (1) of the law regulating the possibility for the court to require the creditor to become holder of ownership of property. Therefore, the criticism made by the authors of the exception of unconstitutionality was related to the regulation by means of an ordinary law, such as Law no. 77/2016 of situations concerning important issues related to the right to property (such as forced transfer of an immovable property in the creditor's patrimony).

The Court held that Law no. 77/2016 governs specific situations which do not relate to the general regime of property, meaning that they concern only a means of enforcement of obligations deriving from the credit agreement in case of hardship. Although the application of Law no. 77/2016 has the effect of a transfer of ownership, this does not mean that the law in itself governs the general regime of property, term referring to the general framework of property in Romania, and not to any transfer of ownership as a result of the application of certain concepts of civil law. In line with its case law (Decision no. 5 of 14 July 1992, published in Official Gazette of Romania, Part I, no. 173 of 22 July 1992), the Court found that the general legal regime of public or private property, essentially covers the three elements of the right to property: possession, use, disposal, being predominantly a regime governed by private law. Property and ownership regime generally represents a legal reality which governs legal relations of a significant social value which require regulation through organic law, whilst the specific rules for the exercise of the attributes of the right to property represent another legal reality, of a lesser importance, that can be determined through ordinary legislation, or, where

appropriate, by ordinances. Furthermore, the legislator has adopted also other regulations that have an impact on the right of property by means of ordinary laws, such as the Code of Fiscal Procedure (Law no. 207/2015, published in the Official Gazette of Romania, Part I, no. 547 of 23 July 2015), which, in Article 348, regulates the seizure ordered in accordance with the law. Therefore, the Court finds that that criticism of extrinsic unconstitutionality is unfounded.

The Court has also found that the provisions of Article 11 first sentence in relation to those of Article 3 second sentence, Article 4, Article 7 and Article (8) of Law no. 77/2016 are constitutional insofar as the court verifies the conditions concerning the existence of hardship. The Court held in paragraph 120 of the contested decision that the court, in the event that the creditor formulates opposition, can and must apply the hardship theory to ongoing contracts. Thus, from a procedural point of view, the court, should the creditor bring an appeal or the debtor bring an action for validation, will verify the compliance with the requirement of notification of the creditor as stipulated by Law no. 77/2016 , compliance with the criteria set out in Article 4 of the law, applying the hardship theory under Article 7 of the Law, namely Article 8 or Article 9 of the same law. The Court has stated that, thus, the court which, in accordance with the law, is independent in its assessment, will apply hardship up to the upper limit imposed by Law no. 77/2016 (hand over of the property and the write-off of debts and accessories).

Furthermore, in paragraph 122, the Court found that the term '*and devaluation of immovable property*' in Article 11 first sentence of the Law no. 77/2016 is unconstitutional. Thus, examining the issue of constitutionality of this term in Article 11 of Law no. 77/2016, the Court found that the object of credit contracts is an amount of money, and not immovable property. Whereas Article 11 first sentence provides as a stand-alone criterion the depreciation of immovable property subject to the security brought by the debtor, such leads to an infringement of the right to private property on the amounts of money of the lender (credit institution), a right enshrined in Article of 44 of the Constitution. The Court found that such a criterion, which was provided with as an alternative to that of risks arising from the credit agreement and, therefore, used on its own, is incompatible with application of hardship by the court, as configured under the 1864 Civil Code. The fact that the guarantee devalues is unconnected with the performance of the credit agreement. This criterion could instead be used in conjunction with the fairness principle as part of the hardship theory as configured under the 1864 Civil Code. The court is expected to assess the imbalance in the benefits resulting from the credit agreement also by recourse to that criterion when the credit agreement was entered into for the acquisition of a property.

On the alleged unconstitutionality of the provisions of Article 11 first sentence by reference to other impugned legal provisions, by Decision no. 623 of 25 October 2016 , the Court dismissed the allegation as to the infringement of the constitutional provisions of Article 15 (2) on the principle of non-retroactivity of civil law, Article 44 on the right to private property and of Article 135 on the economy.

Concerning the allegation made by the authors of the exception of unconstitutionality concerning the failure to comply with the principle of non-retroactivity of civil law whereby it was alleged that the contested rules affect credit agreements by changing the obligation to pay

sums of money to the obligation of handing over the property with which the contract has been secured, in the recitals of the Decision no. 623 of 25 October 2016 , in paragraph 94 et seq., the Court held that the rule *pacta sunt servanda* involves the taking into account of elements such as good faith and fairness when there is a fundamental change in the conditions for the performance of the contract. The Court held that the provisions in question in the light of the infringements of Article 15 (2) of the Constitution are those of Article 11 first sentence of the Law no. 77/2016, and from the analysis of those provisions it resulted that they apply also to ongoing contracts. The expression "*ongoing*" has been used by the legislator in order to cover the case envisaged by Article 8 (5) of Law no. 77/2016, i.e. enforcement phase commenced prior to the entry into force of the Law.

With reference to this complaint, the Court held that the majority of the loan contracts covered by the impugned law were concluded between 2007 and 2009, those contracts being covered the legal framework applicable at that time. They are subject to regulation by ordinary law, i.e. the 1864 Civil Code, which clearly allowed the application of hardship theory under Article 969 and Article 970. Given that the Law no. 77/2016 represents an application of the hardship theory to credit agreements, the Court pointed out that its provisions do not retroactivate.

Furthermore, in paragraph no. 108 of the Decision mentioned above, the Court held that the Law no. 77/2016 governs specific situations which do not relate to the general regime of property, meaning that they concern only a means of enforcement of obligations deriving from the credit agreement in case of hardship. Although the application of Law no. 77/2016 has the effect of a transfer of ownership, this does not mean that the law in itself governs the general regime of property, term referring to the general framework of property in Romania, and not to any transfer of ownership as a result of the application of certain concepts of civil law. Moreover, in paragraph 128 of the aforementioned Decision, the Court held that the right to property is not an absolute right but can be subject to certain limitations according to Article 44 (1) of the Constitution; however, the limits of the right to property, whatever their nature might be, are not to be confused with the actual removal of the right to property. The State protects the right to property provided it is exercised in good faith (see, *mutatis mutandis*, Decision no. 245 of 19 April 2016, published in Official Gazette of Romania, Part I, no. 546 of 20 July 2016, § 59-60). The right to property of credit institutions is not subject to any limitation in terms of hardship, adaptation/termination of contracts having not even the meaning of limitation of the right to property.

**III. The Court upheld**, by unanimity, the exception of unconstitutionality, and found that the term "and devaluation of immovable property" in Article 11 first sentence of Law no. 77/2016 on the datio in solutum of certain immovable property for the settlement of obligations undertaken under credit agreements is unconstitutional, as well as that the provisions of Article 11 first sentence in relation to Article 3 second sentence, Articles 4, 7 and 8 of Law no. 77/2016 on the datio in solutum of certain immovable property for the settlement of obligations undertaken under credit agreements are constitutional insofar as the court verifies the conditions concerning the existence of hardship.

The Court dismissed, as inadmissible, the exception of unconstitutionality of the

provisions of Article 11 first sentence in relation to the provisions of Article 3 first sentence and the exception of unconstitutionality of the provisions of Article 11 second sentence of Law no. 77/2016 and as unfounded the exception of unconstitutionality of the provisions of Article 11 first sentence in relation to other provisions of the Law no. 77/2016.

*Decision no. 623 of 25 October 2016 on the exception of unconstitutionality of the provisions of Article 1 (3), Article 3, Article 4, Article 5 (2), Articles 6-8, especially Article 8 (1), (3) și (5), Article 10 and Article 11 of Law no. 77/2016 on the datio in solutum of certain immovable property for the settlement of obligations undertaken under credit agreements, and of the law as a whole , published in the Official Gazette of Romania, Part I, no. 53 of 18 January 2017*

**The period of 1 year during which the action for determining paternity outside marriage can be lodged, period starting to run from the date of birth of the child, constitutes an insurmountable obstacle in his/her approach to find essential data on his/her own identity, after acquiring full exercise capacity, which violates the right to family and private life.**

**Keywords:** *Action for determining paternity outside marriage, private life*

**Summary**

**I. As grounds for the exception of unconstitutionality**, raised ex officio, it was argued that the provisions of Article 60 (1) of the Family Code, in the version in force prior to the changes operated by Law no. 288/2007 amending and supplementing Law no. 4/1953 — Family Code, according to which "*The action for determining paternity outside marriage can be initiated within one year after childbirth*" are discriminatory and contrary to the right to respect for private and family life. As arguments in support of the unconstitutionality of the impugned legal text, it was pointed out that a discriminatory situation would arise if it were accepted that the substantive right to the determination of paternity is not subject to any statute of limitation only for children born after the date of entry into force of Law no. 288/2007 which established the non-applicability of statutory limitations to the action for determining paternity, excluding those who were born before the amendments to the Family Code, because both categories of children are in the same legal position — child born out of wedlock who wishes to establish parentage — the only difference between them consisting only of the hazard related to the time of birth. It was claimed that the argument that the law cannot be applied retroactively also to children born before its entry into force cannot constitute an objective and reasonable justification.

**II. Having examined the exception of unconstitutionality**, the Court held that, in essence, it is criticised the different legal regime which would result from applying successive legal regulations relating to the deadline to bring an action for determining paternity out of wedlock. The impugned legal text is the text initially enshrined by the Family Code, which

states that the limitation period for the action is one year from the date of the birth of the child, text which, although repealed, is applicable in this case in view of the date of birth of the holder of the action for determining paternity. Law no. 288/2007 amending and supplementing the Family Code, published in the Official Gazette of Romania, Part I, no. 749 of 5 November 2007, established the non-applicability of statutory limitations to actions lodged by children (Article I point 5) and, at the same time, established that the changes concerning the action for determining paternity of the child born out of wedlock are applicable also to children born before its entry into force even if the application is pending (Article II). Subsequently, by Decision no. 1345 of 09 December 2008, published in Official Gazette of Romania, Part I, no. 873 of 23 December 2008, the Constitutional Court upheld the exception of unconstitutionality of the provisions of Article II of Law no. 288/2007, according to which "*The provisions of this law concerning [...] action for determining paternity of the child born out of wedlock are applicable also to children born before its entry into force even if the application is pending*", considering that the impugned legal text is contrary to Article 15 (2) of the Constitution which enshrines the principle of non-retroactivity of civil law, since the new law also applied to children born before its entry into force. As a result of that decision, the non-applicability of statutory limitations to actions for determining paternity remained valid only for children born after the entry into force of the Law no. 288/2007, i.e. after 8 November 2007. The current Civil Code, which repealed the Family Code, also established the non-applicability of statutory limitations to actions for determining paternity lodged by children [under Article [427 (1)], as the rule applicable to children born after 1 October 2011, i.e. the date of entry into force of the Civil Code, in accordance with Article (47) of Law no. 71/2011 for the implementation of the Civil Code.

The Constitutional Court found that the impugned legal provisions, which state that the period limit of 1 year for introducing the action for determining paternity out of wedlock begins to run from the date of birth of the child, violates his/her right to private life, as it deprives him/her from the possibility to act consciously and voluntarily, after obtaining full exercise capacity, in order to establish his/her filiation to the father. The fact that, under the conditions of the impugned legal text, the action for determining paternity is left exclusively to the mother or the legal representative of the child, renders the child dependent on the behaviour of a third party. This is due to the fact that, within the time limit laid down by the impugned legal text, i.e. one year after the birth, the child is, by definition, biologically unable to act. However, the establishment of filiation to the father, as an attribute of the person and as an element which shapes his/her identity cannot be left to someone else's discretion. Where, due to negligence, ignorance or even bad faith or due to an objective situation which would constitute an insurmountable barrier, the mother of the child or his or her legal representative did not within one year after the birth of the child lodged the action for determining paternity, the child would be permanently denied any further possibility to request clarification of his personal situation by bringing an action to establish paternity out of wedlock. Therefore, the impugned legal provisions establish an absolute obstacle to the person concerned to establish key data relating to his/her own identity, which comes against to the right to private and family life, bearing in mind that, as follows from the case-law of the European Court of Human Rights (Judgment of 13 February 2003 in Case *Odièvre v. France*, par.42), the right to know one's origins — in the

present case, by determining paternity out of wedlock — has its basis in the broad interpretation of the concept of privacy and obtaining information indispensable for uncovering the truth on an important aspect of personal identity and dissipation of all uncertainties in this regard is considered a vital interest, protected by the Convention ( Judgment of 7 February 2002 in Case *Mikulić v. Croatia*, above mentioned, par.64 and 65).

The Court has also held, in the same vein, that, by its Judgment of 19 July 2016 in Case *Călin and Others v. Romania* , the ECtHR found violation of Article of 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, by the interference with the right to respect for private life of the applicants due to their inability to establish filiation to the father given the existence in national law of a limitation period, within which they did not have legal capacity to act. The European Court considered that in principle a period of one year, as provided for in Romanian legislation, is not unreasonable from the point of view of its duration. However, it poses problems *dies a quo*, because it does not allow the child to counteract the lack of action of the mother or of the legal representative throughout the time he/she is a minor. As such, the Court held that such a limitation period, as it produces its effects in the Romanian system, limited the right of interested parties to bring proceedings for establishing paternity up to the point of extinguish this right (par.98). The European Court of Human Rights has found an infringement of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms and, considering that the gaps identified can generate future complaints, recommended the Romanian State to take general measures to ensure the right to privacy of the persons concerned (par.110). At the same time, in the judgment referred to above the European Court has noted the evolution of Romanian legislation in the area of parentage, favourable to the biological reality over legal fiction, evidenced by the fact that the current Civil Code states that the action for determining paternity out of wedlock is not subject to a time limit throughout a child’s life (par.99 and 101).

Accordingly, the Constitutional Court has found that the provisions of Article 60 (1) of the Family Code, in the version in force prior to the changes by Law no. 288/2007 amending and supplementing Law no. 4/1953 — Family Code are constitutional as far as the time limit of one year for the determining paternity out of wedlock only applies with regard to the child’s mother or his or her legal representative without being applicable also to the action brought by the child, otherwise conflicting with Article 26 of the Romanian Constitution and Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

**III. On those grounds**, the Court upheld the exception of unconstitutionality and found constitutional the provisions of Article 60 (1) of the Family Code, in the version before amendment by Law no. 288/2007 amending and supplementing Law no. 4/1953 — Family Code insofar as they do not relate to the action for determination of paternity out of wedlock brought by the child.

*Decision no. 697 of 29 November 2016 on the exception of unconstitutionality of the provisions of Article 60 (1) of the Family Code, in the version before amendment by Law*

*no. 288/2007 amending and supplementing Law no. 4/1953 — Family Code , published in the Official Gazette of Romania, Part I, no. 138 of 23 February 2017.*

**The impugned criminalisation rule ensures a clear understanding by its addressees of the constituent elements — objective and subjective — of the offence so that they may foresee the consequences that may derive from non-observance of the rule and adapt their behaviour accordingly. Having regard to the seriousness and consequences of the offences concerning sexual life or closely related to it involving minor persons injured, the legislator has regulated a higher standard of protection for these people, through the presumption of their injury, precisely in order to prevent others to take advantage of their vulnerability.**

**Keywords:** clarity and foreseeability, principle of legality of criminal offences and penalties.

**Summary**

**I. As grounds for the exception of unconstitutionality**, the author claimed, in essence, that the provisions of Article 221 (3) of the Criminal Code infringe the constitutional provisions of Article 1 (5) concerning the mandatory observance of the Constitution, of its supremacy, and of the laws, those of Article of 23 (12) on the lawfulness of the penalty, and those of Article 7 on the lawfulness of criminalisation of the Convention for the Protection of Human Rights and Fundamental Freedoms, as they do not meet the requirements of clarity and foreseeability of the law, whereas the legislator has not stated whether the act is a criminal offence even when the social value protected by the impugned rule is not affected. Thus, the author deemed necessary the legislator's intervention as to provide expressly that the act is a criminal offence only when the moral development of the child is endangered.

**II. With respect to those complaints, the Court held as follows:**

In addition to the sexual acts — which have as their purpose sexual satisfaction, criminalised in the Criminal Code under Articles 218 (rape), 219 (sexual assault) and 220 (sexual intercourse with a juvenile) —, minors must be protected also in respect of acts of a sexual nature, whose purpose is primarily sexual arousal. The provisions of Article 221of the Criminal Code criminalise the act of sexual corruption of minors in several simple modalities [Article 221 (1)], one aggravated modality [Article 221 (2)] and other attenuated modalities [Article 221 (3) and (4)]. Thus, commission of an act that is sexual in nature than that provided for in Article 220, against a juvenile who has not turned 13 of age [Article 221 (1) first sentence], determining a juvenile to endure or carry out such an act [Article 221 (1) second sentence], commission of a sexual act of any nature by a person of age in the presence of a juvenile who has not turned 13 [Article (221 (3)], determination of a juvenile who has not yet

turned 13 years of age, by a person of age, to assist to the commission of acts that are exhibitionist in nature or to shows or performances in which sexual acts of any kind are committed [Article 221 (4) first sentence] and making materials that are pornographic in nature available to the juvenile [Article 221 (4) second sentence] are acts which seriously endanger the moral development of the juvenile, having regard to his/her incitement to practice acts of a sexual nature.

The Court held that the legal object of the crime of sexual corruption of minors — as shown in the literature — consists in the social relations concerning sex life, criminal law protecting, through effectively criminalising this conduct, the climate of moral development of minors and of their preparation for a normal sexual life. It is therefore the also the legal object of the attenuated form of the offence governed by the provisions of Article 221 (3) of the Criminal Code, which consists in the commission of a sexual act of any nature, committed by a person of age in the presence of a juvenile who has not turned 13 . This legislative form does not have a material object, unlike the basic form [Article 221 (1)] and the aggravated form [Article 221 (2)] of the same criminal offence, in which case the material object is the body of the person on whom it is exercised the sexual act or is determined to bear such an act. The active subject of the crime of sexual corruption of minors — in the attenuated form set forth in Article 221 (3) of the Criminal Code — can only be an adult, i.e. a person, regardless of gender, who is at least 18 years of age. Criminal participation is possible in any of its forms, i..e inciting, aiding or abetting, participating as co-author. The passive subject, in any of the regulatory forms of the criminal offence provided for in Article 221 of the Criminal Code is the juvenile, regardless of gender, who had not reached the age of 13 at the time of commission of the offence. The legislator has limited the age of the juvenile at 13 years, in view of the fact that, until that age, the child may be easily sexually perverted through various manoeuvres meant to incite the natural curiosity at that age and to determine him/her to engage in acts of a sexual nature. The material element of the criminal offence of sexual corruption of minors — in the attenuated form under Article 221 (3) of the Criminal Code — is committing a sexual act of any nature. Sexual act of any nature means any modality in which sexual relations between persons of different sexes take place, as well as sexual relations between persons of the same sex, i.e. any modality to obtain sexual satisfaction, by using sex or acting on sex, between persons of the same sex or of different sexes. For the substantive element to be present, the essential requirement that the sexual act of any nature be committed by a person of age in the presence of a juvenile who has not turned 13, must be met. In this attenuated form of the offence, the sexual act of any nature s not exerted on minor, but the latter assists to its commission by a person of age. If the person of age was unable to realise that the person in the presence of whom he performed a sexual act of any nature is a juvenile who has not turned 13, the act does not constitute a criminal offence. The immediate follow-up consists in endangering the social relations concerning sex life of the juvenile who has not turned 13. Being an offence of danger, the causal link between the action constituting the substantive element of the objective part and the immediate follow-up need not be substantiated, as it is apparent from the materiality of the act itself (*ex re*). In terms of subjective part, the offence is committed with direct or indirect intent, the perpetrator of age having representation of the fact that the person

in the presence of whom he/she commits a sexual act of any nature is a juvenile, so the purpose is to determine the latter to assist to the sexual act or just accepts this.

The Court has found that it can neither be accepted the criticism of the author of the exception in the sense that provisions of Article 221 (3) of the Criminal Code are unclear, because the legislator did not specify whether the act is a criminal offence even when the social value protected by the criminal rule is not affected, and that the legislator is required to provide expressly that the act is a criminal offence only when it affects the moral development of the juvenile. Basically, the author of the exception request changes to the terms of criminalisation of the act, by adding an essential requirement to the constituent content of the offence of sexual corruption of minors in the attenuated form under Article 221 (3) of the Criminal Code, in the sense that the act is an offence if the moral development of the juvenile has been jeopardised. The Court noted that the state of danger to social values protected through the provisions of Article 221 (3) of the Criminal Code — state created by commission by a person of age of a sexual act of any nature in the presence of a juvenile who has not turned 13 — is obvious, the act seriously endangering the moral development of the juvenile, by his/her incitement to acts of a sexual nature. According to the doctrine, from a criminological point of view, in case of sexual corruption of minors — in any of the variants of the offence—, perpetrators are usually persons presenting different sexual abnormalities, sexual tendencies falling outside the moral patterns of society. The Court found that, by criminalising — under Article 221 (3) of the Criminal Code — the sexual act of any nature, committed by a person of age in the presence of a juvenile who has not turned 13, the legislator intended to protect a climate of physical and mental development of minors that would ensure the persistence of feelings of prudery, decency and morality regarding sexual life. It is imperative that these values are cultivated, strengthened and developed in order to prepare the juveniles for a normal sexual life, that does not affect their health and physical and mental integrity. However, the act criminalised by the provisions of Article 221 (3) of the Criminal Code shall result in an immediate new condition — contrary to initial — on the sex life of the juvenile, consisting precisely in an infringement of social relations that ensure the protection of the juvenile in terms of his/her moral development and preparation for a normal sexual life, the offence being one of abstract danger, and not concrete danger.

In case of offences of abstract danger, the state of danger to the protected value is presumed by the legislator through the criminalisation of the act itself, and there is no need to prove it. Having regard to the seriousness and consequences of the offences concerning sexual life or closely related to it involving juvenile injured persons, the legislator has regulated a higher standard of protection for these people, through the presumption of their injury, precisely in order to prevent others to take advantage of their vulnerability. Thus, in cannot be accepted the allegation on non-compliance with the requirements of foreseeability of criminal law, whereas the legislator established the criminal liability of any person of age who commits a sexual act of any nature in the presence of a juvenile who has not turned 13, without there being any need to prove the infringement of the protected social values, as such infringement is automatically presumed.

The Court has held that the principle of the legality of criminal offences and penalties — enshrined in the provisions of Article 23 (12) of the Constitution and Article of 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms — requires the legislator to legislate by texts sufficiently clear and precise to be implemented, including by ensuring the possibility for interested persons to comply with the statutory limitation. However, the impugned criminalisation rule ensures a clear understanding by its addressees of the constituent elements — objective and subjective — of the offence so that they may foresee the consequences that may derive from non-observance of the rule and to adapt their behaviour accordingly. Whereas the provisions of Article 221 (3) of the Criminal Code are drafted in a clear and foreseeable wording, including for those who have no legal training, the impugned legal text does not infringe the requirements of clarity and foreseeability of the law on the constitutional provisions of Article 1 (5) on the principle of respect for laws and Article of 23 (12) on the lawfulness of the penalty, as well as the provisions of Article 7 on the legality of penalty of the Convention for the Protection of Human Rights and Fundamental Freedoms.

In the same vein is the case-law of the European Court of Human Rights concerning Article 7 par.1 of the Convention which enshrines the principle *nullum crimen, nulla poena sine lege*, according to which the law must define clearly the offences and the penalties applicable. This requirement is satisfied where an litigant has the possibility to know, from the very text of the relevant legal provision, using its interpretation by the courts and obtaining appropriate legal assistance, if necessary, which are acts and omissions which may lead to his/her criminal liability and which is the penalty he/she may be subject to by virtue of the same. Thus, through a rich case-law, the Strasbourg Court has held that when speaking of "law" Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises statute law as well as case-law and implies qualitative requirements, including those of accessibility and foreseeability (Judgment of 15 November 1996 in Case of Cantoni v. France, paragraph 29, Judgment of 22 June 2000 in Case of Coëme and Others v. Belgium, paragraph 145, Judgment of 7 February 2002 in Case of E.K. v. Turkey , paragraph 51, Judgment of 29 March 2006 in Case of Achour v. France, paragraphs 41 and 42, Judgment of 24 May 2007 in Case Dragotoniu Militaru-Pidhorni v. Romania, paragraphs 33 and 34, Judgment of 12 February 2008 in Case of Kafkaris v. Cyprus, paragraph 140, Judgment of 20 January 2009 in Case of South Fondi srl and Others v. Italy, paragraphs 107 and 108, Judgment of 17 September 2009 in Case of Scoppola v. Italy (no.2), paragraphs 93, 94 and 99, Judgment of 21 October 2013 in Case of Del Rio Prada v. Spain, paragraphs 78, 79 and 91. The European Court of Human Rights found that the meaning of the notion of foreseeability depends to a large degree on the content of the text at issue and on the area it covers, as well as on the number and status of its addressees. The principle of foreseeability of the law is not opposed to the idea that the person concerned should be determined to seek clarifying guidance to assess, to a reasonable degree in the circumstances of the case, the consequences likely to result from a specific act.

**III.** For these reasons, the Court, by unanimity, dismissed as unfounded the exception of unconstitutionality and found that the provisions of Article 221 (3) of the Criminal Code are constitutional in relation to the complaints brought.

*Decision no. 700 of 29 November 2016 on the exception of unconstitutionality of the provisions of Article 221 (3) of the Criminal Code, published in the Official Gazette of Romania, Part I, no. 269 of 18 April 2017.*

**Pre-trial detention of the defendant during the Pre-Trial Chamber proceedings and during trial. The legislative solution referred to in the last phrase of Article 238 (1) of the Criminal Procedure Code, in the wording prior to its amendment through Article II (54) of Government Emergency Ordinance no. 18/2016, excluding the implementation of the provisions of Article 227 of the Criminal Procedure Code, is unconstitutional**

**Keywords:** *individual freedom.*

**Summary**

**I. As grounds for the exception of unconstitutionality**, it is claimed that the provisions of Article 238 (1) of the Criminal Procedure Code violate the constitutional provisions of Article 21 on *Free access to justice*, because the reference norm, according to which "*The provisions of Articles 225, 226 and 228 to 232 shall duly apply*", enshrines only the solution of pre-trial detention, and the Pre-Trial Chamber Judge can no longer duly apply the provisions of Article 227 of the Criminal Procedure Code as well, which regulate the possibility of dismissing the pre-trial detention proposal.

**II. With respect to these pleas, the Court held that:**

By examining the exception of unconstitutionality, the Court indicated that, being the most intrusive precautionary measure, the pre-trial detention measure, regardless of the procedural moment when it was ordered, must be taken in a clear, accurate and predictable regulatory framework both for the person subject to this measure and to the prosecution bodies and courts of law. Otherwise, this would result in the possibility to randomly restrict one of the fundamental rights that is essential in a State governed by the rule of law: individual freedom. It is generally accepted, being regulated by the provisions of Article 23 of the Constitution, that individual freedom is not absolute, but its limitation must be done in compliance with the provisions of Article 1 (5) and Article 21 (3) of the Basic Law, and the degree of precision of the concepts and notions used must be high, given the nature of the restricted fundamental right (see Decision no. 553 of 16 July 2015, published in the Official Gazette of Romania, Part I, no. 707 of 21 September 2015, par. 23). Therefore, the constitutional standard of protection of the individual freedom requires that its limitation be done in a regulatory framework enshrining a guarantee against an arbitrary taking of a precautionary measure that, on the one hand, expressly set the cases of limitation of this constitutional value and, on the other hand, set a procedure doubled by legal criteria, **concerning the existence of reasons justifying detention.** Consequently, according to the provisions of Article 23 (2) of the Constitution, "*Search, taking into temporary custody, or* ***arrest of a person shall be permitted only in the cases and under the procedure provided by law***".

To this effect, the legislator set the conditions, cases and purpose of taking the measure of pre-trial detention, the competent judicial body, the act ordering the pre-trial detention measure, the procedure for taking and, respectively, extending pre-trial detention, the overall duration of this measure during criminal proceedings, pre-trial detention of the defendant during the Pre-Trial Chamber proceedings and during trial, the maximum duration of pre-trial detention during first instance proceedings, the legal cessation, cancelation and replacement of the pre-trial detention measure, the remedy against decisions ordering pre-trial detention during criminal proceedings, during the Pre-Trial Chamber proceedings and during trial, the verification of the precautionary measures during the Pre-Trial Chamber proceedings and during trial,– Articles 202, 204 to 208, 223, 203 (3), 224 to 239, 241 to 242 of the Criminal Procedure Code.

Therefore, the Court found that, concerning the pre-trial detention of the defendant during the Pre-Trial Chamber proceedings and during trial, the legislator exempted, *in terminis*, the possibility to dismiss the pre-trial detention proposal, through the fact that the provisions of the final phrase of Article 238 (1) of the Criminal Procedure Code, in its wording prior to its amendment through Government Emergency Ordinance no. 18/2016 – applicable, however, in this case – did not refer also to the provisions of Article 227 of the Criminal Procedure Code on "*The dismissal of the pre-trial detention proposal during criminal proceedings*". The provisions of Article 238 (1) of the Criminal Procedure Code include a *contradictio in adjecto*, considering that the first phrase states on the possibility of pre-trial detention during the Pre-Trial Chamber proceedings and during trial, *for the same grounds and under the same conditions* as pre-trial detention ordered by the Judge for Rights and Freedoms during criminal proceedings (situation involving even the possibility to dismiss the pre-trial detention proposal), and second phrase – impugned by the author – prohibits, through express exemption, the possibility to dismiss the pre-trial proposal.

In the case-law of the European Court of Human Rights, i.e. in the Judgment of 4 December 1979, delivered in the *Case of Schiesser v. Switzerland*, § 31, it was stated that "the magistrate" (authorised by law to exercise the judicial functions), settling cases involving people arrested or subject to pre-trial detention, referred to in Article 5 para. 3 of the Convention, must fulfil certain conditions, namely: independence from the Executive and the parties; a procedural requirement, i.e. that the magistrate should personally hear the person summoned before him/her, and **a substantive requirement, i.e. the power to examine the circumstances requiring detention or not, and that to state, based on legal criteria, on the existence of grounds to justify** arrest, and, in the absence thereof, to be able to order the release of the person arrested.

Moreover, courts adjudicating on the possibility to maintain the pre-trial detention of the defendant **must examine all concrete and relevant elements,** which can confirm the existence of a necessity to take such a measure (Judgment of 8 June 1995, delivered in the *Case of Mansur v. Turkey*, §§ 55 and 56). Also, through Judgment of 24 July 2003, delivered in the *Case of Smirnova v. Russia*, § 61, and Judgment of 7 April 2009, delivered in the *Case of Tiron v. Romania*, § 38, the Court in Strasbourg stated on the necessity **to identify concrete elements to justify the need to maintain the deprivation of liberty**, elements that make that public interest prevailed over the defendant's presumption of innocence and the fundamental right to individual freedom of the person arrested.

To this purpose, the European Court of Human Rights stated that **an automated system ordering pre-trial detention** because of the existence of a presumption according to which arrest is mandatory for crimes of a certain gravity, except for the case when the person concerned managed to prove that there was no risk of absconding or re-offending, was contrary to Article 5 para. 3 of the Convention (see Judgment of 26 July 2001, delivered in the *Case of Ilijkov v. Bulgaria*, § 87). Considering these requirements, it is all the more obvious that an automated system ordering pre-trial detention due to the procedural stage of a case is contrary to the provisions of Article 5 para. 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

In conclusion, the Court found that this regulatory irregularity was likely to violate the provisions of Article 23 of the Basic Law, corroborated with Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 21 (3) of the Constitution, because, on the one hand, the person subject to pre-trial detention is deprived of liberty, except for previously established cases and legal procedures and, on the other hand, as long as the norm in question can be interpreted, in the absence of any other legal criteria, in the sense of legitimizing mandatory deprivation of liberty, the person subject to this measure cannot benefit from a correct and fair trial. Moreover, the method chosen by the legislator not only forces the Pre-Trial Judge/the court of law to order the deprivation of liberty, but it ignores the very essence of the act of justice, which is no longer impartial for everyone, but differs, depending on the procedural stage of a certain case.

**III. For all these reasons,** the Court upheld the exception of unconstitutionality of the provisions of the last phrase of Article 238 (1) of the Criminal Procedure Code, in the wording prior to its amendment through Article II (54) of Government Emergency Ordinance no. 18/2016 and found that the legislative solution excluding the implementation of the provisions of Article 227 of the Criminal Procedure Code was unconstitutional.

*Decision no. 704 of 29 November 2016 on the exception of unconstitutionality of the provisions of Article 231 (7) and Article 238 (1) of the Criminal Procedure Code, published in the Official Gazette of Romania, Part I, no. 158 of 2 March 2017.*

**The legislator has balanced, on the one hand, the rights and legitimate interests of the person convicted with conditional suspension of the penalty, in particular individual freedom and, on the other hand, the rather moral interest of the person having the status of civil party to obtain satisfaction in terms of the revocation of the suspension of penalty for fulfilment in bad faith of civil obligations laid down in conviction ruling, bearing in mind that the execution of the sentence of detention by the convicted person does not in any way ensure the fulfilment by the latter of those obligations, but on the contrary.**

**Keywords:** *equal rights, discrimination.*

**Executive summary**

**I. As grounds for the exception of unconstitutionality**, the author claimed, in essence, that the provisions of Article 85 (3), second sentence of the 1969 Criminal Code infringe the constitutional provisions of Article 16 (1) on equality of citizens before the law and public authorities, without privilege and without discrimination, and the provisions of Article 14 on the prohibition of discrimination of the Convention for the Protection of Human Rights and Fundamental Freedoms, whereas they create discrimination between sentenced person, on the other hand, and between the civil parties, on the other hand. Thus, in the situation of two defendants convicted in that same day to the same imprisonment penalty — in relation to whom it is ordered the conditional suspension of the penalty — for the person who previously had a conviction for a concurring offence the probation period will expire earlier than for the person convicted for a single criminal offence. Moreover, if the conviction for a concurring offence occurs one day before the expiry of the previously established probation period, in the case of conditional suspension of the resulting penalty no other probation period will continue to run. It was alleged that this last option paralyses the civil party's right to submit a request for revocation of the conditional suspension of penalty resulting from application of the provisions relating to multiple offences, whilst the civil party in a case where a person is convicted of a single offence shall have at his/her disposal a sufficient period of time to make use of the provisions of Article 84 of the 1969 Criminal Code relating to the revocation of conditional suspension in case of non-compliance with the civil obligations.

**II. With respect to those complaints, the Court held as follows:**

According to Article 15 of Law no.187 / 2012 (for the enforcement of the Law no. 286/2009 on the Criminal Code, published in the Official Gazette of Romania, Part I, no.757 of 12 November 2012 ), the measure of conditional suspension of penalty imposed under the 1969 Criminal Code shall be maintained after the entry into force of the new Criminal Code, the regime of this measure, including revocation or cancellation, being that provided for by the 1969 Criminal Code. In this respect, Article 81 (1) in the old Criminal Code provided that the court may order the conditional suspension of the penalty imposed on a person for a certain duration if certain cumulative conditions are met. The duration of the conditional suspension of penalty constitutes probation for the convicted and it consists of the duration of imprisonment penalty applied, plus a 2 years timeframe [Article 82 (1) of the 1969 Criminal Code]. The probation period is calculated from the date when judgement ordering the conditional suspension of penalty has become final [Article 82 (3) of the 1969 Criminal Code). The Court held that the conditional suspension of the penalty has the juridical nature of a means of individualizing the execution of the penalty and operates as a judicial measure of whose observance depends the extinction of execution (Decision no.1 of 17 January 2011, issued by the High Court of Cassation and Justice - The United Sections, published in the Official Gazette of Romania no.495 of 12 July 2011). The immediate effect of the conditional suspension is that the execution of the sentence is suspended, in the sense that, although a final sentence, it is not enforced, an effect conditional upon the conduct of the convicted throughout the duration of the probation period. After this deadline, the conditional suspension ends, the issue of execution of the penalty being thus definitively settled. Suspension can also end not only as a

result of the expiry of the probation period, but also through the cancellation or revocation of the suspension measure, these modalities of cessation of the suspension of the penalty resulting from the nature and purpose of that measure.

As regards the cancellation of the suspension for crimes previously committed, according to Article 85 (1) of the old Criminal Code, if it is discovered that the convicted had committed another offence before the judgement by which it ordered the suspension or before it became final, for which imprisonment has been imposed on him/her even after the expiry of the probation period, the conditional suspension of penalty shall be cancelled, applying, as appropriate, the provisions on multiple offences or repeated offences. In case of cancellation, suspension is ended, as the measure was implemented contrary to the mandatory legal provisions, which means that *ab initio* the suspension measure was struck by a defect which rendered it ineffective. The cancellation of the suspension of penalty does not take place if the crime which could have resulted in cancellation was discovered after the expiry of the probation period [Article 85 (2) of the 1969 Criminal Code]. The Court has held that, in the event of cancellation of the suspension for previously committed offences, if the punishment resulting from merging  does not exceed 2 years, the court may apply the provisions of the Article 81 on conditional suspension [Article 85 (3) first sentence]. Where the conditional suspension of penalty is ordered, the probation period shall be calculated from the date when the judgement previously ordering the conditional suspension of penalty remains final, according to Article 85 (3), second sentence of the 1969 Criminal Code, legal text subject to constitutional review in the present case.

The Court did not accept the complaint that — if, after annulment of the conditional suspension of the penalty, the conditional suspension of the penalty resulting from the application of provisions on multiple offences is ordered — calculation of the probation period calculated from the date when the judgement previously ordering the conditional suspension of penalty remains final creates discrimination between convicted persons, on the other hand, and between the civil parties, on the other hand. The fact that - in the situation of two defendants convicted in that same day for identical offences to the same imprisonment penalty in relation to whom it is ordered the conditional suspension of the penalty — for the person who previously had a conviction for a concurring offence the probation period will expire earlier than for the person convicted for a single criminal offence is not such as to undermine the principle of equality of citizens before the law and public authorities, without privilege and without discrimination, enshrined in Article 16 (1) of the Basic Law, since the two categories of persons are not in the same situation. The constitutional principle invoked by the author of the exception is neither infringed when the conviction for the concurring offence occurs after the expiry of the probation period out above, since this is not a real advantage to the person who was tried at the same date for a single offence, since, on the one hand, the probation period for the first convicted has already expired once, and, on the other hand, also the second convicted may, in turn, benefit, if appropriate, from the provisions of Article 85 (3) of the Criminal Code.

According to the case-law of the Court, the principle of equality before the law requires the establishment of equal treatment to situations which, in the light of the aim pursued, are no

different, which means that it does not exclude, but, on the contrary, require different solutions for different situations (Decision of the Plenum of the Constitutional Court no. 1 of February 8, 1994, published in the Official Gazette of Romania, Part I, no.69 of 16 March 1994). At the same time, the Court has held that Article 16 of the Constitution concerns the equality of rights between citizens with regard to the recognition in their favour of fundamental rights and freedoms, and not the identity of the legal treatment in terms of application of measures, regardless of their nature (Decision no. 53 of 19 February 2002, published in the Official Gazette of Romania, Part I, no. 224 of 3 April 2002, Decision no. 1615 of 20 December 2011, published in the Official Gazette of Romania, Part I, no. 99 of 8 February 2002 2012, Decision no. 323 of 30 April 2015, published in the Official Gazette of Romania, Part I, no. 467 of 29 June 2015, paragraph 19, Decision no.718 of 29 October 2015, published in the Official Gazette of Romania, Part I , no.909 of 9 December 2015, paragraph 15, and Decision no.18 of 19 January 2016, published in the Official Gazette of Romania, Part I, no.182 of 10 March 2016, paragraph 17). However, the two categories of persons compared by the author of the exception are not in the same situation — on the one hand, convicted person benefiting from a suspension tried for an offence committed before the judgement ordering the suspension or before it became final, and, on the other, the defendants who have not been convicted before with conditional suspension of penalty and who can also benefit from the provisions of Article 85 (3) of the Criminal Code.

Furthermore, the Court has found that it cannot be accepted either the complaint that — if the the conviction for the offence previously committed occurs after the expiry of the probation period — the civil party can not longer exercise his/her right to submit a request for revocation of the conditional suspension of penalty resulting from application of the provisions relating to multiple offences, whilst the civil party in a case where a person is convicted of a single offence shall have at his/her disposal a sufficient period of time (all the duration of the probation) to make use of the provisions of Article 84 of the 1969 Criminal Code relating to the revocation of conditional suspension in case of non-compliance with the civil obligations. In connection with this issue, the High Court of Cassation and Justice, by Decision no.14 of 17 October 2011, published in the Official Gazette of Romania, Part I, no. 821 of 21 November 2011, handed down in an appeal in the interest of the law, ruled that the revocation of conditional suspension of the penalty (or the suspension of penalty under supervision), in case of non-compliance by the sentenced with the civil obligations established by judgement of conviction, must take place before expiry of the probation period, regardless whether the trial takes place before or after the expiry of that period. However, in the case invoked by the author of the exception, detection and conviction for the offence committed prior to the conviction with conditional suspension of penalty do not depend — at least not in full — on the procedural conduct of the convicted person, but on the quality of the activity carried out by the judicial bodies, and the lack of efficiency and/or celerity in the conduct of this activity cannot be imputed to the sentenced person.

The Court has held that the provisions of Article 85 (3), second sentence of the 1969 Criminal Code have been conceived by the legislator so that the person convicted with conditional suspension of penalty does not have to go through two probation periods for multiple offences or repeated offences before conviction — subject to prosecution in different

cases, even with the risk that the civil party in a criminal case settled after conviction with conditional suspension could not, in all cases, request revocation of conditional suspension of the penalty on the grounds of non-payment of civil claims by the convicted person. The legislator has balanced, on the one hand, the rights and legitimate interests of the person convicted with conditional suspension of the penalty, in particular individual freedom and, on the other hand, the rather moral interest of the person having the status of civil party to obtain satisfaction in terms of the revocation of the suspension of penalty for fulfilment in bad faith of civil obligations laid down in conviction ruling. In this respect, it should be borne in mind that the execution of the sentence of detention by the convicted person does not in any way ensure the fulfilment by the latter of those obligations, but on the contrary.

Finally, the Court did neither accept the complaint relating to infringement of Article 14 on prohibition of discrimination of the Convention for the Protection of Human Rights and Fundamental Freedoms, whereas the respective text only prohibits discrimination with regard to the exercise of the rights and freedoms guaranteed by the Convention and its additional Protocols, rights that were not mentioned in the present case.

**III.** For these reasons, the Court, by unanimity, dismissed as unfounded the exception of unconstitutionality and found that the provisions of Article 85 (3) second sentence of the 1969 Criminal Code are constitutional in relation to the complaints brought.

*Decision no. 771 of 15 December 2016 on the exception of unconstitutionality of the provisions of Article 85 (3), second sentence of the 1969 Criminal Code, published in the Official Gazette of Romania, Part I, no.*

**The provisions laid down in Article of 453 (3) of the Code of Criminal Procedure on the case of revision referred to in paragraph (1) (a), as well as the legislative provisions contained in Article 453 (4) first sentence of the same Code, which exclude the possibility of revision of the acquittal ruling for the case referred to at paragraph (1) (a), are in breach of the constitutional provisions of Article 16 on equal rights, Article 21 on free access to justice and Article 131 relating to the role of the Public Ministry. On the grounds of Article 31 (2) of Law no. 47/1992, the Court held that it is necessary to extend the constitutional review as to cover also the provisions of Article 457 (2) of the Code of Criminal Procedure, given that this legal text — which sets the time limit for bringing the application for revision — cannot be dissociated from the former, in terms of the possibility of revision of the acquittal ruling for the case referred to in Article 453 (1) (a) of the Code, i.e. from criminal procedural rules found to be unconstitutional. The legislative solution contained in Article 457 (2) of the Code of Criminal Procedure, which excludes the case of revision provided for in Article 453 (1) (a) of the Code, infringes, on the one hand, the equal rights between citizens as regards the recognition of the fundamental right of free access to justice, principles enshrined in the provisions of**

**Article 16 and Article of 21 of the Constitution and, on the other hand, the role of the Public Ministry, as established by Article of 131 of the Basic Law.**

**Keywords:** equal rights, free access to justice, role of the Public Ministry, extending the review of constitutionality.

**Summary**

**I. As grounds for the exception of unconstitutionality**, its authors argued, in essence, that the impugned legal provisions, which do not allow for recourse against the acquitted person to the case of revision provided for by Article 453 (1) (a) of the Code of Criminal Procedure, infringe the constitutional provisions of Article 16 (2), which state that "*No one is above the law*", those of Article 21 (3) on the right to a fair trial, those of Article 24 relating to the right of defence, and the provisions of Article 6 par.1 concerning the right to a fair trial and Article 14 on the prohibition of discrimination in the Convention for the Protection of Human Rights and Fundamental Freedoms, Article 7 on equality before the law of the Universal Declaration of Human Rights and Article 14 par.1 concerning the right to a fair trial of the International Covenant on Civil and Political Rights, whereas they discriminate between the civil party and the acquitted defendant.

**II. With respect to those complaints, the Court held as follows:**

The work cycle of ordinary criminal proceedings — if it was lawful and thorough — must be completed with a final decision having the force of *res judicata*, where the facts retained express the truth, and civil and criminal law were applied correctly. But the practice has also highlighted cases where final rulings pronounced in criminal cases contained serious errors of fact and law. The legislator considered such an event, reason for which it established extraordinary remedies as criminal procedural means of cancellation of rulings with the force of *res judicata* and which do not correspond to the law and the truth. Having regard to the fact that the establishment of such procedural means is of prejudice to the principle of *res judicata*, therefore to the stability of final rulings, which is intended to give confidence in justice, the cases and the conditions for the exercise of the extraordinary remedies must be strictly regulated by the legislator in order to restore legal order. Equally, the option of the legislator to regulate extraordinary avenues of appeal must be subject to the constitutional limits.

The extraordinary avenue of appeal allowing the criminal court to reconsider its own ruling, which is a factual avenue of appeal, whereby judicial errors arising in dealing with criminal cases are detected and removed. Is request for revision is formulated against a ruling which has acquired the force of *res judicata* on the basis of facts or circumstances which were not known to the court upon the settlement of the case, being discovered subsequently, and proving that the final ruling was based on a miscarriage of justice. According to Article 455 of the Code of Criminal Procedure, the following may file for a revision: "*parties to the proceedings, within the limits of their procedural quality*" , "*a member of the convict's family, even following the latter's death, only if the motion is drafted for the benefit of the convict*" and the public prosecutor, who may request *ex officio* the revision of the criminal part of the ruling. As regards the subject matter of the avenue of appeal, the revision may be exercised —

in the cases exhaustively laid down in Article 453 of the Code of Criminal Procedure — only against final criminal rulings settling the substance of the case, since, as it has been pointed out in legal literature, the purpose of judicial revision is to remove procedural error and the procedural function of this concept is to facilitate the discovery, the collection and the submission to the court of material evidence quite unprecedented or at least unknown to the court, making it possible to ascertain the judicial error and to remove the same.

The Court held that the ground for revision provided for by Article 453 (1) (a) of the Code of Criminal Procedure concerns the situation where new facts or circumstances were found which were not known at the time of settlement of the case and proving groundlessness of the ruling issued. With regard to the meaning of the expression "*facts or circumstances*" in literature and in practice, it was taken the view that this refers to the evidence itself, as factual, informative elements on what needs to be proven during the revision procedure, i.e. any circumstance, situation or condition which, independently or in conjunction with other evidence, can prove groundlessness of the ruling. The provisions of Article 453 (4) first sentence of the Code of Criminal Procedure enshrine the maintenance of the system of total revision with regard to the reason referred to in paragraph (1) (a) of the same Article, limiting the scope of that revision to cases where new facts or circumstances may prove the groundlessness of the ruling of conviction, of waiver of penalty, of postponement of the penalty or of termination of criminal proceedings. This means that new facts or circumstances must lead to an opposite solution to that reached by the ruling whose revision is sought. If new facts or circumstances does not tend to prove the groundlessness of the ruling of conviction, of waiver of penalty, of postponement of the penalty or of termination of criminal proceedings, but only to prove certain matters but maintain that solution, the new facts or circumstances do not constitute grounds for revision.

According to the current rule, unlike that included in the 1936 and 1968 Codes of Criminal Procedure, the case of revision provided for by Article 453 (1) (a) of the Code of Criminal Procedure does not apply in case of groundlessness of the ruling of acquittal of the accused. This follows both from the list contained in the first sentence of the Article 453 (4) of the Code of Criminal Procedure and from the condition set forth at paragraph (3) of the same Article, condition according to which the case referred to at paragraph (1) (a) can be relied on as a ground for revision only in favour of the sentenced person or of the person in regard to whom it as ordered the waiver or postponement of penalty.

The Court found that the legislative solution according to which case laid down by Article 453 (1) (a) of the Code of Criminal Procedure may be invoked as a ground for revision only in favour of the sentenced person or of the person in regard to whom it as ordered the waiver or postponement of penalty, excluding the possibility of revision of the acquittal ruling, is liable to break the equal rights between citizens as regards the recognition of the fundamental right of access to justice. The Court noted that the exclusion of the possibility to invoke against the acquitted person of the ground for revision provided for by Article 453 (1) (a) of the Code of Criminal Procedure — consisting of the discovery of facts or circumstances which were not known during trial and proving groundlessness of the ruling concerned —creates a discriminatory treatment for civil party in the respective case in relation to civil parties in other

cases also settled by a final aquittal rulings, but with regard to whom the reasons for revision provided for by Article 453 (1) (b) to (d) of the Code of Criminal Procedure are deemed applicable, namely: the ruling was based on a statement of a witness, expert opinion or statements of an interpreter who has committed the offence of false testimony in the whose revision is sought, thereby influencing the outcome; or a document which has served as the basis of the ruling whose revision is sought was declared to be a forgery in the course of proceedings or after the judgement, circumstance which has influenced the outcome; or a member of the panel, the prosecutor or the person who carried out the prosecution has committed an offence in connection with the case for which revision is requested, which influenced the outcome. With regard to the two categories of civil parties mentioned, the Court has held that, although they find themselves in similar situations, they are subject — in terms of the possibility to formulate the request for revision — to a different legal treatment, which is likely to contravene the provisions of Article of 16 of the Constitution, whereas the discriminatory treatment has no objective and reasonable justification.

In terms of ensuring the equality of citizens in exercising their procedural rights, including legal remedies, the Court held in its case-law that, in establishing rules of access of litigants to these rights, the legislator is bound by the principle of equality of citizens before the law. Therefore, the establishment of special rules as regards the appeals is not contrary to that principle, as long as they ensure legal equality of citizens in terms of their use. The principle of equality before the law requires the establishment of equal treatment for situations which, in the light of the aim pursued, are no different. It does not preclude, but, on the contrary, requires different solutions for different situations. Consequently, a different treatment cannot be only the expression of the exclusive assessment of the legislator, but must be rationally justified, in respect of the principle of equality of citizens before the law and public authorities (Constitutional Court Plenum Decision no. 1 of 8 February 1994, published in the Official Gazette of Romania, Part I, no.69 of 16 March 1994). At the same time, the Court has held that Article 16 of the Constitution concerns the equality of rights between citizens with regard to the recognition in their favour of fundamental rights and freedoms, and not the identity of the legal treatment in terms of the application of measures, regardless of their nature (Decision no. 53 of 19 February 2002, published in the Official Gazette of Romania, Part I, no.224 of 3 April 2002, Decision no. 1615 of 20 December 2011, published in the Official Gazette of Romania, Part I, no.99 of 8 February 2002, Decision no.323 of 30 April 2015, published in the Official Gazette of Romania, Part I, no. 467 of 29 June 2015, paragraph 19, and Decision no.540 of 12 July 2016, published in the Official Gazette of Romania, I, no. 841 of 24 October 2016, paragraph 21). However, in the light of the interest to ask for and obtain the rectification of judicial errors, civil parties in cases in which a final ruling of acquittal was issued — whose groundlessness could be established on the basis of new facts or circumstances, under the terms of Article 453 (1) (a) of the Code of Criminal Procedure — are, as regards the recognition of free access to justice, in a similar situation with the civil parties in cases settled by final rulings of acquittal covered by the grounds of revision set out in Article 453 (1) (b) to (d) of the Code of Criminal Procedure.

As the Court has held in its case-law, free access to justice requires access to procedural means whereby justice is carried out. It is true that the rules relating to the conduct of

proceedings before the courts are the exclusive competence of the legislator, as is apparent from the provisions of Article 126 (2) of the Constitution — text according to which ‘Jurisdiction of the courts and the conduct of trial proceedings are determined only by the law’ — and those of Article of 129 of the Basic Law, according to which, “Judicial decisions may be appealed against by the parties concerned and by the Public Ministry, subject to the law” . The principle of free access to justice requires that those concerned enjoy the unlimited possibility to use these procedures in the forms and modalities established by law, but only in compliance with the rule enshrined in Article of 21 (2) of the Constitution, stating that no law shall allow restrictions on the access to the courts, which means that the legislator cannot exclude from the exercise of the procedural rights which it has set up a social group or category (Constitutional Court Plenum Decision no. 1 of 8 February 1994 and Decision no. 540 of 12 July 2016, paragraph 22, decisions cited above).

Next, as regards the role of the prosecutor in criminal proceedings, the Court observed that, under Article of 131 of the Constitution, within judicial activities, the Public Ministry shall represent the general interests of society and it shall defend the legal order, as well as the citizens’ rights and freedoms, exercising its attributions through public prosecutors constituted into prosecution offices. Thus, pursuant to the provisions of Article 62 (2) of the Law no. 304 / 2004 on the judicial organization (republished in the Official Gazette of Romania, Part I, no. 827 of 13 September 2005), prosecutors carry out their activity according to the principles of legality, impartiality and hierarchical control, and, under the provisions of Article of 67 of the same legislative act, the prosecutor participates in court hearings, in accordance with the law, and has an active role in the finding of the truth. In this respect, the provisions of Article 55 (3) (f) of the Code of Criminal Procedure provide the prosecutor’s attribution, during criminal proceedings, to file and use challenges and avenues of appeal set by the law against court decisions. Therefore, departing from the purpose for which the extraordinary remedy of revision has been enacted — to ensure the possibility that final criminal rulings based on judicial errors be rectified by reference to the cases expressly and exhaustively provided for by law — and from the role of the prosecutor, who, 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 trial, in the spirit of legality (Decision no. 983 of 8 July 2010, published in the Official Gazette of Romania, Part I, no.551 of 5 August 2010, and Decision no.641 of 11 November 2014, published in the Official Gazette of Romania, Part I, no. 887 of 5 December 2014, paragraph 51), the Court held that the provisions of Article 131 of the Constitution require the legislator to ensure the possibility of revision — including at the initiative of the public prosecutor, in the latter’s capacity as holder of this extraordinary legal remedy — of acquittal rulings whose groundlessness can be established on the basis of new facts or circumstances, under the terms of Article 453 (1) (a) of the Code of Criminal Procedure.

Consequently, the provisions laid down in Article 453 (3) of the Code of Criminal Procedure on the case of revision referred to in paragraph (1) (a), as well as the legislative provisions contained in Article. 453 (4) first sentence of the Civil Code, which excludes the possibility of revision of the acquittal ruling for the case referred to at paragraph (1) (a), are in breach of the constitutional provisions of Article 16 on equal rights, Article 21 on free access to justice and Article 131 relating to the role of the Public Ministry, as they deprive the civil

party of the possibility to defend his rights and legitimate interests, i.e. they deprive the prosecutor of the levers needed to exercise his specific role in criminal proceedings. The Court held that where facts or circumstances which were not known during trial are discovered and such can prove the groundlessness of the acquittal ruling, both the civil party and the prosecutor must enjoy the possibility to request and obtain the restoration of the judicial truth through the cancellation of the ruling in question.

On the grounds of Article 31 (2) of Law no.47/1992, which provides that "if the exception is admitted, the Court shall also pronounce upon the constitutionality of other provisions of the normative act being challenged, of which those mentioned in the case referral act cannot obviously and necessarily be dissociated", the Court found that it is necessary to extend the constitutional review as to cover also the provisions of Article 457 (2) of the Code of Criminal Procedure, given that this legal text — which sets the time limit for bringing the application for revision — cannot be dissociated from the former, in terms of the possibility of revision of the acquittal ruling for the case referred to in Article 453 (1) (a) of the Code, i.e. from criminal procedural rules found to be unconstitutional. Thus, the Court held that the legislative provisions contained in Article 457 (2) of the Code of Criminal Procedure, which excludes the case of revision provided for in Article 453 (1) (a) of the Code, is liable to infringes, on the one hand, the equal rights between citizens as regards the recognition of the fundamental right of free access to justice, principles enshrined in the provisions of Article 16 and Article of 21 of the Constitution and, on the other hand, the role of the Public Ministry, as established by Article of 131 of the Basic Law.

**III. For these reasons**, the Court, by unanimity, upheld the exception of unconstitutionality and found that: 1. the provisions laid down in Article of 453 (3) of the Code of Criminal Procedure are unconstitutional as regards the case of revision referred to in paragraph (1) (a); 2. the legislative solution contained in Article 453 (4) first sentence of the Code of Criminal Procedure, which excludes the possibility of revision of the acquittal ruling for the case referred to at paragraph (1) (a) is unconstitutional; 3. the legislative solution contained in Article 457 (2) of the Code of Criminal Procedure, which excludes the case of revision referred to in Article 453 (1) (a) is unconstitutional.

*Decision no. 2 of 17 January 2017 on the exception of unconstitutionality of the provisions of Article 453 (3) and (4) first sentence and Article 457 (2) of the Code of Criminal Procedure, published in the Official Gazette of Romania, Part I, no.324 of 5 May 2017.*

**Settlement of the appeal against the preventive measure of judicial control ordered by the public prosecutor. Proportionality of the maximum duration of judicial review**

**Keywords***: judicial review, free access to justice, effectiveness, proportionality*

**Summary**

**I.As grounds for the exception of unconstitutionality**, the author claimed that the provisions of Article 213 (2) of the Code of Criminal Procedure are unconstitutional, given that they do not regulate the deadline for handling appeals against the preventive measure of judicial control ordered by the public prosecutor. This leads to the situation where the resolution of the appeal takes place after the cessation of the judicial control measure, contrary to the requirements of the constitutional provisions relied on. In relation to the provisions of Article $215^{1}$ of the Code of Criminal Procedure, the author pointed out that they do not comply with the principle of proportionality, where the measure of judicial control can be ordered during the prosecution for 1 or 2 years.

**II. Having examined the exception of unconstitutionality,** the Court noted hat the preventive measure of judicial control can be ordered, in accordance with Article 211 of the Code of Criminal Procedure, by the prosecutor, by order, during the prosecution, by the pre-trial chamber judge, in the pre-trial chamber procedure or by the court, during the proceedings, in the last two cases through a court order. The Court further found that the application to the court to rule on the legality and merits of the decision to take/extend the preventive of judicial control is qualified by the legislator in the names of Articles 204, 205, 206 and 213 of the Code of Criminal Procedure, as 'avenue of appeal', in Articles 204, 205 and 206 of the same legislative act as 'challenge', and in Article 213 of the same legislative act as 'complaint'. The Court found that, irrespective of the name adopted by the legislator, the request for a court to rule on the legality and merits of a decision to take/extend the preventive measure of judicial control is a means of access to justice whereby the person concerned, whose constitutional rights have been restricted, exercises the right to have his or her claim addressed to a competent national court. Even though the request for the court to rule on the legality and merits of a decision to take/extend the preventive measure of judicial control would be classified as an avenue of appeal, the Court noted that it has previously ruled that the exercise of appeals is a facet of the free access to justice (Decision no. 485 of 23 June 2015, published in the Official Gazette of Romania, Part I, no. 539 of 20 July 2015, paragraph 22) so that the safeguards relating to free access to justice also affect the rules governing judicial remedies. In this context, the Court noted that one of the free access to justice safeguards is its effectiveness, stating that the State is under an obligation to guarantee the effective nature of the free access to justice and of the right of defence. The Court has also held that in regulating the exercise of the access to justice, the legislator has the possibility to impose certain formal requirements, taking into account the nature and requirements of the administration of justice, without, however, affecting the substance of the right or lacking it of effectiveness.

The Court considered that a number of procedural issues need to be examined in the assessment of the effectiveness of free access to justice, substantially related with the application to the court, the court's ability to effectively examine the totality of the means, arguments and evidence presented, and to issue a solution, as well as issues which affect the effectiveness of free access to justice, such as the time limit to adjudicate matters subject to court's analysis, or issues relating to the effects of the judgement rendered by the court. As regards the first issue, the Court noted that the legislator regulated the possibility of challenging the decision to take/extend the preventive measure of judicial control ordered by the public

prosecutor, during the criminal prosecution, by the provisions of Articles 213 and 215[1] of the Code of Criminal Procedure, so that this requirement is fulfilled. With regard to the second issue, the Court noted that according to Article 213 (6) of the Code of Criminal Procedure, the Judge for Rights and Liberties may revoke the preventive measure of judicial control, if the legal provisions regulating the requirements for taking it were violated, or may modify the obligations within the judicial control, this requirement being fulfilled as well. As regards the time limit to adjudicate on matters which are subject to court's analysis, the Court found that the regulation of appeals against the decision to take/extend the preventive measure of judicial control is different, depending on the procedural time in which it was ordered and thus of the quality of the body ordering it.

Thus, during criminal prosecution, according to Article 213 and Article 215[1] (5) of the Code of Criminal Procedure, a prosecutorial order through which a judicial control measure was taken can be challenged by a defendant through complaint with the Judge for Rights and Liberties of the court that would have the competence of jurisdiction to rule on the case in first instance. The Order by which the Judge for Rights and Liberties resolves the complaint lodged by the defendant against the prosecutorial order through which a judicial control measure was taken is final, in accordance with Articles 213 and 215[1] ( 5) of the Code of Criminal Procedure, as interpreted by the Decision of the High Court of Cassation and Justice no. 25 of 7 December 2015, published in the Official Gazette of Romania, Part I, no. 46 of 20 January 2016, pronounced within an appeal in the interest of the law. The Court also held that, also in the course of criminal proceedings, but if the preventive measure of judicial control is ordered by the Judge for Rights and Liberties in the context of the rejection of a proposal for issuing an order for pre-trial detention or house arrest, the rule of general nature contained in Article 204 of the Code of Criminal Procedure with the name — Avenue of appeal against court resolutions ordering preventive measures during the criminal investigation — will become applicable. It provides that against court resolutions through which the Judge for Rights and Liberties orders preventive measures, the defendant and the prosecutor may file a challenge, within 48 hours of their return or, as applicable, as from their communication. In this context, the Court considers that of particular importance is Article 204 (4), which states that ‘A challenge filed by a defendant shall be ruled on within 5 days of its registration’, thereby establishing a certain time limit for the settlement of the appeal concerning the taking of the preventive measure of judicial control.

As regards the preventive measure of judicial control taken by the pre-trial chamber judge, in the pre-trial chamber procedure or by the court, during the proceedings, the Court noted that it is governed by the provisions of Article 214 of the Code of Criminal Procedure, which do not lay down the avenue of appeal against the order relating to the preventive measure of judicial control. However, similar to the previous situation, these provisions are read in conjunction with those of Articles 205 and 206 of the Code of Criminal Procedure. According to these provisions, against court resolutions under which the Pre-trial Chamber Judge orders preventive measures, during the pre-trial chamber procedure, or under which the court, during trial, orders such measures, the defendant and the prosecutor may file a challenge within 48 hours of its returning or, as applicable, of its communication. The Court noted that, again, the appeals lodged by the defendant are settled, in accordance with Article 205 (4) and Article 206 (5) of the Code of Criminal Procedure, within 5 days of registration.

It follows from the analysis of all the situations set out above that the only case in which the legislator did not regulate a time limit for the settlement of the avenue of appeal is that of the complaint against the order of the prosecutor ordering the taking/extension of the measure of judicial control, during the criminal prosecution, in all other cases the legislator specifying the time limit of 5 days as of the registration of the challenge, time limit within which the court is required to rule. In other words, where the preventive measure of judicial control is taken by the judge (either the rights and freedoms judge, the pre-trial chamber judge or the court judge), the appeal lodged by the defendant against the Order will in all cases be resolved within 5 days of registration, while in cases where the preventive measure of judicial control is taken/extended by the public prosecutor, the complaint against the order will be dealt with in an uncertain term, the legislator not regulating in this case the court's obligation to rule within a certain deadline.

As to the effects produced by the Order issued, the Court noted that, according to Article 213 (6) of the Code of Criminal Procedure, the Judge for Rights and Liberties may revoke the measure, if the legal provisions regulating the requirements for taking it were violated, or may modify the obligations within the judicial control. As set out above, it appears that the legislator has governed the possibility for the court to effectively examine the totality of means, arguments and evidence presented and to reach a solution, in this case in the form of an Order. However, the Court found that the essence of the preventive measure of judicial control is its application from the time it was ordered, and that the application cannot be suspended until the court issues a ruling. Thus, if a court ascertains the unlawfulness or unsoundness of the application of this preventive measure after a considerable period of time or even after its expiry, the court's findings will have no effect on the situation of the person against whom the preventive measure of judicial control has been taken. However, the Court found that the effectiveness of access to justice is not characterised solely by the possibility for the court to examine the totality of means, arguments and evidence presented and to issue a solution, but also by the fact that the decision rendered determines the removal of the alleged infringement and of its consequences for the holder of the infringed right.

Thus, the Court found that, in case of a prosecutorial order through which a judicial control measure was taken, the non-regulation by the legislator of a certain and imperative period of time within which the complaint needs to be settled leaves at the judge's subjective appreciation the determination thereof. However, the wide margin of discretion left to the courts in order to establish time limits which at time expire after the ordered/extended measure has itself expired, or at a time which is far away from the time when the measure was taken/extended, time limits that can extend to months, is likely to deprive of effectiveness this avenue of appeal. The Court found that, by the way in which it decided to regulate the settlement of the complaint against the taking or prolongation of the preventive measure of judicial control, the legislator introduced an element of uncertainty which would put into question the effectiveness itself of this avenue of appeal. In this context, the Court deemed relevant to recall that the European Court of Human Rights stated that remedies which have no precise time-limits, thus creating uncertainty, cannot be considered as effective remedies (Decision of 17 February 2009 in the Case of Williams v. the United Kingdom). The Court found that the impugned legal provision, by not providing for a certain period of time for settlement of the complaint against the decision of the public prosecutor in which the

preventive measure was taken/prolonged, renders the preventive measure ineffective, in breach of Article 21 of the Constitution.

As regards the exception of unconstitutionality of Article 215[1] (6) of the Code of Criminal Procedure, the Court held that they cover the maximum duration of the measure of judicial review ordered in the criminal proceedings, i.e. one year or two years, depending on the sentence prescribed for the offences against the defendant. As regards the criticism that the maximum time for which the preventive measure of judicial control can be ordered does not meet the principle of proportionality, the Court considered that it cannot be accepted. The proportionality of the duration of the preventive measure of judicial control is analysed from two perspectives. Thus, given the characteristics of this preventive measure, the Court found the existence of objective proportionality which falls within the definition by the legislator of the maximum period for which the measure can be ordered and of subjective proportionality arising from the factual and legal situation of the defendant at the time when the preventive measure is ordered against him/her. The Court found that the analysis of objective proportionality is the responsibility of the constitutional court, whereas the analysis of the subjective proportionality is the responsibility of the court called on to decide on whether the measure is to be taken/extended.

In this context, the Court held that the constituent legislator deemed necessary the regulation at the level of the Basic Law of the maximum length for which preventive measures involving deprivation of liberty can be ordered, in the course of criminal investigations, and consequently, laid down that the detention cannot exceed 24 hours, and that provisional arrest and house arrest (see Decision no. 740 of 3 November 2015, published in the Official Gazette of Romania, Part I, no. 927 of 15 December 2015) cannot exceed together 180 days. The Court held that, by not expressly regulating, at constitutional level, the maximum duration for which the preventive measure of judicial control can be ordered during criminal investigations, the constitutional legislator has left to the ordinary legislator the task to determine the same within the framework of the regulation of the measures related to the State's criminal policy.

The Court found that the maximum duration for which preventive custodial measures can be ordered is 180 days — around 6 months, while the maximum duration for which the preventive measure of judicial control can be ordered is 1 year or 2 years. The Court has also held that the ordering of the preventive measure of judicial control by judicial bodies is intended, in accordance with Articles 211-215 of the Code of Criminal Procedure, to ensure the proper conduct of criminal proceedings, to prevent the defendant from escaping investigations or trial, and to prevent perpetration of new offences. In this light, given the purpose for which the preventive measure of judicial control is ordered, and given that preventive measures involving deprivation of liberty are more intrusive than the judicial control, the Court considered that fixing a maximum duration for which the preventive measure of judicial control may be ordered, i.e. 1 year or 2 years, is not contrary to the principle of proportionality.

The Court has also held that the ordering of the preventive measure of judicial control involves imposing obligations and prohibitions on the defendant in order that his/her conduct be monitored by the judicial body. Article 215 of the Code of Criminal Procedure establishes, *ope legis*, a number of positive obligations, which have to be ordered upon placement under judicial control and such are not subject to censorship and removal, as well as a number of

positive and negative obligations, left to the discretion of the judicial body. In this way the measure of judicial control can be individualised, depending on the information available about the offence and the offender, information enabling the assessment of the state of danger determining such measure (see, to that effect, also Decision no. 333 of 24 May 2016, published in the Official Gazette of Romania, Part I, no. 646 of 23 August 2016, paragraph 14).

**III. For all these reasons**, by unanimity, the Court upheld the exception of unconstitutionality and found constitutional the provisions of Article 213 (2) of the Code of Criminal Procedure in so far as the settlement of the complaint against the prosecutorial order through which a judicial control measure was taken is carried out in accordance with the provisions of Article 204 (4) of the Code of Criminal Procedure. By the same decision the Court dismissed the exception of unconstitutionality of Article $215^1$ (6) of the Code of Criminal Procedure as unfounded.

*Decision no. 17 of 17 January 2017 on the exception of unconstitutionality of the provisions of Article 213 (2) and Article $215^1$ (6) of the Code of Criminal Procedure, published in the Official Gazette of Romania, Part I, no. 261 of 13 April 2017.*

**The legislative solution contained in the provisions of Article 347 (1) of the Code of Criminal Procedure, in the form in force prior to the amendment by Law no.75/2016, which excludes the appeal against the sentence passed by the pre-trail chamber judge under Article 346 (2) violates the constitutional provisions of Article 16 on equal rights, Article 21 on free access to justice and Article 131 on the role of the Public Ministry.**

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

**Summary**

**I. As grounds for the exception of unconstitutionality**, its authors claimed mainly that the provisions of Article 347 (1) of the Code of Criminal Procedure - in the wording preceding its amendment by Law no.75/2016 - are in breach of the constitutional provisions of Article 24 relating to the right of defence and of Article 124 on the administration of justice, as well as of Article 20 concerning the priority of international human rights treaties over national laws, in relation to the provisions of Article 6 (3) (c) on the defendant's right to defend himself or to be assisted by a defence counsel of his choice and those of Article 13 on the right to an effective remedy of the Convention for the Protection of Human Rights and Fundamental Freedoms, as they preclude the defendant to appeal against the sentence of the pre-trial chamber judge under Article 346 (2) of the Code of Criminal Procedure, i.e. if no motions or exceptions have been filed or no ex officio exceptions have been raised.

**II. With respect to those complaints, the Court held as follows:**

In accordance with Article 425[1] (1) of the Code of Criminal Procedure, the ordinary remedy consisting in appeal may be exercised only where the law expressly provides for the same. The general criminal procedural rule in Article 425[1] is applicable when the law does not provide otherwise, meaning that if there are derogating provisions, they shall be applied first. As regards the pre-trial chamber, the Code of Criminal Procedure allows that against those decided in connection with the subject of this new phase of the criminal proceedings be exercised the remedy of appeal under the conditions and within the limits set forth in Article 347, which, at para. (1) — in the version before amendment by Law no.75/2016 — established that an appeal may be lodged against the modality of settlement of motions and exceptions, as well as against the decisions provided for in Article 346 (3) to (5) of the same Code.

Regarding the object of the appeal regulated by the criticized law, the Court held that the provisions of Article 347 (1) of the Code of Criminal Procedure, in the drafting before the amendment by Law no.75 / 2016, provide for the possibility to appeal , separately or cumulatively, two distinct layers of the decisions handed down in the pre-trial chamber procedure. A first layer consists in the handling of motions and exceptions, case in which the appellant criticises the manner in which the motions and exceptions have been accepted or dismissed, as the case may be, by the pre-trial chamber judge through an interim order pronounced on the basis of Article 345 (1) of the Code of Criminal Procedure — whereas for that interim order there is no separate appeal, it can only be the subject of an appeal together with the appeal lodged against the final order — or through the final order provided for by Article 346 (3) and (4) of the Code of Criminal Procedure. The modality in which this solution is reformed may influence the resolution of the phase of pre-trial criminal proceedings in the sense of reaching a solution different from the solution of the pre-trial chamber judge at the court of first instance. The second layer consists in the handling of the pre-trial chamber procedure under Article 346 (3) and (4) of the Code of Criminal Procedure. In such cases, the appellant challenges either the decision to return the case to prosecution office pursuant to Article 346 (3) of the Code of Criminal Procedure, or the decision to commence proceedings under Article 346 (4) — where the pre-trial chamber judge found irregularities of the indictment but took the view that they do not affect the possibility to establish the subject matter and limits of proceedings, or excluded one or more pieces of evidence brought or invalidated certain acts of prosecution, without necessarily challenge also the manner how motions and exceptions have been handled. The Court noted that, erroneously, Article 347 (1) of the Code of Criminal Procedure, in the wording preceding the amendment by Law no.75/2016, refers, in regard to solutions, also to Article 346 (5), although this latter text contains no provision relating to any decision, but provides that '*evidence excluded cannot be taken into account in the settlement of the case on the merits*' .

On the other hand, the Court has held that, under Article 346 (2) of the Code of Criminal Procedure, in the version in force before its amendment by Law no. 2/2016, if no exception or motions have been raised or no exception have been invoked ex officio, on expiry of the time limits laid down in Article 344 (2) or (3), the pre-trial chamber judge finds the legality of referral to the court, of the production of evidence and of the carrying out acts of prosecution

and orders that proceedings be commenced. The provisions of Article 347 (1) in conjunction with those of Article 346 (2) of the Code of Criminal Procedure, in the version before amendment by Law no.75/2016, lead to the conclusion that by the order through which the pre-trial chamber judge ordered the commencement of proceedings, where no exception or motions have been raised or no exception have been invoked ex officio, is not subject to appeal. Therefore, the appeal against the order of the pre-trial chamber judge under Article 346 (2) of the Code of Criminal Procedure shall be inadmissible. Finally, to end the analysis of the provisions of Article 347 (1) of the Code of Criminal Procedure, in the version before amendment by Law no. 75/2016, in the light of the possibility to bring an appeal against the decisions provided for in Article 346, the Court held that no appeal can be brought against the order declining jurisdiction either, order pronounced on the basis of Article 346 (6) of the Code of Criminal Procedure. Such a regulation is, however, fully in line with the provisions of Article 50 (4) of the same Code, which provide that the order declining jurisdiction is not subject to appeal.

Turning to the legislative solution criticised by the authors of the exception of unconstitutionality, the Court found that the exclusion of the possibility of appeal against the order of the pre-trial chamber judge under Article 346 (2) of the Code of Criminal Procedure, in the version before amendment by Law no.75/2016, is such as to break the equal rights between citizens as regards the recognition of the fundamental right of free access to justice. Thus, the Court has held that the appeal provided for in Article (347) of the Code of Criminal Procedure is meant to ensure the control of legality on a number of final orders pronounced within the pre-trial chamber procedure, as a guarantee of compliance with the principle of legality of criminal proceedings enshrined in Article 2of the Code of Criminal Procedure, which is, in turn, based on the provisions of Article 1 (5) of the Constitution referring to the principle of legality. The purpose of the appeal within the pre-trial chamber procedure is to rectify the errors of law committed by the pre-trial chamber judge upon checking, after indictment, the legality of the referral to the court, as well as the legality of evidence, and of the way in which acts of prosecution had been carried out, errors which need to be addressed within the same procedural stage, having regard to the reasons for which the pre-trial chamber procedure has been established. But such errors of law can equally arise also in those cases in which, within the pre-trial chamber procedure, no motions or exceptions have been raised and no exceptions have been raised ex officio. In those circumstances, the Court found that the passivity of the parties and of the injured party cannot constitute an objective criterion to exclude them from the right to appeal, given that this right is recognised by the legislator with regard to those parts and injured parties who have remained in the passivity in cases where another participant in the proceedings than the appellant raised motions or exceptions or the pre-trial chamber judge raised ex officio exceptions.

Thus, the Court found that the exclusion of the appeal against the order of the pre-trial chamber judge for commencement of proceedings — whereas no motions or exceptions have been filed and no ex officio exceptions have been raised — creates a discriminatory treatment for the defendant, the injured party, the civil party and the civilly responsible party in the respective case in relation to parties and injured persons who, in turn, remained passive in criminal cases in which the pre-trial chamber judge raised of exceptions ex officio or another

participant in the process than appellant -a party, the injured party or the public prosecutor has filed motions or exceptions. Thus, although they are in similar situations, the parties and the injured parties of the two categories are subject to a different legal treatment in terms of the possibility to being an appeal pursuant to Article 347 (1) of the Code of Criminal Procedure, according to the procedural conduct of another participant in the criminal proceedings — party, injured person or judicial body —, which is contrary to the provisions of Article 16 of the Constitution, if the discriminatory treatment finds no objective and reasonable justification.

In terms of ensuring the equality of citizens in exercising their procedural rights, including legal remedies, the Court held in its case-law that, in establishing rules of access of litigants to these rights, the legislator is bound by the principle of equality of citizens before the law. Thus, the introduction of special rules for appeal is not contrary to this principle as long as they ensure legal equality of citizens in terms of use thereof. The principle of equality before the law requires the establishment of equal treatment of situations which, in the light of the aim pursued, are no different. It does not preclude, but, on the contrary, requires different solutions for different situations. Consequently, a different treatment cannot be only the expression of the exclusive assessment of the legislator, but must be reasonably justified, in respect of the principle of equality of citizens before the law and public authorities (Constitutional Court Plenum Decision no. 1 of 8 February 1994, published in the Official Gazette of Romania, Part I, no.69 of 16 March 1994). At the same time, the Court has held that Article 16 of the Constitution concerns the equality of rights between citizens with regard to the recognition in their favour of fundamental rights and freedoms, and not the identity of the legal treatment in terms of the application of measures, regardless of their nature (Decision no. 53 of 19 February 2002, published in the Official Gazette of Romania, Part I, no.224 of 3 April 2002, Decision no. 1615 of 20 December 2011, published in the Official Gazette of Romania, Part I, no.99 of 8 February 2002, Decision no.323 of 30 April 2015, published in the Official Gazette of Romania, Part I, no. 467 of 29 June 2015, paragraph 19, and Decision no.540 of 12 July 2016, published in the Official Gazette of Romania, I, no. 841 of 24 October 2016, paragraph 21). However, in the light of the interest to request and obtain the rectification of errors of law committed upon checking, after indictment, the legality of the referral to the court, as well as the legality of production of evidence, and of the carrying out of acts of prosecution, the parties and the injured parties in cases where no motions or exceptions have been filed or no ex officio exceptions have been raised are in a similar situation — as regards the recognition of free access to justice — with the parties and injured persons remaining, in turn, passive in criminal cases in which the pre-trial chamber judge raised exceptions ex officio or another participant in the process than applicant filed motions and exceptions. The Court found that the differential treatment resulting from the impugned provisions of law is unjustified and leads to discrimination.

As the Court has held in its case-law, free access to justice requires access to procedural means whereby justice is carried out. It is true that the rules relating to the conduct of proceedings before the courts are the exclusive competence of the legislator, as is apparent from the provisions of Article 126 (2) of the Constitution — text according to which "*Jurisdiction of the courts and the conduct of trial proceedings are determined only by the law*" — and those of Article of 129 of the Basic Law, according to which, "*Judicial decisions may*

*be appealed against by the parties concerned and by the Public Ministry, subject to the law*". The principle of free access to justice requires that those concerned enjoy the unlimited possibility to use these procedures in the forms and modalities established by law, but only in compliance with the rule enshrined in Article of 21 (2) of the Constitution, stating that no law shall allow restrictions on the access to the courts, which means that the legislator cannot exclude from the exercise of the procedural rights which it has set up a social group or category (Constitutional Court Plenum Decision no. 1 of 8 February 1994 and Decision no. 540 of 12 July 2016, paragraph 22, decisions cited above).

Next, as regards the role of the prosecutor in criminal proceedings, the Court observed that, under Article of 131 of the Constitution, within judicial activities, the Public Ministry shall represent the general interests of society and it shall defend the legal order, as well as the citizens' rights and freedoms, exercising its attributions through public prosecutors constituted into prosecution offices. Thus, pursuant to the provisions of Article 62 (2) of the Law no. 304 / 2004 on the judicial organization (republished in the Official Gazette of Romania, Part I, no. 827 of 13 September 2005), prosecutors carry out their activity according to the principles of legality, impartiality and hierarchical control, and, under the provisions of Article of 67 of the same legislative act, the prosecutor participates in court hearings, in accordance with the law, and has an active role in the finding of the truth. In this respect, the provisions of Article 55 (3) (f) of the Code of Criminal Procedure provide the prosecutor's attribution, during criminal proceedings, to file and use challenges and avenues of appeal set by the law against court decisions. Therefore, departing from the purpose of appeal — to ensure the possibility of rectification of judicial errors committed during the settlement of the case within the pre-trial chamber procedure — and from the role of the prosecutor, who, 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 trial, in the spirit of legality (Decision no. 983 of 8 July 2010, published in the Official Gazette of Romania, Part I, no.551 of 5 August 2010, and Decision no.641 of 11 November 2014, published in the Official Gazette of Romania, Part I, no. 887 of 5 December 2014, paragraph 51), the Court held that the provisions of Article 131 of the Constitution require the legislator to ensure that, by means of the appeal set forth by the provisions of Article 347 (1) of the Code of Criminal Procedure, in its version in force before amendment by Law no.75/2016, be ensured the possibility to verify — including at the initiative of the public prosecutor — the legality of orders pronounced by the pre-trial chamber judge pursuant to Article 346 (2) of the Code of Criminal Procedure, in its version in force before amendment by Law no.75/2016.

The Court held that, where the law — the rule of criminal procedure and/or the rule of substantial criminal law — both the prosecutor and the defendant, the injured party, the civil party and the civilly liable party must enjoy the possibility to request and obtain the restoration of legality through the reformation of the unlawful decision. On the one hand, the impugned legal provisions deprive the parties and the injured party of the possibility to defend their rights, freedoms and legitimate interests and, on the other hand, deprive the prosecutor of the levers he needs in order to exercise his specific role in criminal proceedings. Considering that the outcome of the pre-trial chamber procedure on the lawfulness of the taking of evidence and procedural acts by the prosecution has a direct influence on the conduct of proceedings on the

merits and may be decisive in establishing the guilt or innocence of the defendant (Decision no.831 of 6 November 2015, paragraph 34), the Court found that the guarantee under the provisions of Article 21 and Article of 131 of the Basic Law — as these texts have been interpreted in the case-law of the Constitutional Court — require that the prosecutor, the parties and the injured party be granted the possibility to appeal against the order of the pre-trial chamber judge for commencement proceedings if no motions or exceptions have been filed or non ex officio exceptions have been raised. Therefore, the legislative provisions contained in Article 347 (1) of the Code of Criminal Procedure, in the version in force before amendment by Law no.75/2016, which exclude the remedy of appeal against the order of the pre-trial chamber judge pursuant to Article 346 (2), are in breach of the constitutional provisions of Article 16 on equal rights, of Article 21 on free access to justice and of Article 131 relating to the role of the Public Prosecutor.

**III. For these reasons**, the Court, by unanimity, upheld the exception of unconstitutionality and found unconstitutional the legislative solution contained in the provisions of Article 347 (1) of the Code of Criminal Procedure, in the version preceding the amendment by Law no.75 / 2016 on the approval of the Government Emergency Ordinance no.84/2014 amending and supplementing Law no.135/2010 on the Code of Criminal Procedure, which excludes the possibility of appealing against the solution provided in Article 346 (2).

*Decision no. 18 of 17 January 2017 on the exception of unconstitutionality of the provisions of Article 347 (1) of the Criminal Code, published in the Official Gazette of Romania, Part I, no. 312 of 2 May 2017.*

**The provisions of Article 2 and Article 3 (5) of Government Emergency Ordinance no. 114/2013, which establish the transfer of a privately owned land, whose legal regime had been established in that regard by final and irrevocable court decision, from the management of the Self-Managed Company “Administrația Protocolului de Stat” to the management of the Romanian Intelligence Service, namely the latter institution’s subrogation as to the rights of the Self-Managed Company “Administrația Protocolului de Stat” in relation to that property, infringes, by ignoring a court decision, the principle of separation of powers enshrined in Article 1 (4) of the Constitution and the constitutional and conventional provisions which protect and enshrine the right to private property.**

**Keywords***: principle of separation of powers; right to private property; legislative delegation — Government Emergency Ordinances: extraordinary situation; urgency of regulation*

**Summary**

**I. As grounds for the exception of unconstitutionality**, its author claimed, mainly, that by the adoption of Government Emergency Ordinance no. 114/2013, the legal status of the land at issue was changed from a privately owned land, (whose legal regime had been established by final and irrevocable court decision) to a State-owned land under the management of the Romanian Intelligence Service. All these at a time when the land at issue no longer belonged to the State, but was already irrevocably acquired by the heirs of the former owner, after issuance of a judicial decision.

It was also pointed out that the Government may not restrict or suppress the right to property definitively and irrevocably established by national courts, by issuing an Emergency Ordinance, all the more so as it was aware of the situation of the land in relation to which the courts had acknowledged applicant's right. Moreover, as long as the applicants' notification was not resolved, the Government could not, by an emergency ordinance, change the destination of the property notified for restitution under Law no. 10/2001, Article 21 of that legislative act establishing a ban against transferring properties subject to restitution under this law, regardless of any other legal proceedings, the presence on the land at issue of a military establishment of national interest to the Romanian Intelligence Service being therefore unlawful.

**II. Having examined the exception of unconstitutionality** in relation to legislative delegation limits enshrined in Article 115 (4), i.e. existence of exceptional circumstances and urgency, the Court found, in line with its settled case-law in this area, that the Government may adopt emergency ordinances in the following conditions, cumulatively met: the existence of exceptional circumstances; the regulation cannot be postponed; the urgency is reasoned within the ordinance. With regard to the first of those conditions, namely "the existence of exceptional circumstances", the Court held that it refers to an objective, measurable factual situation, independent of the will of the Government, which endangers a public interest. Crucial to that effect is its objective nature in the sense that it does not depend on the will of the Government which, in such circumstances, is forced to react promptly to defend a public interest by means of an emergency ordinance. As regards urgency, the Court held, inter alia, that utility, opportunity or raison d'être can not be invoked to support the adoption of an emergency ordinance.

Having examined the preamble of Government Emergency Ordinance no. 114/2013, containing the contested provisions, the Court found that delegated legislator justified the legislative intervention on the property including also the land subject to a restitution claim in 2002, only by "*the need to take measures necessary to ensure the conduct in optimum conditions of the specific activities of the Romanian Intelligence Service*." Having further examined the explanatory memoranda attached to the Emergency Ordinance on that point, the Court found that it contains a single mention, as follows: *"The building in question is requested by the Romanian Intelligence Service, for the purpose of carrying out specific activities."* However , the grounds thus submitted may be considered as capable of justifying a possible

utility or opportunity of the regulation and not the existence of an objective, quantifiable factual situation. beyond the control of the Government, which endangers a public interest or a constraints that led it to react promptly to the defence of the public interest for the purposes of the adoption of rules by an emergency ordinance. This all the more so as, regarding the property in question, it was known the fact that it had been claimed since 2002 and there was a final and irrevocable court decision, whereby the State was obliged to comply with the ownership and possession of the land area of 6.80866 ha, issues expressly set out in the Explanatory memorandum to the legislative act. In these circumstances, not even a potential opportunity of the measure to accept the request of the Romanian Intelligence Service cant be sustained, let alone the extraordinary situation or the urgency of such a measure. Thus, the Court found that the contested provisions are not justified in terms of the existence of exceptional circumstances and of urgency and do not meet the cumulative conditions laid down in the Constitution and constantly revealed in the case-law of the Constitutional Court, as to justify their regulation by Emergency Government Ordinance and therefore infringe Article 115 (4) of the Constitution.

The Court also held that the legal regime of the right of management has its constitutional basis in the provisions of Article 136 (4) of the Constitution, provisions developed at infraconstitutional level by the provisions of Article 868 and Article 869 of the Civil Code. It follows therefore both from the constitutional rules cited and from the infraconstitution provisions related thereto that the right of management derives from the right to private property, being conditional on the existence of that right, and that, in turn, it has the nature of a right in rem, inalienable, intangible and not subject to any statute of limitation and confers on its holder the prerogatives of possession, use and disposal. However, in the present case, as it follows from the Explanatory Memorandum to the Emergency Ordinance no. 114/2013, on the date of its adoption and, on its entry into force, there was already a final and irrevocable decision (dated 1 April 2013) whereby a court had already rules in favour of the applicants, on the ownership of the land in question.

The Court also noted that the Government, in breach of the obligation laid down by the court and, implicitly, of the right to property of the author of the exception of unconstitutionality, recognised by that decision, carried out acts of disposal on the entire property, construction and land (including land in question) identified in Annex no. 2 to the Emergency Ordinance. However, at that time, the Government could no longer decide with regard to that land, but was obliged to respect the irrevocable judgement and to enforce it under the conditions prescribed by law, namely by observing the right of property of the applicants. In this regard, the Court held that compliance with and enforcement of judgements are of the essence for the rule of law, as established also by the Venice Commission in the Rule of Law Checklist, adopted by the Commission at its 106th Plenary session, which states that ***"Judicial decisions are essential to the implementation of the Constitution and of legislation. The right to a fair trial and the Rule of Law in general would be devoid of any substance if judicial decisions were not executed."*** (point 107).

On those grounds, the Court found that the provisions of Article 2 and Article 3 (5) of Government Emergency Ordinance no. 114/2013, which set out the transfer from the management of the Self-Managed Company "Administrația Protocolului de Stat" to the

management of the Romanian Intelligence Service, namely the latter institution's subrogation as to the rights of the Self-Managed Company "Administrația Protocolului de Stat" in relation to that property, **infringes, by ignoring a court decision, both the principle of separation of powers enshrined in Article 1 (4) of the Constitution and the provisions which protect and enshrine the right to private property, contained in Article (44) of the Constitution and Article 1 of Protocol no. 1 to Convention for the Protection of Human Rights and Fundamental Freedoms.**

**III. For all these reasons**, by a majority, the Court upheld the exception of unconstitutionality and found unconstitutional the provisions of Article 2 and Article 3 (5) of Government Emergency Ordinance no. Law 114/2013 on the change of the holders of the right of management of certain properties in the public and private ownership of the State and amending certain legislative acts.

*Decision no. 19 of 17 January 2017 on the exception of unconstitutionality of the provisions of Article 2 and Article. 3 (5) of Government Emergency Ordinance no. Law 114/2013 on the change of the holders of the right of management of certain properties in the public and private ownership of the State and amending certain legislative acts, published in the Official Gazette of Romania, Part I, no. 151 of 28 February 2017.*

***Ordering house arrest where previously the defendant had been in custody or under house arrest in the same case, in the absence of new grounds rendering necessary the deprivation of liberty.***

**Keywords***: ordering house arrest, warranties*

**Summary**

**I. As grounds for the exception of unconstitutionality**, its author claimed that the ordering of the house arrest by the pre-trial chamber judge in relation to the defendant who had previously been in custody or under house arrest in the same case is constitutional only in case of emergence of new grounds rendering the deprivation of liberty necessary.

**II. Having examined the exception of unconstitutionality,** the Court noted that preventive measures of pre-trial detention and house arrest are preventive measures involving deprivation of liberty. These are procedural law concepts resulting in restraint in order to ensure that criminal proceedings are properly carried out, that they concern the state of liberty of the suspect or the defendant and that they result either in the deprivation of liberty or in the restriction of the freedom of movement. Furthermore, the Court held that both the persons in pre-trial detention and the persons under house arrest are in a form of deprivation of liberty and in the perspective of the nature/substance, effects, enforcement and intensity, conditions and

cases for adoption of the same, the two measures represent major interference with a person's individual liberty. From this perspective, the Court held that, given the modality of regulation of the house arrest measure, it affects the rights of the person, namely, by the intensity and modality of application/enforcement, affects the freedom of the person, with the characteristics of a deprivation of liberty.

The Court noted that by Decision no. 740 of 3 November 2015, published in the Official Gazette of Romania, Part I, no. 927 of 15 December 2015, paragraph 27, it stated, as a principle, that the constituent legislator sought, upon the regulation of Article 23 (5) of the Basic Law, to limit any deprivation of liberty to 180 days, except for temporary police custody, which benefit from a separate regulation under Article 23 (3). The Court thus held that the determination of the preventive nature of the measure of house arrest in the sense that it is a preventive measure involving deprivation of liberty would have to be accompanied by the totality of the guarantees recognised in the case of the pre-trial detention as a measure entailing deprivation of liberty. This conclusion is necessary in view, on the one hand, of the similarity of the two measures in terms of both nature and substance, which is determined both by the Constitutional Court and by the European Court of Human Rights and, on the other hand, by the principle that results from the case-law of the Constitutional Court, according to which the constitutional rule of Article 23 is to be interpreted in a broad manner, with reference to all preventive measures involving deprivation of liberty.

In this context, the Court held that, in accordance with Article 218 (1) of the Code of Criminal Procedure, the house arrest is ordered by the rights and freedoms judge, by the pre-trial chamber judge or by the court, if the conditions laid down in Article 223 of the Code of Criminal Procedure are fulfilled and if the adoption of the measure is necessary and sufficient to achieve one of the purposes referred to in Article 202 (1) of the same legislative act. The Court has also noted that the measure of pre-trial detention may be taken by the judge of rights and freedoms, during the criminal proceedings, by the pre-trial chamber judge, in the pre-trial chamber procedure or by the court before which the case is pending, only if there is reasonable evidence showing that the defendant has committed an offence and one of the situations covered by Article 223 of the Code of Criminal Procedure is applicable in the case. Thus, the Court stated that both preventive measures of deprivation of liberty can be ordered if the conditions laid down in Article 223 of the Code of Criminal Procedure are fulfilled.

The Court then held that, in the course of criminal proceedings, both the duration of the house arrest and the duration of pre-trial detention is, in accordance with Articles 222 (1) and 233 (1) of the Code of Criminal Procedure, 30 days, with the possibility of its extension for a maximum period of 180 days. In the pre-trial chamber procedure and during trial, both preventive custody measures can be ordered, in accordance with Article 222 (12) and Article 238 (1) of the Code of Criminal Procedure, for a period not exceeding 30 days. In accordance with the second sentence of Article 222 (12) and Article 239 of the Code of Criminal Procedure, in the course of the trial in the first instance, the total period of house arrest and pre-trial detention of the defendant may not exceed a reasonable period of time and cannot be greater than half of the special maximum period provided for by the law for the offence which is the subject of the case before the court; the duration of preventive custodial measures in the first instance may not exceed 5 years. The Court noted that in the light of the ordering of the two

preventive measures involving deprivation of liberty, as well as in the light of the duration for which they can be ordered, the legislator did not establish any regulatory difference.

However, the Court noted that, contrary to the situation of pre-trial detention, which may be ordered again against the defendant who had previously been arrested in the same case, during the criminal proceedings, the pre-trial chamber procedure or the court proceedings, only if new grounds requiring deprivation of liberty arise, in the case of house arrest, this guarantee is not regulated. Thus, the preventive measure of house arrest may be ordered again against the defendant who has previously been arrested in the same case, during the criminal proceedings, the pre-trial chamber procedure or the court proceedings, even if there are no new grounds requiring deprivation of liberty. In that perspective, the Court held that it should be determined to what extent the impossibility of issuing a new detention order against the defendant who had previously been under house arrest or pre-trial detention in the same case, during criminal proceedings, pre-trial chamber procedure or trial proceedings, if there were no new grounds requiring deprivation of liberty, represents a guarantee accompanying the preventive measures involving deprivation of liberty.

The Court held that, within the constitutional review, what is relevant is the guarantee that the person is entitled to be heard within a reasonable period of time or released in the course of proceedings, governed by the second sentence of Article 21 (3) and Article 23 (9) of the Constitution and by Article 5 (3) of the Convention. Thus, the provisions of Article 23 (9) of the Constitution stipulate that "release of a detained or arrested person shall be obligatory if the reasons for such measure disappeared as well as in other instances determined by law" and those of Article 5 (3) of the Convention provide that "everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article [...] shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.". The Court held that the aforementioned constitutional provisions must be interpreted in the light of the case law of the European Court of Human Rights relating to Article 5 (3) of the Convention. Thus, the Strasbourg Court held that the second sentence of Article 5 (3) of the Convention does not give judicial authorities a choice between either bringing an accused to trial within a reasonable time or granting him provisional release pending trial. Until conviction, he must be presumed innocent, and the purpose of the provision under consideration is essentially to require his provisional release once his continuing detention ceases to be reasonable. Continued detention therefore can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty laid down in Article 5 of the Convention (see the Judgment of 3 October 2006 in the Case of McKay v. United Kingdom, §§ 41-42).

The European Court of Human Rights also held that the existence and persistence of a reasonable suspicion that the person arrested has committed an offence is a condition sine qua non for the lawfulness of the continued detention. However, after a certain lapse of time it no longer suffices (see the Judgment of 6 February 2014 in the Case of Zimin v. Russia , § 31; the Judgment of 17 March 1997 in the Case of Muller v. France, § 35). Domestic courts are under an obligation to review the continued detention of persons pending trial with a view to ensuring release when circumstances no longer justify continued deprivation of liberty. For at least an initial period, the existence of reasonable suspicion may justify detention but there comes a

moment when this is no longer enough (Case of McKay v. United Kingdom, cited above, § 45).

Further, the Constitutional Court noted that the main reasons accepted by the European Court of Human Rights in order to refuse conditional release are the risk that the accused may not appear at the trial; the risk that, where released, the accused may take an action detrimental to the administration of justice; the risk of committing new offences and the risk of retaliation of the public order. With regard to these issues, in its case law, the Strasbourg Court pointed out, for example, that the risk of absconding is undeniably diminishing with the passing of time spent in detention [Judgment of 27 June 1968 in the Case of Neumeister v. Austria, § A.10]; that the risk of pressure on witnesses is acceptable at the initial stages of the procedure [Judgment of 4 October 2005 in the Case Jardzynski v. Poland, § 43]. In the long term, however, the requirements of the investigation do not suffice to justify the detention of a suspect: in the normal course of events the risks alleged diminish with the passing of time as the inquiries are effected, statements taken and verifications carried out (Judgment of 27 November 1991 in the Case of Clooth v. Belgium, § 43); the maintenance of law and order cannot be regarded as a relevant and sufficient basis unless it is based on facts showing that the release of a detained person would genuinely disturb public order. Moreover, detention shall not remain legitimate unless the public policy is in fact at risk; the continued detention cannot be used in anticipation of a custodial sentence (Judgment of 1 October 2013 in the Case of Leontin Pop v. Romania, § 42). In this context, the Court noted that according to Article 223 (1) of the Code of Criminal Procedure, the reasons for taking preventive measures involving deprivation of liberty are similar to those held in the case law of the European Court of Human Rights, namely: the defended escaped or absconded, in order to escape prosecution or trial, or has made preparations of any kind for such acts; the defendant tries to have an influence on another participant in the commission of the offence, a witness or expert or to destroy, obscure, conceal or take away evidence or to convince another person to have such behaviour; the defendant puts pressure on the injured party or seeks a fraudulent settlement with the injured party; there is a reasonable suspicion that, after criminal proceedings being taken against him, the defendant knowingly committed a new offence or is preparing for committing a new criminal offence.

Thus, the Court considered that, although sufficient to trigger a preventive measure depriving the liberty, the underlying grounds for this measure are losing intensity with the passage of time, while at the same time losing their sufficiency. That is why, at a point in time, the prolongation of the preventive custodial measure will no longer be able to rely on the existence of the same grounds on which the order was based but, possibly, on the existence of new grounds. Thus, the Court held that the impossibility of issuing a new detention order against the defendant who had previously been under house arrest or pre-trial detention in the same case, during criminal proceedings, pre-trial chamber procedure or trial proceedings, if there were no new grounds requiring deprivation of liberty, represents a guarantee accompanying the preventive measures involving deprivation of liberty.

In that light, the Court found, in particular, that the ordering of a new detention order, after having previously been ordered a preventive measure involving deprivation of liberty, cannot be based on the same grounds underlying the first preventive detention measure involving deprivation of liberty. Conversely, we would reach a case where the underlying

grounds for a custodial sentence may not be sufficient to substantiate the taking of such action, which would be contrary to Article 23 of the Constitution and Article 5 of the Convention.

Based on these assumptions, and in relation to the case subject to constitutional review, the Court noted that, in the case of the preventive measure of house arrest, the legislator allows for it to be ordered again against the person who had previously been subject to a detention order without regulating the obligation for new grounds in this case. However, given that the preventive measure of the house arrest is a measure similar to pre-trial detention, i.e. a measure entailing deprivation of liberty, the Court considers that it must be accompanied by the same guarantees as those laid down in the case of the pre-trial detention, including that governed by the provisions of Article 238 (3) of the Code of Criminal Procedure. The Court has also held that, by way of a different regulation of the house arrest vis-à-vis the pre-trial detention, concerning the prohibition of a new preventive measure involving deprivation of liberty against the defendant who had previously been subject to pre-trial detention or house arrest in the same case, if there were no new grounds requiring deprivation of liberty, the legislator has fulfilled its constitutional obligation to regulate the guarantees that must accompany preventive measures involving deprivation of liberty only with regard to pre-trial detention, and not with regard to house arrest, even though the latter, given the fact that it is a measure involving deprivation of liberty, must be accompanied by the same guarantees as pre-trial detention.

**III. For all these reasons**, by majority, the Court upheld the exception of unconstitutionality and found unconstitutional the legislative solution governed by the provisions of Article 220 (1) of the Code of Criminal Procedure, as it allows that house arrest be ordered against a defendant who has previously been in custody or under house arrest in the same case, in lack of new grounds rendering necessary the deprivation of liberty.

*Decision no. 22 of 17 January 2017 concerning the exception of unconstitutionality of Article 220 (1) of the Code of Criminal Procedure, published in Official Gazette of Romania, Part I, no. 159 of 3 March 2017.*

**Successive extension of the legal time limit within which local and county committees for real estate restitution or, where appropriate, the Bucharest Committee for real estate restitution can meet their obligation to settle all the applications for restitution, vesting in possession and issuance of property titles. Unconstitutionality.**

**Keywords***: free access to justice, reasonable period of time*

**Summary**

**I. As grounds for the exception of unconstitutionality,** raised by the court of its own motion, it was claimed that, by the amendment to Article 11 (1) of Law no. 165/2013 of Government Emergency Ordinance no. 66/2015 for extension of the time limit within which local and county committees for real estate restitution or, where appropriate, the Bucharest

Committee for real estate restitution can meet their obligation to settle all the applications for restitution, vesting in possession and issuance of property titles until 1 January 2017 — a time until which the inactivity of the committees for real estate restitution cannot be challenged in court, it was created an imbalance between the means used and the aim intended by the legislator, so that impugned legal norm affects the exercise of free access to justice, as guaranteed by Article 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms. It was claimed, in that regard, that although 3 years had passed since the adoption of Law no. 165/2013, it is not possible to determine with certainty the status of fulfilment of obligations incumbent on the local and county committees for real estate restitution and which applications were settled by them so that, in the absence of criteria that relate to a particular order of settlement of the applications for restoration of the right to property or another criterion against which the work of these committees between 2013 and 2016 can be assessed, the provision had virtually no efficiency, because these committees will continue to rely on the time-limit extended on1 January 2017 with being held liable for such non-settlement. However, in its judgment of 13 January 2009 in Case *Faimblat v. Romania*, paragraph 33, the European Court of Human Rights found that the dismissal of the applicants' action without examining the conduct of the administration and its compliance with the procedure laid down by the Law no. 10/2001 puts in doubt the effectiveness of access to a court, granted to the applicants in the ascertainment procedure.

**II. Having examined the exception of unconstitutionality**, as to its merits, the Court found that, compared with the de facto situation *at the time of its referral*, when the deadline for settlement of applications for restitution was limited to *1 January 2017*, the same is currently extended to 1 January 2018, this being the time limit applicable to the present case. The Court also held that adoption of Law no. 165/2013 was determined by the Pilot-Judgement of the European Court of Human Rights pronounced on 12 October 2010 in Case *Maria Atanasiu and Others v. Romania*, this law representing the legislative solution to improve the mechanism for granting compensation in restitution matters, in the light of the observations and recommendations of the Strasbourg Court concerning the ineffectiveness of the national compensation mechanism in place at that time, which was likely to create a systemic, recurrent and far-reaching problem. If at the time of adoption of Law no. 165/2013 and its examination in 2014 by the European Court of Human Rights by judgement pronounced in Case *Preda and Others v. Romania*, the Constitutional Court (by Decision no. 684/2014), accepted the initial duration of the administrative deadline laid down in Article 11 (1) of impugned law by reference to the certainty (at least legal certainty at that time) of its cessation on 1 January 2016, the Court found that the same considerations may no longer be valid and also in the current legislative context of successive extension (after 2014) of the time limit, firstly until 1 January 2017, then until 1 January 2018. Those arguments were raised in the light of the fact that, in the initial wording, the provisions of Article 11 (1) provided a clear, unique and well-defined time limit, i.e. 1 January 2016, and the European Court of Human Rights expressed unequivocally the possibility that such time limits be reconsidered after exhaustion of those administrative time limits, valid only subject to compliance with those time limits in that version (1 January 2016).

Accordingly, the Court found that contested legal provisions depart from the recommendations of the European Court of Human Rights on the regulation of an efficient mechanism, both during the administrative and the judicial phase, for settling claims for restitution and/or compensation.

*The reasonable period of time* is a concept essentially variable and its assessment is made in relation to the circumstances of the case. In this respect, the European Court of Human Rights stated, in its case-law, 3 criteria according to which it may be determined: 1) the complexity of the case; 2) applicants and competent authorities' conduct; 3) the importance of the dispute for the parties concerned. These criteria may be relied on, first, by the judge *a quo*, when he has to decide on the duration of the administrative and judicial procedures specific to a case, until it becomes final.

The Court considered that it adjudicates on the constitutionality of the legal provisions in respect of which it is seised, without being able to examine like a court of law or like the European Court of Human Rights, compliance with the procedures applied in a particular case. With regard to the reasonableness of a legal time limit, it can only be assessed *in abstracto* by the Constitutional Court, applying the proportionality test as to the compliance with strict requirements relating to quality of the law, the legitimacy of the purpose and the principle of proportionality.

In this case, the time given to the administrative entities to deal with applications for restoration of the right of ownership has been successively extended, until 1 January 2018. In that regard, the Court held, applying the proportionality test, that the provisions of Article 11 (1) of Law no. 165/2013 do not meet the requirement of foreseeability of the law, a component of the constitutionality of the rule in terms of its quality. Thus, the interested parties may not have a precise forecast on the depletion of the period throughout which they are obliged to await the resolution of their claims, being prevented from effectively address a court to defend their right to property. The Government acted rapidly, first, on 30 December 2015 (by Government Emergency Ordinance no. 66/2015, published in the Official Gazette of Romania, Part I, no. 986 of 31 December 2015) and, then, on 15 December 2016 (by Government Emergency Ordinance no. 98/2016, published in the Official Gazette of Romania, Part I, no. 1030 of 21 December 2016), at the very end of the term, extending it for another year.

As regards the requirement of legitimacy of the measure adopted, the Court noted that the purpose declared in the legislative acts of extension was, in itself, a legitimate purpose, aimed at the completion of the administrative procedures of land stocktaking and centralisation, so at to ensure, subsequently, the as fair as possible settlement of all applications for restoration of the right of ownership. Specifically, the Court held that the Government has adopted such legislation for granting additional time to the administrative entity to fulfil its legal obligations. In practice, in this case, the executive seems to have acted, in the sense of law-making, based on the concrete possibility to the competent administrative authority to carry out or not its tasks in a timely manner, covering, in reality, through the two legislative acts, its lack of efficiency in comparison with the previously foreseen results. In those circumstances, the Court noted a reversal of the relationship between the delegated legislator and the legal subject of the regulation adopted by an act of the Government, in the sense that the recipient of the rule is the

one directing the delegated legislator to legislate in a specific way, which is unacceptable. In addition, following the same reasoning relied on by the issuer of the legislation of extension, it could be reasonably considered that, at the end of 2017, the Government will adopt a new Emergency Ordinance to the same end of extension of the administrative time limit, if the competent State entities will not complete the stage of administrative settlement of application for the restoration of the right of ownership, relying on the same grounds as in the years 2015 and 2016.

Moreover, in connection with the above, the Court noted that *there is no sanction* established by means of legislation for failure to comply with the administrative deadlines, which is likely to affect the *efficiency of the mechanism* for administrative settlement of applications, governed by Law no. 165/2013. Thus, the persons concerned are unable to claim the passivity, or the lack of care of the State entity, or, ultimately, the absence of a reply on their application.

With regard to maintaining a fair balance between the general interest of the society and the private interest and the proportionality between the purpose intended and the measures adopted, the Court found that it is affected by the fact that, in the present case, the general interest coincides with the interests of all the persons covered by the impugned regulation, authors of the applications for restitution and/or compensation; it is precisely them who are hindered in the exercise of free access to justice as a guarantee of the right of property claimed. The sole subject of law favoured by the adopted measures is the State, represented, in the present case, by the local and county committees for real estate restitution, who obtain thus more time to meet obligations for which they do not possess effective and sufficient means and resources. However, this reason is not sufficient to justify the infringement of the interest of persons covered by the regulation, interest consisting of achievement of the right to property by the exercise of the right of access to justice.

The deadline extended, now until 1 January 2018 is prohibitive, preventing essentially the exercise of the right of effective access to a court and thus affecting the possibility of obtaining the claimed property. As regards the reasonableness of the time-limit, the Court pointed out that it may no longer be supported given the successive extension, for the second time, by unexpected legislative interventions of the Government, of the time limit which, in the original drafting of Law no. 165/2013 was set for 1 January 2016. The period of almost 2 years originally envisaged by the law for exhaustion of administrative phase falls within the concept of a reasonable period, but not also its extension for another 2 years. Finally, after applying this new time limit, a period of more than 4 years appears necessary only for carrying out the inventory and administrative centralisation, prior to issuing of title deeds and vesting the entitled persons in possession. A possible judicial stage, for challenging the decisions of the competent entities under the law and finally, obtaining, my means of a court ruling, the claimed rights, followed by the procedure conducted before the National Committee for Property Compensation- where restitution in kind is not possible-, the calculation of compensation granted, mainly points, as well as their use as cash, as provided, in essence, by Law no. 165/2013 outlines a complex mechanism and, in particular, long, departing practically

from the purpose of the law itself and from the recommendations of the European Court of Human Rights.

**III. For these reasons**, by a majority, the Court upheld the exception of unconstitutionality and found unconstitutional the provisions of Article 7 (1) and Article of 11 (1) of Law no. 165/2013 on measures to complete restitution, in kind or by equivalent, of property taken over abusively during the Communist regime in Romania.

*Decision no. 44 of 31 January 2017 on the exception of unconstitutionality against the provisions of Article 7 (1) and Article of 11 (1) of Law no. 165/2013 on measures to complete restitution, in kind or by equivalent, of property taken over abusively during the Communist regime in Romania, published in the Official Gazette of Romania, Part I, no. 211 of 28 March 2017.*

**Use of emergency ordinances for bringing the national law into line with the EU law where the initiation of infringement proceedings before the Court of Justice appears as imminent is fully constitutional**

**Both the State, in concreto the Government, acting as delegated legislature, and Parliament, have broad discretion in regulating games of chance.**

**Taxation must not only be lawful but also proportionate, reasonable and fair and not to differentiate taxes on groups or categories of citizens.**

**Keywords***: slot-machine games, casinos, bingo, video lottery, sin tax,* magin of appreciation, *infringement procedure, fair distribution of the tax burden, State monopoly, Treaty on the Functioning of the European Union, taxation.*

**Summary**

As grounds for the exception of unconstitutionality, it was claimed , in essence, that the fair distribution of the tax burden means “morality, reasonableness, proportionality, equality, non-discrimination, balance”. It is unfair that the State has a monopoly on the organisation of gambling, to regulate creative defects for its citizens, to give as the organisation of private firms in return for licensing and authorisation fees, stimulating the development of this sector and then to establish certain taxes on “defect”. It is claimed, at the same time, that the duty imposed by the contested provisions is unreasonable both morally and economically, as the organiser of gambling games who paid the licence and authorisation fee is also obliged to pay a ‘sin tax’ reason why it is assessed that such does not meet the reasons of proportionality, equality and balance; as there are no grounds of urgency or any interest from the company as to the application of the sin tax for slot-machine games, the tax burdens thus created for the organisers of gambling games do not represent a fair settlement of the tax burden.

Thus, the contested provisions introduced a new tax, i.e. the sin tax for games of chance, which could not be made by Government Emergency Ordinance, as it does not represent an extraordinary situation whose regulation cannot be postponed, not being motivated the need to introduce such a tax. It is considered that, through these provisions, it was limited the economic freedom and it was hampered the participation in the trade, implicitly the possibility to obtain profit from this activity; the restriction on these rights was achieved through an Emergency Ordinance and not by a law, as stipulated by the constitutional text, not being satisfied the other requirements laid down in Article (53) of the Constitution either, i.e. for the measure to be proportional to the situation which led to the adoption of the respective measure and to be applied without discrimination, reason why it is claimed that it creates discrimination because the contested provisions do not apply also to other organisers of other games (video lottery, bingo, casinos, etc.).

**II. Having examined the exception of unconstitutionality** in terms of the complaints brought, the Court found that it includes both intrinsic and extrinsic complaints of unconstitutionality.

a) as regards the extrinsic complaint of unconstitutionality as to Article 115 (4) of the Constitution concerning the conditions under which emergency ordinances can be adopted, the Court notes that it is unfounded, because, in the preamble of Government Emergency Ordinance no. 92/2014, are exposed to the elements which have led to the adoption of measures by means of legislative delegation.

Thus, the Emergency Ordinance no. 92/2014 was adopted having regard to the Letter of formal notice — Infringement no. 2013/4216 of the European Commission, which is aimed at drawing attention 'to certain provisions of the Government Emergency Ordinance no. **77/2009** on the organisation and operation of games of chance, which appear to raise problems of compatibility with the fundamental principles of freedom to provide services governed by Article 56 of the Treaty on the Functioning of the European Union', and 'objections to the lack of coherence of the Romanian legal framework on gaming', such that, by this Emergency Ordinance, the legislator come with a regulation aimed at avoiding infringement of the Treaty on the Functioning of the European Union, but at the same time to serve the interests enshrined through the State monopoly in the area of gambling. In addition, given the need for fiscal measures on the sources of financing of economic development and taking into account that the licence fee charged to the organisers of games of chance is unchanged since 2009, the modification of the taxation of economic operators in the field of gambling.

From the above, the Court held that the impugned emergency ordinance was adopted in a context where the European Commission sent a "Letter of formal notice — Infringement no. 2013/4216 the European Commission", which "draws attention to certain provisions of the Government Emergency Ordinance no. **77/2009** on the organisation and operation of games of chance, which appear to raise problems of compatibility with the fundamental principles of freedom to provide services governed by Article 56 of the Treaty on the Functioning of the European Union", and by the Government Ordinance are proposed legislative regulations aimed at avoiding the infringement of the Treaty on the Functioning of the European Union.

Moreover, the Court notes that, as is apparent from the explanatory memorandum of the Emergency Ordinance and from the explanatory memorandum to the draft law approving the Government Ordinance, this act proposes "legislation aimed to put a stop to the infringement procedure against Romania for infringement of the provisions of the Treaty on the Functioning of the European Union (procedure in final phase and, in case of non-compliance as pledged, referral to the Court of Justice), but at the same time to serve the State's interest to strengthen social security and legal order, as well as to implement the provisions applicable to the State monopoly in the area of games of chance".

As such, the Court found that, in accordance with Article (148 (4) of the Constitution, the Romanian authorities undertook to ensure the carrying out of the obligations arising from the Treaties of the European Union, the binding Community rules and the Act of Accession. In this respect, the Government is constitutionally authorised, through the means it has at hand, to ensure that Romania's obligations towards the European Union are complied with. Thus, the use of emergency ordinances for bringing into line the national law where the EU law where the initiation of infringement proceedings before the Court of Justice is imminent appears as fully constitutional. In those circumstances, the Court, for instance by Decision no. 802 of 19 May 2009, published in Official Gazette of Romania, Part I, no. 428 of 23 June 2009) found that such a situation is considered as one extraordinary whose regulation cannot be postponed so that the criticised emergency ordinance complies with the requirements of Article 115 (4) of the Constitution.

b) Next, the Court noted that by Decision no. 1344 of 13 October 2011, published in Official Gazette of Romania, Part I, no. 32 of 16 January 2012, was to be taken into account and that the case-law of the Court of Justice of the European Union in the field of freedom to provide services, provided for in Article 49 EC. By judgment of 3 June 2010 in Case C-258/08, Ladbrokes Betting & Gaming Ltd — Ladbrokes International Ltd against the Stichting de Nationale Sporttotalisator, the Court of Justice of the European Union reconfirmed its case-law according to which, in the field of regulating games of chance, the Member States have a very broad margin of action. Furthermore, the Court has specified the criteria which national courts have to consider in the context of checks on the fitness of national legislation to limit gambling addiction and the prevention of fraud in this area. European Court decided that the main objective pursued by the national legislation must be the fight against crime, more specifically the protection of consumers of games of chance against fraud committed by operators. The Court has stated that national legislation intended to limit gambling operators in order to limit gambling addiction and to prevent fraud, is in principle compatible with Community law.

c) When adopting Government Emergency Ordinance no. 92/2014, in addition to the concrete measures put in place with regard to the organisation and operation of gambling, the organisers of gambling games were given the possibility to withdraw from such activity,if they do not agree with conditions for authorisation and licensing, provided that certain cumulative conditions are met. Thus, according to Article I point 41 of Government Emergency Ordinance no. 92/2014, which amended Article 27 of Government Emergency Ordinance no. 77/2009, "in a situation where economic operators holding a licence to organise games of chance valid at the date of entry into force of this emergency ordinance do not wish to continue the activity for which they have been licensed, for terminating such activity they must fulfil the following

cumulative conditions: a) notify the termination within 120 days of the date of entry into force of this emergency ordinance to the National Office for Gambling Games and the tax authorities responsible for the tax administration thereof; b) attach to the notification a statement from the manager of the economic operator showing the modality of conservation, decommissioning or sale of game equipments that have been used for the purpose for which was issued the licence for the operation of games of chance; c) pay the fee for licences for the operation of gambling set forth under the legislation in force at the time such were granted, in the amount and at the date provided for by decision of the Supervisory Board of the National Office for Gambling Games."

d) As regards the alleged breach of constitutional provisions on economic freedom and fair distribution of the tax burden, the Court observed that it is unfounded, as the contested provisions being an application of the mentioned constitutional provisions, whereas e**conomic freedom must be exercised in accordance with the law, and citizens have the fundamental task of contributing, through taxes, to public spending.** The existence of an express obligation of each citizen to contribute through taxes and duties to the public expenditure referred to in Article (56 (1) of the Constitution and of an obligation of the State to protect national interests in the financial activity is justified by the need to ensure certainty in the rhythmic constitution of the financial resources of the State. It is thus beyond doubt that the collection of taxes and levies are the main source of revenue of the State, being one of the most obvious expressions of protection of national interests at financial level. Only if has these budgetary resources, the State will be in a position to meet its obligations to its citizens and businesses, as set out by the Basic Law. The imposition of duties and taxes does not affect the provisions of Article 45 of the Constitution, according to which anyone's free access to an economic activity, free enterprise and the exercise of such rights in accordance with the law shall be guaranteed. The impugned legal texts impose such legal requirements. Free access to an economic activity does not exclude but, on the contrary, involves setting limits for the exercise of economic freedom. Thus, under Article of 135 of the Basic Law, the State is required to impose rules of economic discipline, and the legislator has the power to establish appropriate penalties for failure to comply with them.

e) In this context, the Court reiterated that both the State, *in concreto* the Government, acting as a delegated legislator, and Parliament, have broad discretion in regulating games of chance.

f) On the allegation that the contested provisions establish discrimination, in terms of fair settlement of tax burden, due to the fact that they do not cover also the organisers of other games, the Court noted that it was unfounded, since there can be a violation of the principle of equality only when applying differential treatment to equal situations, without an objective and reasonable justification, which is not the case as regards the contested rules in the present case, since they should not be seen in isolation, but the entire betting and gaming legislation must be taken into consideration, namely both specific aspects of each type of game of chance and the general aspects thereof.

g) In relation to the aforementioned, as well as to the considerations of principle adopted by the Constitutional Court in its case-law, reiterated, for example, by Decision no. 45 of 17 February 2015, published in Official Gazette of Romania, Part I, no. 366 of 27 May 2015,

according to which taxation must not only be lawful but also reasonable, fair and proportionate, and not to differentiate taxes on groups or categories of citizens, the Court found that the contested provisions comply with the constitutional requirements contained in the provisions relied on in support of the exception.

h) Finally, the Court observed that the provisions of Article 53 of the Basic Law are not relevant in the present case, as there is no restriction of fundamental rights and freedoms and the constitutional rule invoked is therefore not applicable.

**III. For all of those reasons**, the Court dismissed as unfounded the exception of unconstitutionality and found that the provisions of Article I point 47 [with reference to point 4 (C of the Annex to Government Emergency Ordinance no. 77/2009 on the organisation and operation of gambling] of Government Emergency Ordinance no. 92/2014 establishing some fiscal and budgetary measures and amending certain legislative acts, as well as the provisions of the Emergency Ordinance as a whole are constitutional in relation to the complaints brought.

*Decision no. 72 of 28 February 2017 on the unconstitutionality exception of the provisions of Article I point 47 (re point 4 C of the Annex to Government Emergency Ordinance no. 77/2009 on the organisation and operation of gambling] of Government Emergency Ordinance no. 92/2014 for fiscal measures and amending certain legislative acts, as well as the Emergency Act, published in the Official Gazette of Romania, Part I, no. 489 of 28 June 2017.*

## Legal re-characterisation of the facts. The legislative solution enshrined by Article 311 (3) of the Criminal Procedure Code, excluding the obligation to inform the suspect/the defendant about the legal re-characterisation of the facts, is unconstitutional

**Keywords:** *right of defence, right to a fair trial.*

**Summary**

**I. As grounds for the exception of unconstitutionality**, it is claimed that the provisions of Article 311 (3) of the Criminal Procedure Code affect the right of defence and the right to a fair trial, because the impugned text does not require the judicial body to inform the defendant about the decision to order the legal re-characterisation of the facts during the extension of the criminal proceedings. Or, according to Article 6 (3) (a) of the Convention for the Protection of Human Rights and Fundamental Freedoms, any person charged with a criminal offence has the right to be informed promptly and in detail, of the nature and cause of the accusation against him/her.

**II. With respect to these pleas, the Court held that:**

By examining the exception of unconstitutionality, the Court found that the legal characterisation of the facts is a legal mechanism that requires judicial bodies to establish a

correlation between the legal content of the criminal offence and its substantive content. Essentially, the name of the criminal offence and the provision in the Criminal Code or in a special law, referring to that criminal offence, are established. The need to legally re-characterise the facts can be determined by a wrong initial characterisation or by the subsequent intervention or discovery of circumstances leading to retaining a legal characterisation of the facts different from the initial one. The legal re-characterisation of the facts can have consequences on the power to conduct the criminal proceedings, on the obligation to provide legal assistance, on the official nature of the criminal trial, etc.

When the legal re-characterisation of the facts is required, during the *in personam* criminal proceedings, by new circumstances that form the substantive act of that same criminal offence (in the case of complex or repeated criminal offences or of those with particularly serious consequences; e.g. the criminal proceedings concern a theft and it is discovered that other assets have been stolen from the same person at different time intervals or when a theft is investigated and it is found that violence was used in order to stole the asset) or by an error/a mistake in establishing the initial legal characterisation of the facts, the Court found that the fairness of the proceedings was affected depending on the procedural stage when the legal re-characterisation of the facts took place.

Thus, through Decision no. 599 of 21 October 2014, paragraphs 33 to 34, published in the Official Gazette of Romania, Part I, no. 886 of 5 December 2014, the Constitutional Court retained that the concept of "criminal charge" should be understood in the meaning of the Convention and can be defined as "the official notification, from the competent authority, on the suspicion that a criminal act was committed", definition which also depends on the presence or absence of "significant repercussions on the situation (of the suspect)". To this effect, the Court held that the Criminal Procedure Code, currently in force, enshrined **three ways of bringing criminal charges**, covered by Article 307 – on disclosure of the capacity as suspect, Article 309 – on the initiation of the criminal prosecution and on disclosure of the capacity as defendant and Article 327 (a) – on settling cases by issuing the indictment and referring to the Court. If, in the first two situations, under Articles 307 and 309 of the Criminal Procedure Code, the judicial body must inform the suspect or the defendant about the nature of the accusation, the situation is completely different when the legal re-characterisation of the facts takes place after the initiation of the criminal prosecution. Thus, the person concerned does not enjoy full exercise in order to attain the purpose intended by exercising the right of defence during a fair trial. To this effect, by the Judgement of 25 July 2000, delivered in case of *Mattoccia v. Italy*, paragraphs 58 to 72, the Court of Strasbourg stated that the requirements of paragraph 3 of Article 6 of the Convention represented particular aspects of the right to a fair trial guaranteed in paragraph 1. To this effect, paragraph 3 (a) of Article 6 of the Convention points to the need for special attention to be paid to this requirement, and the notification of the accusation plays a crucial role in the criminal process. Therefore, any accused **must be made aware promptly and in detail** both of **the cause of the accusation**, respectively *the material facts* alleged against him/her, and of **the nature of the accusation**, namely, the legal qualification of these material facts. The Court in Strasbourg considered that, in criminal matters, the provision of full, detailed information concerning the charges against a defendant is an essential prerequisite for ensuring that the proceedings are fair. The extent of such information varies depending on the particular circumstances of each case; in this respect, **the**

**adequacy** of the information must be assessed in relation to the requirements in paragraph 1 and in point (a) of paragraph 3 of Article 6 of the Convention, which confers on every accused the right to have adequate time and facilities for the preparation of their defence.

Therefore, the accused **must be duly and fully informed of any changes in the accusation, including changes referring to the cause of the accusation**.

In this judgement, the European court was required to examine aspects related to **the cause** of the accusation, respectively those related to the time and place of the criminal offence, aspects that changed during the proceedings and that were not known by the accused. Therefore, the Court of Strasbourg stated that the applicant's right to be informed in detail of the nature and cause of the accusation against him/her and his/her right to have adequate time and facilities for the preparation of his/her defence were infringed. The Strasbourg Court also ruled in the same manner through the Judgment of 30 May 2013, delivered in the case of *Malofeyeva v. Russia*, paragraphs 113 to 120.

Consequently, the aspects related to the observance of the right of defence and of the right to a fair trial, as also defined by the case-law of the European court, must be examined depending on the entire trial and on the specific principles of organisation of each proceeding. Therefore, no potential isolated analysis of certain important aspects of the proceedings can be disregarded, even if these are prior to the finalisation of the trial (see the Decision of the Constitutional Court no. 599 of 21 October 2014, paragraph 31).

The same reasons are also valid as concerns the legislative solution resulting from the interpretation of Article 311 (3) of the Criminal Procedure Code currently in force, as there is the possibility that, once the criminal prosecution is initiated through ordinance, the existence of new circumstances or the identification of an error in the initial legal characterisation require the legal re-characterisation of the facts. In such a situation, the defendant does not enjoy the right of being informed, in a prompt and detailed manner, about the nature of the accusation, as, according to Article 10 (3) of the Criminal Procedure Code, the defendant has the right to be **forthwith** informed **about the legal characterisation of the facts, only upon the initiation of the criminal prosecution, not prior to this moment**. The fact that (s)he initially knew the cause of the accusation does not automatically lead to the conclusion that (s)he benefitted from the right to be informed, because a legal re-characterisation, even of the same antisocial facts, which has consequences in terms of criminal liability or of the power to conduct the criminal proceedings, highlights, in compliance with the principle of legality of the criminal proceedings, the defendant's interest in being informed, according to Article 83 ($a^1$) of the Criminal Procedure Code, with regard to the facts for which (s)he is investigated and to their new legal characterisation.

According to Article 327 of the Criminal Procedure Code, criminal cases can be settled either by issuing an ordinance – ordering the closing of the case or non-prosecution, or by presenting the indictment. Or, in this last case, the defendant's right of defence and right to a fair trial are affected because, as (s)he is not promptly informed about the legal re-characterisation, (s)he shall persist in error about the new nature of the criminal accusation, until the indictment is disclosed under Article 344 (2) of the Criminal Procedure Code, as (s)he does not enjoy the time and appropriate means to react and organise his/her defence.

Furthermore, through the Judgment of 12 April 2011, delivered in the case of *Adrian Constantin v. Romania*, the European Court of Human Rights stated that legal re-qualification,

during deliberations, leads to the violation of the procedural safeguards intended to provide the defendant with the right to defend himself/herself concerning the legal and factual grounds of the accusation. Thus, there was a violation of the defendant's right to be informed, in a detailed manner, about the nature and the cause of the accusation, as well as the right to enjoy the time and appropriate means to organise his/her defence. Consequently, the European court stated that "this is in no way a question of assessing the validity of the defences that the applicant could have raised if (s)he had had the opportunity to discuss the criminal offense for which (s)he was finally convicted. It simply points out that **it is plausible to argue that these grounds were different from those chosen to challenge the main charge**" (paragraph 25).

In conclusion, the Court found that legislative solution in Article 311 (3) of the Criminal Procedure Code, according to which the judicial body having ordered the legal re-characterisation is not bound to inform the accused about this, violates the constitutional provisions of Article 21 (3) on the right to a fair trial and of Article 24 on *The right to defence*, as well as the provisions of Article 6 (3) (a) of the Convention for the Protection of Human Rights and Fundamental Freedoms on the right of the accused to be informed promptly of the nature and cause of the accusation against him/her.

**III. For all these reasons,** the Court upheld the exception of unconstitutionality and found that the legislative solution enshrined by Article 311 (3) of the Criminal Procedure Code, excluding the obligation to inform the suspect/the defendant about the legal re-characterisation of the facts, was unconstitutional.

*Decision no. 90 of 28 February 2017 on the exception of unconstitutionality of the provisions of Article 311 (3) of the Criminal Procedure Code, published in the Official Gazette of Romania, Part I, no. 291 of 25 April 2017.*

**The measure of staying any payment to the creditor and any judicial or extrajudicial proceedings, initiated by the creditor or by persons subrogating themselves in the rights of the latter, aimed against the consumer or his/her property, for a period of, at least, 30 public holidays following the date of the notification by which the consumer informs the creditor of having decided to transfer the right of ownership over the immovable property to him/her in order to extinguish the debt resulting from the loan agreement, until the first day of convocation thereof before the notary public, as well as that of its maintenance until the final solution of the challenge lodged by the creditor concerning the fulfilment of the conditions of admissibility of the proceedings governed by Law no. 77/2016, complies with the principle of proportionality, which must characterize any State measure in the field of private property**

**Keywords:** *jurisdiction of the Constitutional Court, failure to criminalise, legislator's power to criminalise or decriminalise, traffic safety on public roads, violation of the principle of equal rights*

**Summary**

In fact, in this decision, by referring to Decision no. 623 of 25 October 2016, published in the Official Gazette of Romania, Part I, no. 53 of 18 January 2017, the Constitutional Court dismissed the exception of unconstitutionality concerning several provisions of Law no. 77/2016 on the transfer of certain immovable property in lieu of payment in order to extinguish obligations undertaken by loans, as follows.

The exception of unconstitutionality of the provisions of Article 8 (5), of the provisions of the first sentence of Article 11, in relation to the provisions of the first sentence of Article 3, as well as the exception of unconstitutionality of the provisions of the second sentence of Article 11 of Law no. 77/2016 were dismissed as inadmissible. The exception of unconstitutionality of the provisions of the first sentence of Article 11, in relation to the provisions of the second sentence of Article 3, of Article 4 (1), of Article 7 and of Article 8 (1) of Law no. 77/2016 was dismissed as having become inadmissible, and the exception of unconstitutionality of the provisions of the first sentence of Article 11, in relation to the other provisions of Law no. 77/2016 was dismissed as unfounded. On the other hand, the exception of unconstitutionality of the provisions of the first sentence of Article 11, in relation to the provisions of Article 5 (3) and Article 7 (4) of Law no. 77/2016 was dismissed as unfounded, with no specific reference to the solution and recitals of Decision no. 623 of 25 October 2016. For these reasons, this summary shall consider exclusively the recitals and the Court's solution on the exception of unconstitutionality of these legal provisions.

**I. As grounds for the exception of unconstitutionality,** it is claimed that it is necessary to discard the automatic suspensive effect of the notification, since it is obvious that the debtor cannot legally interrupt the voluntary execution of the payments, exclusively by virtue of a notification, which represents a unilateral manifestation of will. Maintaining the suspensive effect of the notification in such a case would mean that, despite the findings of the Constitutional Court, the debtor retains an instrument likely to generate abuses, a simple notification being sufficient to legalise the non-performance of the obligations undertaken. If the creditor does not accept transfer in lieu of payment, until the court of law reaches the conclusion that the conditions of hardship have been fulfilled, the cessation of payments, by the debtor, unilaterally, is only tantamount to a legal fact, the lawfulness or unlawfulness of which (contractual fault) is established only subsequently, based on the court ruling ascertaining the fulfilment or not of the conditions of hardship.

**II. With respect to these please, the Court held that:**

By regulating the procedure of transfer in lieu of payment, as an expression of contractual hardship, through Article 5 (3) and Article 7 (4) of Law no. 77/2016, the legislator made available to the debtor of the obligation a specific procedural mechanism by the effect of which the payments potentially due by the debtor under the loan agreement are automatically stayed.

It is a related measure specific to the debtor's decision to transfer to the creditor the right of ownership over the immovable property, in order to extinguish the debt resulting from the mortgage loan agreement. The staying of the payments under the loan agreement is an ancillary element to the unilateral decision of the latter, whereby (s)he considers that the admissibility conditions inherent to the procedure of transfer in lieu of payment are fulfilled; however, during the staying of the payments, the performance of the other obligations of the debtor resulting therefrom continues.

The Court found that the abovementioned staying applied both in the case where the creditor of the obligation did not lodge a challenge against the notification sent, and in the one in which such a challenge is lodged. Thus, in the absence of the challenge provided for in Article 7 (1) of the Law, the notification sent to the creditor remains final, in that both parties accept the fact that it fulfils the conditions of admissibility; in case of hardship, the parties have the possibility to negotiate in order to reach a new agreement within the deadline provided for in Article 5 (3) of the law. It is only after the expiry of the abovementioned deadline that the deed of transfer in lieu of payment can be signed. Throughout the challenge period, as well as the negotiation period, the execution of payments deriving from the loan agreement is stayed. Thus, the legislator made available to the creditor a legal instrument by which it counterbalances the much lower economic position of the consumer compared to the professional in the event of hardship. According to the Court, it would not be normal that, during this period, the execution of the contract continued as such, especially since it is a pre-trial stage, of negotiation between the parties, of identification of possibilities to continue the execution of the loan agreement, by adapting it to the new socio-economic conditions. On the other hand, if the creditor lodges a challenge, the notification is subject to a resolutive condition, i.e. of admission of the challenge by the competent court of law. But, whether or not this condition is fulfilled, throughout the challenge and trial period, the notification has also the effect of staying the payments resulting from the loan agreement, as a temporary and ancillary measure thereto.

Then, the Court pointed out that such a procedural mechanism was not likely to affect or annul the private property right of the creditor, because the staying of the payments is an immediate measure intended to prevent the imminent ruin of the debtor, dismissing the negative effects on its assets, should the creditor decide to initiate legal proceedings. This is a temporary measure by its very nature, because, if the creditor's challenge is upheld, the debtor of the obligation shall have to continue executing the loan agreement, the payment of the amounts relating to the staying period being resumed.

Based on the foregoing and taking into account the normative content of Article 5 (3) and Article 7 (4) of Law no. 77/2016, the Court found that it regulated a State's intervention with regard to the execution of the loan agreements in progress and recalled that, in principle, no constitutional text prevented the legislator from intervening in the execution of these agreements in order to counterbalance them, in compliance with the conditions imposed by Decision no. 623 of 25 October 2016 on the good-faith and fairness that should govern this field. But, according to the Court, the intensity of this intervention, from the perspective of the requirements of the Constitution, must be assessed by using the proportionality test developed by the Constitutional Court in its case-law, given that the relative rights, contrary to the enforcement of Article 53 of the Constitution, are subject to implicitly accepted limitations,

resulting from their evolution and confrontation over time, as well as from the perspective of their holders.

Subsequently, the Court applied the test of proportionality of the State measures impugned in the case. Thus, at a first stage of this test, the Court found that, although the creditor of the obligation held, in principle, an asset within the meaning of Article 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, represented by the claim that was the object of the loan agreement, the intervention of the State, carried out through the impugned laws, pursued a legitimate aim, namely the protection of the consumer by avoiding a situation in which (s)he should have to pay amounts corresponding to the loan agreement, should hardship based on Articles 969 and 970 of the Civil Code of 1864 be invoked. Therefore, the legitimate aim pursued is limited to the concept of protecting the consumer by warding off the danger of his/her impending ruin.

Next, the Court analysed whether or not the impugned measure was adequate, necessary and compliant with a fair proportionality ratio between general and individual interests. Thus, the Court held that, in the abstract, the staying of the payments was a measure capable of fulfilling the legitimate aim pursued, as there was no difference between its substance and its purpose. Moreover, according to the Court, the regulated measure and the intended purpose are in a clear relation of logical consequence, which leads to the irrefutable conclusion of its proper nature.

At a later stage of the proportionality test, the Court found that the impugned legal measure was necessary, the legislator having full constitutional jurisdiction, according to Article 15 (1), Article 44 (1) and Article 61 (1) of the Constitution, to effectively protect the proprietary interests of its citizens when an aspect related to hardship was part of the paradigm of the execution of the agreement – a loan agreement in this case. The Court noted that, from all the measures at its disposal, the legislator chose the temporary staying of the payments resulting from the loan agreement, a measure that should be described as having a moderate degree of interference with the right of ownership of the creditor, as resulting both from its legal nature as a temporary/provisional measure and from the creditor's possibility to have his/her claim fully executed insofar as the court of law upholds the challenge. The Court acknowledged that this option of the legislator was not the least intrusive one, in which case the legislator should have left to the court of law the competence to decide by itself, eventually, through the procedure of the presidential order or through the suspension of the forced execution, where appropriate, whether or not the measure of the temporary staying of the payments inherent to the loan agreement was required. However, the Court found that this legislative orientation took into account the existing socio-economic realities, with regard to which the legislator enjoys a wide margin of appreciation, as well as the peculiarities and the specificity of the circumstances relating to the imminent beginning or continuation of the forced execution with irreparable effects on the consumer, as well as the professional-consumer relationship in which the latter is in a position of economic inferiority. Therefore, according to the Court, if there is a misunderstanding between the parties as to the existence of hardship with regard to an agreement, the legislator correctly assessed as necessary to proceed with the automatic staying of the execution of such an agreement until the final court ruling is issued in the case, thus settling the dispute between the parties.

Then, at the final stage of the proportionality test, the Court held that the impugned measure set a fair proportionality ratio between general interests and particular interests, in that it opposed, on the one hand, the immediate and direct protection of the consumers, therefore of a broad category of persons who, although on a legal equal footing with professionals, from the point of view of their economic power, considered individually, are in a clear inferiority and, on the other hand, the interest of professionals in seeing the amounts resulting from loan agreements executed. Next, the Court noted that, by its intervention in this sensitive area, falling within its margin of appreciation, as derived from the provisions of Article 61 (1) of the Constitution, the legislator has regulated this measure in a limited field [loan agreements] and under restrictive conditions [conditions of admissibility within the margin of hardship], while protecting, with an immediate and temporary effect, the persons exposed to this major risk occurred during the execution of the agreement, risk qualified by the Constitutional Court as superadded. According to the Court, it would have been contrary to the concept of hardship as such that, during the period when the notification of transfer in lieu of payment had been filed, the debtor in good faith of the obligation be forced to continue paying amounts that, in terms of value, evoked hardship, since the starting point of the Court's analysis was the axiomatic premise of Article 57 of the Constitution. In these circumstances, the Court concluded that it could not be accepted that a formal legal reality resulting from the loan agreement prevailed over the rules of fairness and good faith governing civil agreements.

The Court also held that, if the court of law upheld the challenge filed by the professional, the pecuniary entitlements due under the loan agreement had to be executed as such, the creditor of the obligation also having, in this case, the right to receive compensation for damage to the extent that the court of law found the bad faith of the debtor while exercising his/her right to the notification referred to in Article 5 of Law no. 77/2016.

**III. In conclusion, in the light of the foregoing**, the Court found that the procedural mechanism regulated by the legislator did not, in any way, bring into question the substantive conditions to be considered when filing the notification, but established a fair procedural balance between the conflicting parties, in accordance with the principle of proportionality characterizing any State measure in the field of private property. In addition, the Court found that the provisions of Law no. 77/2016, in the mandatory interpretation given to them by Decision no. 623 of 25 October 2016, allowed for the staying of the payments to the creditors to be maintained, only to the extent that, in the case of each individual loan agreement, objective criteria were met, i.e. the conditions for the existence of hardship, which would be assessed under conditions of independence and impartiality, respectively by the courts of law. Thus, the creditors enjoy sufficient guarantees that their right of ownership cannot be affected in its substance by the fact that the debtors enjoy the prerogative provided for in Article 5 (1), corroborated with Article 5 (3) and Article 7 (4) of Law no. 77/2016.

*Decision no. 93 of 28 April 2017 on the exception of unconstitutionality of the provisions of Article 3, of Article 4 (1), of Article 5 (1) and (3), of Article 7, of Article 8 (1) and (5), of Article 10 and of Article 11 of Law no. 77/2016 on transfer of certain immovable*

*property in lieu of payment in order to extinguish obligations undertaken by loans, published in the Official Gazette of Romania, Part I, no. 382 of 22 May 2017.*

**Even if it takes the form of a legislative omission, the unconstitutionality defect cannot be ignored, since such a legislative omission and lack of precision are those which give rise to infringement of constitutional rules. According to Article 1 (5) of the Basic Law, respect for the Constitution is mandatory, which means the legislator is able to exercise the power of criminalisation and decriminalisation of antisocial acts only in accordance with the rules and principles enshrined in the Constitution. It is also outside any legal rational and reasonable argument that a person who possesses a driving licence, granted for categories other than agricultural or forestry tractors, and who drives such a vehicle on the public highway may be active subject of the offence provided for in Article 335 (2) of the Criminal Code, while a person who does not hold a driving licence and that drive on public roads an agricultural or forestry tractor may not be subject to criminal sanctions.**

**Keywords:** *competence of the Constitutional Court, failure to criminalise, legislator's competence to criminalise and decriminalise, traffic safety on public roads, violation of the principle of equality*

**Summary**

**I. As grounds for the exception of unconstitutionality**, it was held that the provisions of Article 335 (1) of the Criminal Code are unconstitutional, as excluding tractors of the vehicles category, and, in those circumstances, the act of driving a tractor on public roads without holding a driving licence does not constitute a criminal offence. It was assessed that, in a contrary interpretation, the contested provisions are unconstitutional, in contravention of the provisions of Article 1 (3) and Article 53 of the Constitution. It was pointed out, in this respect, that driving a tractor without a driving licence is not a criminal offence, but leaving the site of an accident after driving the tractor involved in the accident and the driving on the public highway of a tractor by a person who is under the influence of alcohol do constitute criminal offences. It was also added that the criticised text discriminates against persons holding driving licences, compared to those who do not hold a driving licence and drive tractors on public roads.

**II. With respect to those complaints, the Court held as follows:**

In line with the provisions of Article 4 (4) of Directive 2006/126/EC, the legislative provisions contained in Article 6 point 6 of Government Emergency Ordinance no. 195/2002, currently in force, exclude agricultural or forestry tractors from the category of motor vehicles. The Court has also held that the provisions of Article 6 point 30 of Government Emergency

Ordinance no. 195/2002 establish that an ‘agricultural or forestry tractor’ is ‘any power-driven vehicle, designed for movement on wheels or tracks, having at least two axles, the main function of which lies in its tractive power, designed in particular to draw, push, carry or operate certain equipment, machinery or trailers used for agricultural or forestry exploitation and whose use for road transport of persons or goods or for drawing, on the road, vehicles used for the carriage of persons or goods is only a secondary function. Shall be assimilated to agricultural or forestry tractor vehicles designed to carry out services or works known as self-propelled vehicles;”. In addition, in the Emergency Government Ordinance no. 195/2002, the terms “tractor” is replaced by the words “agricultural or forestry tractor”, according to Article I point 35 of the Government Ordinance no. 21/2014. In that regard, the Court found that definition of the legal concepts of “motor vehicle” and “agricultural or forestry tractor” is an exclusive task of the legislator, who has to give them a certain legal significance without such being contrary to the provisions or principles of the Constitution.

The Court has also found a mismatch between the name of Article 335 of the Criminal Code, which refers to the concept of ‘vehicle’, and the text of Article 335 (1) of the Criminal Code exhaustively using the concepts of ‘motor vehicle’ and ‘tram’, the latter being, according to Article 6 point 6 second sentence of Government Emergency Ordinance no. 195/2002 a vehicle.

At the same time, the Court held that driving on public roads an agricultural or forestry tractor by a person who does not possess a driving licence poses a high social risk likely to undermine social values protected by Government Emergency Ordinance no. 195/2002, which aims precisely at ensuring a safe and smooth traffic on public roads, as well as at protecting life, bodily integrity and health of persons participating in the traffic or located on the public road or area, at protecting the rights and legitimate interests of persons concerned, the public and private property and the environment, as is apparent from Article 1 (2) of the Ordinance.

However, given that, according to Article 6 point 6 second sentence of Government Emergency Ordinance no. 195/2002, the agricultural or forestry tractor is not considered a ‘motor vehicle’ and in Article 335 (1) of the Criminal Code, the legislative solution does not extend to agricultural and forestry tractors, the act of driving such a vehicle on public roads, without holding a driving licence, does not fall within the regulatory situation set forth by Article 335 (1) of the Criminal Code. The Court found that this legal solution is confirmed by judicial practice in this area. Thus, by ordering the acquittal of the defendants on account of the offence of driving a motor vehicle on public roads by a person who does not have a driving licence, an offence provided by Article 335 (1) of the Criminal Code, the courts have held, in essence, that there is not a full matching between the provisions of the Criminal Code and those of Government Emergency Ordinance no. 195/2002. Even if it can be considered that there must be a protected social value, namely traffic safety on public roads, which could be affected by putting into circulation on public roads an agricultural tractor, as the rule of criminalisation does not specifically state that agricultural tractors may form the subject of offences referred to in Articles 334 to 335 of the Criminal Code, it cannot held, based on a broad interpretation, that the defendants have committed those offences (in this regard see, for example, Criminal Decision no. 1.420/A of 22 October 2015 pronounced by Bucharest Court of Appeal, 1st

Criminal Section and Criminal Decision no. 15/A of 12 January 2016, the Bucharest Court of Appeal - 1st Criminal Section).

In addition, the High Court of Cassation and Justice — the Panel for settlement of issues of law in criminal matters has established that in the interpretation of the concept of "motor vehicle" provided for by Article 334 (1) of the Criminal Code and Article of 335 (1) of the Criminal Code, in relation to Article 6 point 6 and point 30 of the Government Emergency Ordinance no. 195/2002, as amended and supplemented by Government Ordinance no. 21/2014, driving on public roads of an agricultural or forestry tractor not registered under law or by a person who does not possess a driving licence does not meet the conditions of typicality of offences covered by Article 334 (1) of the Criminal Code, and Article 335 (1) of the Criminal Code (see Decision no. 11 of 12 April 2017, handed down by the High Court of Cassation and Justice in file no. 347/1/2017, not yet published in the Official Gazette of Romania, until the date of this Decision).

In those circumstances, the Constitutional Court has found that the act of driving on public roads an agricultural or forestry tractor without holding a driving licence remains outside any criminal sanctions. This situation has arisen as a result of redefining the concept of "motor vehicle" and the express exclusion of "agricultural and forestry tractors" from the category of motor vehicles. However, Directive 2006/126/EC and Government Ordinance no. 21/2014 implementing the provisions of Article 4 (4) of the Directive into national law, are not aimed at decriminalising such offences. Moreover, prior to the modification of Article 6 point 6 of Government Emergency Ordinance no. 195/2002 by Article I, point 1 of Government Ordinance no. 21/2014, road tractor was considered a motor vehicle so that its driving on public roads without holding a driving licence constituted a criminal offence.

Furthermore, given the mismatch between the two rules relating to the settlement of the case in which this exception of unconstitutionality was invoked, i.e. Article 335 (1) of the Criminal Code and Article 6 point 6 second sentence of Government Emergency Ordinance no. 195/2002, the Court found the existence of a genuine defect of unconstitutionality arising from omission to include in Article 335 (1) of the Criminal Code the agricultural or forestry tractors as material object of the offence of driving a vehicle on public roads without a driving licence.

The Court stated that, in the case of Article 335 (1) of the Criminal Code, we cannot talk about a mere choice of the legislator, as an expression of the provisions of Article 73 (3) (h) of the Constitution, but of a legislative omission of constitutional relevance, which attracts the competence of the constitutional court to proceed to its correction by means of the constitutional review.

In this respect, the Constitutional Court ruled in its case-law that, in such a situation, even if it takes the form of a legislative omission, the defect of unconstitutionality notified cannot be ignored, since such a legislative omission and lack of precision are those which give rise to infringement of constitutional rules. However, the Constitutional Court, according to Article of 142 of the Basic Law is the guarantor of the supremacy of the Constitution, which entails, inter alia, compliance of all legal provisions with the Constitution (see, for example, Decision

no. 503 of 20 April 2010, published in Official Gazette of Romania, Part I, no. 353 of 28 May 2010 or Decision no. 107 of 27 February 2014, published in Official Gazette of Romania, Part I, no. 318 of 30 April 2014). In that regard, the Court held, moreover, that failure to include agricultural and forestry tractors in the regulatory framework of Article 335 (1) of the Criminal Code amounts to decriminalisation of the offence of driving such a vehicle on public roads without holding a driving licence. However, if such facts are not discouraged by means of criminal law, such results in the violation of fundamental values, protected by the Criminal Code, such as the rule of law, in its components relating to the protection of public order and public safety, citizens' rights and freedoms, respect for the Constitution and laws, which are enshrined in Article 1 (3) and (5) of the Basic Law amongst the supreme values. Thus, the provisions of Article 1 (3) of the Constitution require the legislator to take measures in order to safeguard public order and security, by adopting the necessary legal instruments to prevent the state of danger and the crime phenomenon excluding any rules likely to encourage this phenomenon. At the same time, according to Article 1 (5) of the Basic Law, respect for the Constitution is mandatory; therefore, the legislator is can exercise its power of criminalisation and decriminalisation of antisocial acts only in accordance with the rules and principles enshrined in the Constitution. Moreover, the Constitutional Court ruled in its case-law (see Constitutional Court Decision no. 62 of 18 January 2007, published in Official Gazette of Romania, Part I, no. 104 of 12 February 2007) that the legislator could not define and establish as criminal offences, without thereby infringing the Constitution, acts that would include elements of discrimination. Similarly, the legislator may not proceed with the removal of the criminal legal protection of values having a constitutional status. Parliament's regulatory freedom shall be exercised in such cases by regulating the conditions for accountability for anti-social acts affecting the values laid down in and guaranteed by the Constitution. However, by not including amongst criminal offences the act of driving an agricultural or forestry tractor on public roads without a driving licence, the legislator has impaired the criminal protection granted to the social values of particular importance, such as the traffic safety on public roads, with major consequences on the life and bodily integrity of individuals, protected by Article 22 of the Constitution.

The Court has also found that, contrary to the provisions of Article 16 of the Constitution, the legislative solution contained in Article 335 (1) of the Criminal Code creates discrimination without any rational and objective reasons to justifying it. According to the case-law of the Constitutional Court, a breach of the principle of equality and non-discrimination takes place when a differential treatment is applied to similar cases without an objective and reasonable justification (see, in this respect, Decision no. 107 of 01 November 1995, published in Official Gazette of Romania, Part I, no. 85 of 26 April 1996).

Applying these considerations to the case at issue, the Court found that it is outside any rational and reasonable legal argument for a person who possesses a driving licence granted for categories other than the category of agricultural or forestry tractors and who drives such a vehicle on the public roads to be the active subject of the offence provided for in Article 335 (2) of the Criminal Code, while a person not holding any driving licence and who drives on public roads an agricultural or forestry tractor not to be subject to the same criminal sanctions. Nothing justifies a differentiation between the two categories and a privileged treatment for

persons not holding a driving licence. Therefore, the solution for removing the unconstitutionality arising from the application of a differentiated legal treatment to the two categories can only be that of ascertaining the existence of a state of inequality, contrary to Article 16 (1) of the Constitution. Consequently, the Court found that the regulatory defect contained in Article 335 (1) of the Criminal Code generates a state of unconstitutionality, in relation to Article 1 (3) and (5), Article 16 and Article of 22 of the Basic Law, reason why the exception of unconstitutionality was to be upheld in this regard.

Having regard to the provisions of Article 147 (1) of the Constitution, the Court found that it is incumbent upon the legislator to bring into line with the Basic Law and with the present Decision, the legal solution contained in Article 335 (1) of the Criminal Code, which does not criminalise the act of driving on public roads an agricultural or forestry tractor by a person who does not possess a driving licence.

*Decision no. 224 of 4 April 2017 on the exception of unconstitutionality of the provisions of Article 335 (1) of the Criminal Code and Article 6 point 6 second sentence of the Emergency Government Ordinance no. 195/2002 on public road traffic, published in Official Gazette of Romania, Part I, no. 427 of 9 June 2017.*

**Practicing the lawyer's profession. Establishing the conditions under which the capacity of lawyer ceases, through disbarment for undignified conduct under Article 14 (a) of Law no. 51/1995 , republished.**

**Keywords**: *quality of the law (foreseeability and clarity of the law); equality before the law*

**Summary**

**I. As grounds for the exception of unconstitutionality**, its authors claimed that the rule contained in Article 27 (d) of Law no. 51/1995 , republished, is unclear as regards the listing of facts under criminal law for which the lawyer was convicted by final judgement and which render him unfit to practice his profession. Thus, the author claimed that the text is unclear and can be interpreted arbitrarily, because it does not specify which are the specific facts under criminal law which render a lawyer unfit. It was also claimed that Article 14 (a) of Law no. 51/1995 , republished, should have been formulated with clarity and precision so that its addressees may adapt their social behaviour, i.e. to know clearly those offences affecting the prestige of the profession of lawyer, by clarifying that they must be committed in connection with the exercise of the profession of lawyer or without any connection to the profession. Concerning the infringement of Article 16 (1) and (2) of the Constitution, the author of the exception claimed that these provisions ensure equality of citizens before the law and public authorities, without privilege and discrimination, which means that the legal rule contained in a law will apply in the same way to any citizen in the same legal situation. Such a

possibility, however, is excluded when the law lacks clarity, foreseeability and accessibility. Finally, it was pointed out that the profession of lawyer is a liberal profession and its choice and practice are guaranteed to any person who meets the conditions for access to and subsequent practice of the profession. In the absence of clear and precise rules on the cases of cessation of the capacity of lawyer, which he/she must know so that he/she may adapt his/her behaviour, the decision under which the capacity of lawyer is declared terminated is unfair, arbitrary and violates the right to free choice of the profession, guaranteed by Article 41 (1) of the Constitution .

**II. Having examined the exception of unconstitutionality**, the Court held that, under the contested provisions of Law no. 51/1995 on the organisation and practice of the lawyer's profession, republished, the legislator regulated, on the one hand, the cases of undignified conduct in the practice of the lawyer's profession, and, on the other hand, sets out the situations in which the capacity of lawyer ceases. In its case-law, for example Decision no. 629 of 27 October 2016, published in Official Gazette of Romania, Part I, no. 36 of 12 January 2017, the Court ruled that "the regulation regarding the lawyers' undignified conduct is normal, providing a guarantee that those exercising this honouring profession have an impeccable moral profile, as it is inconceivable that individuals with (serious) criminal convictions participate in the act of justice. The legislator has sought to make subject to that maximum penalty— exclusion from the profession — only perpetration of intentional crimes, excluding those of fault, considering that if there is no intention from the lawyer, it cannot be said that his/her probity and fairness are affected. In accordance with the law, cases of undignified conduct are expressly and exhaustively provided for by law and are verified both upon acceptance as a bar member, upon re-listing as a lawyer entitled to practise the profession and throughout the practice". The Court held, thus, that the conditions relating to the probity, integrity and fairness in the exercise of the profession of lawyer may result in the loss itself of the capacity of lawyer. In other words, if a lawyer is declared to have had an undignified conduct, such has serious consequences for his/her career.

The Court found that Article 14 (a) of Law no. 51/1995, republished, criticised in the present case, covered one of the instances of undignified conduct of a lawyer, namely that of a final sentence to imprisonment penalty for an intentional offence, liable to undermine the prestige of the profession. The Court noted that the first case of undignified conduct implies meeting all of the following conditions: conviction, by final judgement, to imprisonment (the law makes no distinction between sentencing to imprisonment with suspended execution or full time execution); conviction for the offence needs to have been committed with intent; the offence must undermine the prestige of the profession. The author of the exception of unconstitutionality held that, by its content, this legal text is not formulated with sufficient clarity and precision so that its addressees may adapt their social behaviour, i.e. to know precisely those infringements which are likely to affect the prestige of the profession of lawyer.

In relation to the criticism thus brought, the Court held that it is well-founded and that due to vague drafting of this legal text [Article 14 (a) of Law no. 51/1995 , republished), determination of offences affecting the prestige of the lawyer's profession is a matter left to the sovereign discretion of the professional structures competent to ascertain the undignified

conduct, as provided for by Law no. 51/1995 , republished. Therefore, the Court noted that, at present, the law does not determine the scope of offences affecting/not affecting the prestige of the profession of lawyer, the undignified conduct of the lawyer being ascertained and, implicitly, his/her disbarment being carried out, on a case-by-case basis, by the competent professional. Furthermore, the decision adopted is not based on objective, reasonable and practical criteria, but on subjective assessments which may vary from one local professional structure to another. The fact that the contested legislation does not specify the intentional offences for whose perpetration, and,conviction, the lawyer becomes unfit to practice the respective profession leads to the circumstance that a key issue, which is liable to affect the gravity of disciplinary sanctions applied, is not explicitly provided for by law, but left to the subjective assessment of the relevant professional bodies. However, the rules on disciplinary inquiry must comply with certain requirements of stability and foreseeability, otherwise being contrary to Article 1 (5) of the Constitution as concerns foreseeability, since the person concerned is not in a position to adapt his/her conduct accordingly and to have proper representation of the disciplinary proceedings (see, in this respect, Decision no. 392 of 02 July 2014, published in Official Gazette of Romania, Part I, no. 667 of 11 September 2014).

In this context, in its case-law (for example Decision no. 1 of 10 January 2014, published in Official Gazette of Romania, Part I, no. 123 of 19 February 2014), the Court found that an essential feature of the rule of law is the supremacy of the Constitution and the obligation to respect the law, and one of the prerequisites of the principle of respect of the law concerns the quality of legislative acts. In this respect, the Court ruled that, in principle, any legislative act must fulfil certain qualitative conditions, including foreseeability, which implies that it must be sufficiently clear and precise to be applied; thus, a norm need to be formulated with sufficient precision to enable interested persons – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.

In relation to the above, the Court found that the legislator has the power to regulate the conditions for the exercise of certain professions and to determine cases of termination thereof. In law-making activity, however, as the Court ruled in Decision no. 405 of 15 June 2016, published in Official Gazette of Romania, Part I, no. 517 of 8 July 2016, it is incumbent upon the legislator, irrespective of the area in which it exercises this competence constitutional, to show increased attention to compliance with the principle of clarity and foreseeability of the law.

As regards the Article 14 (a) of Law no. 51/1995, republished, the Court found that the legislator did not expressly and exhaustively specify which are those intentional offences for whose perpetration and subsequent conviction the lawyer becomes unfit to practice his profession. That circumstance was likely to give rise to abuse and arbitrariness, given the wide spectrum of intentional offences under the Criminal Code and special laws. In this regard, the Court has held that there may be situations in which, for the same offences committed intentionally, different solutions can be adopted given by the competent structures of the legal profession on the decision to maintain or exclude a lawyer from the bar.

As a result, the Court found that the term '*likely to undermine the prestige of the profession of lawyer*' in Article 14 (a) of Law no. 51/1995 on the organisation and practice of the lawyer's profession, republished, is unconstitutional and contrary to Article 1 (5) of the Constitution, as it lacks clarity and precision, given that it does not clearly state those intentional criminal offences affecting the prestige of the profession of lawyer. Therefore, failure to specifically list the offences whose perpetration is likely to harm the prestige of the profession of lawyer leaves place for arbitrariness, rendering possible the differentiated application of the penalty of exclusion from the profession depending on the subjective assessment of the professional bodies competent to ascertain the case of undignified conduct. This lack of clarity, precision and foreseeability of the term "*likely undermine the prestige of the profession of lawyer*" under Article 14 (a) of Law no. 51/1995, republished, creates thus the assumption of its application in a different discriminatory manner, as a result of some discriminatory or arbitrary assessments. Therefore, the Court held that it is for the legislator to confer an conclusive legislative content to the impugned legal rule and to establish a coherent and unequivocal legislative framework about the concrete conditions in which a lawyer loses this status, through exclusion from the profession, in case of undignified conduct under Article 14 (a) of Law no. 51/1995 , republished.

With regard to the complaint concerning Article 27 (d) of Law no. 51/1995 on the organisation and practice of the lawyer's profession, republished, the author of the exception argues that this legal text is unconstitutional due to its unclear nature as regards the offences under criminal law for which the lawyer was convicted by final judgement and which render him unfit to practice the legal profession. In this context, the Court held that Article 27 (d) of Law no. 51/1995 , republished, as a rule, should be seen in the light of the effects of the declaration as unconstitutional of the term "*likely to undermine the prestige of the profession of lawyer*" under Article 14 (a) of the same legislative act. Thus, through its normative content, Article 27 (d) of Law no. 51/1995, republished, contains no error of unconstitutionality, but only covers one of the situations in which the capacity of lawyer ceases.

Moreover, in its case-law on the matter, for example Decision no. 472 of 28 June 2016, published in Official Gazette of Romania, Part I, no. 573 of 28 July 2016 or Decision no. 379 of 24 September 2013, published in Official Gazette of Romania, Part I, no. 731 of 27 November 2013, the Court held that according to the legislator, law practising is a public service, which is organised and operated on the basis of a special law, and those who wish to practise this profession have an obligation to abide by the law and to accept the rules imposed by it. The Court also held that, although law practising is a liberal and independent profession, it must be practised in an organised manner in accordance with predetermined rules, compliance with which must be ensured, including by taking coercive measures. Thus, the Court pointed out that the setting up, under the law governing the practice of the lawyer's profession, of obligations for those concerned, and penalising measures vis-à-vis those who infringe the rules laid down therein is not affected by any defect of unconstitutionality. The Court held, moreover, that the disciplinary measure of disbarment reflects the principle of dignity and honour of the profession of lawyer, a guarantee of probity and professional morality for members of the Bar. From that perspective, the legislation on the organisation of the profession of lawyer is governed by certain principles and rules to ensure a smooth, normal

and legal conduct of the legal practice, the lawyer having the obligation to refrain from committing anti-social deeds that would shed a negative light on him.

**III. For all these reasons**, by unanimity, the Court upheld the exception of unconstitutionality and found that the term "*likely to undermine the prestige of the profession of lawyer*" under Article 14 (a) of Law no. 51/1995 on the organisation and practice of the lawyer's profession, republished, is unconstitutional and in respect of Article 27 (d) of the same legislative act, the Court dismissed, as unfounded, the exception of unconstitutionality and found that these provisions are constitutional in relation to constitutional complaints.

*Decision no. 225 of 4 April 2017 on the exception of unconstitutionality of the provisions of Article 14 (a) and Article 27 (d) of Law no. 51/1995 on the organisation and practice of the lawyer's profession, republished, published in the Official Gazette of Romania, Part I, no. 468 of 22 June 2017*

**Protection order. Conditions. Definition of members of the family.**

**Keywords:** *right to life and to physical and mental integrity, right to private and personal life, rule of law, mismatch between a treaty concerning human rights and the domestic law*

**Summary**

**I. As grounds for the exception of unconstitutionality**, the author has argued that the impugned provisions, by regulating the conditions of admissibility for the issuance of a protection order, are contrary to constitutional provisions of Article 1 (3) on the rule of law and Article 16 (1) on the principle of equality before the law. In this respect, it was pointed out that, although the aim of the law was to ensure protection also to persons who established relationships similar to those between spouses, it is noted that the terms "if they share the same dwelling" set a requirement that can be hardly met by victims of violence in the family, namely that such an application can be admissible only if the victim resides with the perpetrator at the time of lodging of the application. However, such a requirement would run counter to the very purpose for which the law was adopted, i.e. to protect victims of domestic violence. In order to fulfil this condition and to obtain a protection order, the victim should move back with the perpetrator, to ensure that she/he can prove this, lodge the application for the issuance of the protection order and then, if still able, leave the common home. It is claimed that there is a differentiation between categories of persons who may request a protection order under Law no. 217/2003. Thus, is as regards the spouse or former spouse there is no additional requirement for them to be considered family members, in the meaning of the provisions of Article (5) of Law no. 217/2003, regarding the situation of concubines, in line with the impugned provisions of law, they may be considered as family members only "if they share the same dwelling". This

differentiation is in fact a discrimination and a breach of the constitutional rights of citizens. An interpretation of the phrase "if they share the same dwelling", capable of being applied with regard to an application for a protection order would only prove the sharing of a common dwelling on the basis of the evidence brought, for the purpose of issuance of the order protection. Such an interpretation was given by some courts but a grammatical interpretation of those terms leads to the conclusion that partners must share the same dwelling at the time when the application is lodged, and most courts, in cases such as the present case, where the victim was no longer living with the perpetrator at the date of the application, declare inadmissible the application.

**II. Having examined the exception of unconstitutionality**, the Court held that the purpose of Law no. 217/2003, as set out in Article 1 (1) thereof, is family protection and support, development and strengthening of family solidarity based on friendship, affection and moral and material support of family members, which is an objective of national interest. Preventing and combating domestic violence are part of the integrated family protection and support policy and represent an important public health problem and, according to Article 1 (3) of the law, the Romanian State shall develop and implement policies and programmes for preventing and combating domestic violence, ans well as for the protection of victims of domestic violence. In order to achieve that purpose, Law no. 25/2012 amending and supplementing Law no. 217/2003 on preventing and combating domestic violence, published in the Official Gazette of Romania, Part I, no. 165 of 13 March 2012 has introduced into Law no. 217/2003 Chapter VII: "Protection Order" which after the republication of Law no. 217/2003 became Chapter IV (Articles 23-35). The rationale for introducing rules on the protection order consist, as it follows from the Explanatory Memorandum to Law no. 25/2012, of creating an efficient civil legal instrument for preventing and combating domestic violence, similar to those used in other European Union legislation, as in the Romanian legislation, there was only criminal protection against domestic violence and such was exercise under very restrictive conditions. According to Article (3) of Law no. 217/2003, "domestic violence" means any physical or verbal intentional act or omission (with the exception of self-defence or defence actions), committed by a family member against another family member, which cause or may cause physical injury or mental, sexual, emotional or psychological suffering, including threats of such acts, coercion or arbitrary deprivation of liberty. A protection order may be issued by an act of violence is committed (act which, according to Article 4 of the law may be: verbal violence, physical violence, psychological violence, economic violence, sexual violence, social violence, spiritual violence), likely to endanger the life, integrity or freedom of the victim by a family member. Article 5 of the law defines the concept of 'member of the family', comprising: a) the ascendants and descendants, brothers and sisters, their children, and the persons to be rendered by the adoption, in accordance with the law, such relatives; b) the spouse and/or former spouse; c) persons who established relationships similar to those between spouses or between parents and children, if they share the same dwelling; d) the guardian or other person exercising rights in fact or in law the rights as to the person of the child; e) the legal representative or other person taking care of the person with mental illness, intellectual disability or physical disability, except those fulfilling these functions in the exercise of professional duties.

The Court notes that the Romanian law provides protection against domestic violence and persons who established relationships similar to those between spouses or between parents and children, provided that they share the same dwelling.

Having examined the case-law of the courts, the Court held that their practice on the interpretation of Article 5 (c) of Law no. 217/2003, as regards the condition of cohabitation required to persons who established relationships similar to those between spouses or between parents and children, lacks unity. Most courts consider that for issuance of an order of protection, besides meeting the other conditions provided by law, persons who established relationships similar to those between spouses or between parents and children must live together at the time of lodging the request for the issuance of the order for protection. Other court take the view that, for issuance of an order of protection, besides meeting the other conditions provided by law, persons who established relationships similar to those between spouses or between parents and children must have lived together, but not necessarily at the time of lodging the request for the issuance of the order for protection. Finally, Bucharest 4th District Trial Court, which has referred to the Constitutional Court the exception of unconstitutionality of the provisions of Article.5 (c) of Law no. 217/2003, exception constituting the subject matter of the Constitutional Court File no. 925D/2017, applied directly, under Article of 20 of the Constitution, the provisions of the Istanbul Convention, ratified by Romania through Law no. 30/2016, considering that the condition of cohabitation is met.

The Court found that, since the purpose of the order of protection is the right to life and to physical and psychological integrity, it can take into account the considerations of principle adopted by the Constitutional Court in its Decision no. 511 of 12 December 2013, published in Official Gazette of Romania, Part I, no. 75 of 30 January 2014 which concluded that, as stated by the European Court of Human Rights, the right to life, enshrined in Article of 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms, constitutes the 'ultimate right', a right which enshrines one of the fundamental values of democratic States forming the Council of Europe and one of the key provisions of the Convention.

In view of this, the Court held that the cohabitation requirement imposed by the provisions of Article 5 (c) of Law no. 217/2003 to persons who established relationships similar to those between spouses or between parents and children, in order to issue an order of protection is unreasonable, whereas it may lead to the inadmissibility of the application for the order, even find a violent act such as to endanger the life, physical or psychological integrity or freedom of the victim would be ascertained and even if the victim brings evidence before court that relationships similar to those between spouses or between parents and children had been established. That conditionality imposed by the criticised legal text itself is at odds with the very purpose for which Law no. 25/2012 was adopted, namely creating a civil effective legal instrument for preventing and combating domestic violence — the protection order, whereby a court may provisionally order one or more of the obligations or prohibitions, referred to in Article of 23 of the law, in order to protect the life, physical or psychological integrity or freedom of the victim.

Thus, in the case of the persons who established relationships similar to those between spouses or between parents and children, the cohabitation condition provided for in the criticised legislation prejudices the right to life and the right to physical and mental integrity of the person whose life, physical or mental integrity or freedom is jeopardised by an act of violence inflicted on the same by a family member; in such a case, the respective person may ask the court, in order to remove the risk, to issue a protection order. In view of the aforementioned, the Court found that the term "if they share the same dwelling" in the provisions of Article 5 (c) of Law no. 217/2003 is contrary to Article of 22 of the Constitution on the right to life and to physical and mental integrity of the person.

In the same vein is the case-law of the European Court of Human Rights, which, in its Judgment of 9 June 2009 in Opuz v. Turkey, held that States must take preventive measures for the protection of the right to life of citizens (par.128-130) and that States have a positive obligation to establish and effectively implement a system to punish all forms of domestic violence and to provide sufficient guarantees to victims. (par.145). Also, by the judgement of 2 March 2017 in Talpis v. Italy, the European Court of Human Rights has established that the positive obligations incumbent on the authorities — in some cases by virtue of Article 2 or Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, and in other cases, by virtue of Article 8 or Article 8 in conjunction with Article 3 of the Convention — lies also in their obligation to adopt and implement a legal framework adapted to provide protection against acts of violence (par.100). In that case, the human rights court concluded that, although the State had a positive obligation to implement practical preventive measures to protect the individual whose life is threatened, by failing to take prompt action on the complaint lodged by the applicant, the national authorities have deprived the complaint of any effect, failing to meet their obligation to protect the right to life (par.123-125).

In addition, the Court found that, in the case of persons who established relationships similar to those between spouses or between parents and children, a requirement where the victim of violence lives with the perpetrator, as one of the requirements for the issuance of the protection order, is contrary to the constitutional provisions of Article 26 as it regards personal life and private life. Thus, according to Article 26 (1) of the Constitution, public authorities have the constitutional obligation to respect and protect the personal, family and private life of the individual. However, rendering conditional, under the impugned legal provisions, the issuance of the protection order, upon the cohabitation of the victim with the aggressor, irrespective of how this requirement has been interpreted by the courts, is in breach of the obligation of public authorities to protect private and personal life of citizens. In the same vein is the case-law of the European Court of Human Rights, which, by judgement of 13 November 2010 in Hajduovà against Slovakia, par.46, held that the notion of 'private life' includes the right to physical and mental integrity, and that Member States have an obligation to protect the physical and psychological integrity of their citizens. The human rights court recalled that the particular vulnerability of victims of domestic violence and the need for active involvement of States in their protection were provided by a series of international instruments, which were set out in the judgement of 9 June 2009 in Opuz v. Turkey, par.72-82.

For all these reasons, the Court found the the impugned legal text is also in breach of Article 1 (3) of the Constitution as a reference text put forward by the author of the exception of unconstitutionality, since this constitutional provision refers to supreme values of the rule of law, as it is a rule of principle underling all other rules of the Basic Law. (see in this regard Decision no. 350 of 7 May 2015, published in Official Gazette of Romania, Part I, no. 504 of 8 July 2015, par.18).

The Court further held that Article 20 (2) of the Constitution establishes that in case of inconsistencies between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations take precedence, unless the Constitution or national laws include more favourable provisions. Thus, this constitutional rule establishes the priority of application of international regulations to domestic laws to the contrary. The Council of Europe Convention of 11 May 2011 on preventing and combating violence against women and domestic violence (Istanbul Convention), ratified by Romania through Law no. 30/2016 represents a genuine human rights treaty and Article 3 (b) thereof provides that "domestic violence" shall mean all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, "whether or not the perpetrator shares or has shared the same residence with the victim".

In conclusion, the term 'if they share the same dwelling' contained in the provisions of Article 5 (c) of Law no. 217/2003 infringes the constitutional provisions of Article 1 (3), Article 22 on the right to life and to physical and psychological integrity and Article 26 relating to private and personal life.

**III. For all these reasons**, by unanimity, the Court upheld the exception of unconstitutionality and found that the term 'if they share the same dwelling' contained in the provisions of Article 5 (c) of Law no. 217/2003 on preventing and combating domestic violence is unconstitutional.

*Decision no. 264 of 27 April 2017 on the exception of unconstitutionality concerning the term 'if they share the same dwelling' contained in the provisions of Article 5 (c) of Law no. 217/2003 on preventing and combating domestic violence, published in the Official Gazette of Romania, Part I, no. 468 of 22 June 2017*

**The delineation between the different forms of legal responsibility and criminal liability cannot have as sole criterion the type of legislative act infringed in the exercise of work duties, i.e. an act of primary regulation (law or Government ordinance) or an administrative regulatory act, but, on the contrary, bearing in mind the possibility that, in the event of a breach of a law or a Government Ordinance, both criminal liability and other forms of liability, such as the disciplinary, administrative or civil liability can be deemed applicable, the Court highlighted, as an additional criterion, the degree of**

**intensity required to apply a criminal sanction, namely the need for the existence of a certain amount of damage or a specific gravity of the prejudice to legitimate interests or rights, arising from the perpetration of the offence.**

**Keywords: effects of Constitutional Court decisions, "ultima ratio" principle in the matter of criminal liability, lawmaking power**

**Summary**

**I. As grounds for the exception of unconstitutionality**, the author claimed that the provisions subject to criticism are unconstitutional, since the legislator did not regulate a threshold value for the 'undue use', 'property damage' and 'damage', in case of the offence of outcome, i.e. the abuse of duty, which would distinguish it from other forms of criminal liability.

**II. With respect to those complaints, the Court held as follows:**

Based on the recitals of Decision no. 405 of 15 June 2016, published in Official Gazette of Romania, Part I, no. 517 of 8 July 2016, in which the constitutional court upheld the exception of unconstitutionality and found that the provisions of Article 246 of the Criminal Code of 1969 and Article 297 (1) of the Criminal Code are constitutional in so far as the term "performs in a faulty manner" is construed to mean "performs in a violation of the law", the Court has developed several considerations.

Thus, pursuant to the provisions of Article 147 (4) of the Constitution, the decisions of the Constitutional Court are generally binding and effective only for the future, with the same effects for all public authorities and all individual subjects of law. The decision by which the Constitutional Court, in the exercise of the a posteriori concrete review, upholds the referral of unconstitutionality binding and produces *erga omnes* effects, imposing an obligation on the legislator, in accordance with Article 147 (1) of the Constitution, to bring the unconstitutional provisions of law into line with the provisions of the Basic Law. The time limit within which the constitutional obligation must be fulfilled is 45 days, the consequence of the failure to comply with the same consisting in the cessation of the legal effects of the provisions of the laws or ordinances found unconstitutional, in force at the time of the review and suspended as of right during the constitutional term.

Moreover, in line with its case-law, for example, the Decision of the Plenary of the Constitutional Court no. 1 of 17 January 1995, published in the Official Gazette of Romania, Part I, no. 16 of 26 January 1995, or Decision no. 414 of 14 April 2010, published in the Official Gazette of Romania, Part I, no. 291 of 4 May 2010, the res judicata which accompanies the judicial acts, and therefore also the decisions of the Constitutional Court, is attached not only to the operative part of the decision, but also to the recitals on which it is based. The solution is the same also with regard to the binding effect of Constitutional Court decisions. The term recitals on which the operative part of the Court's decision is based should be construed as the unitary set of arguments, which, set out in a logical sequence, become the legal reasoning underpinning the Court's solution. Thus, stand-alone arguments or multiple combined arguments can lead to a well-founded logical and legal construction according to the structure

premises-demonstration-conclusion. In other words, the recitals of a Constitutional Court decision contain a comparative analysis between the legal text subject to criticism and the constitutional rule, the logical process being based on the presumed situation (involving on the one hand the analysis of the legal text and, on the other hand, the analysis of the constitutional text), by carrying out the correlating, inferential links (analysis of the relationship between the two rules) from which conclusions derive, i.e. the consequence of the analysis (the solution passed by the Court). This structure is consistent, coherent, the entire argumentative assembly representing the foundation of the final conclusion, so that the argument that the content of a decision of the Court might include considerations independent of the legal reasoning leading to the decision rendered and, by default, would not lend the binding nature of the operative part to the judicial act. Therefore, since all considerations in a decision support the operative part of the decision, the Court finds that the force of *res judicata* and the binding nature of the solution cover also all the considerations on the decision.

In the light of the above, the Court notes that, as of 8 July 2016, the date of publication in the Official Gazette of Romania, Part I, of the Constitutional Court Decision no. 405 of 15 June 2016, the primary or delegated legislator became bound to regulate the amount of damage and the gravity of the injury resulting from the offence of "abuse of office", with the application of the "last ratio" principle, as developed in doctrine and jurisprudence (including that of the Constitutional Court). Developing the legal reasoning underlying the solution reached in aforementioned decision, the Court found that the delineation between the different forms of legal responsibility and criminal liability cannot have as sole criterion the type of legislative act infringed in the exercise of work duties, i.e. an act of primary regulation (law or Government ordinance) or an administrative regulatory act, but, on the contrary, bearing in mind the possibility that, in the event of a breach of a law or a Government Ordinance, both criminal liability and other forms of liability, such as the disciplinary, administrative or civil liability can be deemed applicable, the Court highlighted, as an additional criterion, the degree of intensity required to apply a criminal sanction, namely the need for the existence of a certain amount of damage or a specific gravity of the prejudice to legitimate interests or rights, arising from the perpetration of the offence.

Moreover, it is not the first time the Court has established such a link between the seriousness of the offence and the incidence of criminal liability. In its case law, the Court has held that the criminalisation/decriminalisation of facts or reconfiguration of the constitutive elements of a criminal offence stem from the legislator's margin of discretion, which is not absolute, and is limited by the constitutional principles, values and requirements. By regulating the criminal protection only of the facts giving rise to certain consequences, the legislator must place itself inside that margin, since no constitutional provision explicitly/implicitly obliges the establishment of a reference standard which automatically determines the criminalisation of any injury to a constitutionally or legally established value. In this regard, by Decision no. 683 of 19 November 2014, published in the Official Gazette of Romania, Part I, no. 47 of 20 January 2015, on the legislative solution which imposed the threshold of more than 90 days of hospitalisation of a victim of a road traffic accident resulting in the application of the criminal law, the Court noted that 'the legislator is entitled to place constitutional protection of the value not covered by criminal law in the scope of civil liability', so that the Court implicitly accepted

the argument that the incidence of criminal liability is contingent on a certain seriousness of the act or on a certain level of harm of the value protected by criminal law.

As regards the criminal provisions relating to the act of "abuse of office", the Court found that the absence of certain circumstances with regard to the determination of a certain amount of damage or a certain serious harm to the rights or to the legitimate interests of a natural person or legal person makes it difficult, and sometimes impossible, to delineate criminal liability from other forms of legal liability, with the consequence of initiating criminal investigation, prosecution and conviction of persons who, in the performance of their duties, cause harm or injury to the legitimate interests of a natural or legal person, regardless of the amount of the damage or the intensity of the injury. The criminal provisions in force are formulated in a broad sense and in vague terms, which determines an increased degree of unforeseeability, a problematic issue in terms of Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms as well as of other fundamental requirements of the rule of law principle, this wording representing the premise for arbitrary/random interpretations and applications. Such an omission is of constitutional relevance in the present case [see also Decision no. 503 of 20 April 2010, Decision no. 107 of 27 February 2014 or Decision no. 308 of 12 May 2016, par.41, in which the Court held that 'the omission and legislative inaccuracy are those that create the infringement of the allegedly violated fundamental right'] as it affects fundamental rights and freedoms of the person against whom such a criminal charge is brought. In these circumstances, the Court being bound by the obligation to interpret a legal provision in order to take effect and, thus, to give it a constitutional meaning (see, to that effect Decision no. 223 of 13 March 2012), considers it necessary to set a threshold for the damage and to detail the injury of the harm caused by the offence, elements in relation to which the incidence of criminal law is determined or not.

Given the nature of the legislative omission concerned, the Constitutional Court noted that it does not have the power to repair this legislative defect as it would go beyond its legal powers by acting in the exclusive sphere of competence of the primary or delegated legislator. Consequently, taking account of the constitutional provisions of Article 142 (1), according to which 'the Constitutional Court is the guarantor of the supremacy of the Constitution' and of Article 1 (5), according to which, 'observance of [...] the laws shall be obligatory in Romania', the Court has stressed that the legislator is obliged to regulate the value threshold of the damage and the intensity of the injury or of legitimate interest resulting from the offence within the criminal rules relating to the offence of abuse of office, as its passivity is likely to lead to situations of inconsistency and instability, contrary to the principle of legal certainty in its component of legal clarity and foreseeability.

**III. By a majority of votes**, the Court dismissed as inadmissible the exception of unconstitutionality of Article 297 (1) of the Criminal Code.

*Decision no.392 of 6 June 2017 on the exception of unconstitutionality of the provisions of Article 248 of the 1969 Criminal Code, Article 297 (1) of the Criminal Code and Article 13*$^{2}$ *of Law no. 78/2000 on preventing, detecting and punishing acts of corruption, published in Official Gazette of Romania, Part I, no. 504 of 30 June 2017.*

## 2. The control of constitutionality of legal conflicts [Article 146 (e) of the Constitution]

**Adoption of a Governmental Emergency Ordinance cannot be qualified as an act of arrogation of some powers, duties or competences which, according to the Constitution, belong to the Parliament. In legislative procedure, the Government does not have any constitutional or legal obligation to seek the opinion of the Superior Council of Magistracy on matters other than the activity of the judicial authority.**

**Keywords:** legal dispute of a constitutional nature, legislative delegation, Government Emergency Ordinance, lawmaking procedure, opinion of the Superior Council of Magistracy

**Summary**

**I. As grounds for the requests of settlement of certain legal disputes of a constitutional nature**, the President of Romania and the President of the Superior Council of the Magistracy argue that there was a legal dispute of a constitutional nature between the Executive Authority, represented by the Romanian Government, on the one hand, and the legislative authority, represented by the Romanian Parliament, on the other hand, generated by the Government's arrogation of the power to legislate in the field of organic law in other situations than those permitted by Article 115 (4) of the Romanian Constitution.

The same authors also support the existence of a legal dispute of a constitutional nature between the Executive Authority – Government of Romania, on the one hand, and the judicial authority — the Superior Council of Magistracy, on the other, generated by the Government, which prevented the Superior Council of Magistracy to carry out a constitutional duty concerning the issuance of an advisory opinion as to a legislative act.

**II. With respect to those complaints, the Court held as follows:**

Article 108 (3) and Article 115 (1) (3) of the Constitution establish the Government's power to issue ordinances, therefore a regulatory power, derived from an empowerment law adopted by the Parliament, whereby the sole legislative authority in Romania delegates, for a limited period of time, the law-making power in the areas strictly defined by the Constitution and the empowerment law. The exercise of that competence is also included within the scope of the executive power, since by issuing ordinances, the Government implements the law of empowerment with the particularity that such an law entails in terms of assessing the limits of the empowerments granted. Although by its empowerment, the Government issues an act which, through its content, is of a legislative nature, being the consequence of a legislative delegation, the ordinance remains an administrative act of the executive authority.

Moreover, in terms of the law-making power, the Court notes that the relationship between the legislative and the executive powers becomes complete by virtue of powered conferred upon the Government to adopt emergency ordinances under the terms laid down by Article 115 (4) to (6) of the Constitution. Thus, the emergency ordinance, as a legislative act enabling the Government, under the control of the Parliament, to deal with an extraordinary

situation, is justified by the urgency to regulate this situation, which, because of its circumstances, requires immediate solutions to avoid serious harm to the public interest.

The special regime of the emergency ordinance is laid down in Article 115 (4) to (6) of the Constitution and covers cases in which it may be issued: extraordinary situations whose regulation may not be delayed, the Government having to give reasons for the urgency of the matter; entry into force: only after filing it for discussion in an emergency procedure at the first-referred Chamber and the mandatory convening of Parliament if it is not in session; regulatory area: it may also be of the nature of organic laws, in which case the law of approval shall be adopted by the majority laid down in Article 76 (1) of the Constitution; however, the emergency ordinance may not be adopted in the field of constitutional laws, may not affect the regime of fundamental State institutions; in addition, the emergency ordinance cannot affect the rights, freedoms and duties provided for by the Constitution, or electoral rights, and may not concern measures of forced transfer of property into the public domain.

Having regard to those considerations, the Court notes that, in addition to Parliament's legal monopoly, the Constitution, in Article 115, enshrines the legislative delegation by virtue of which the Government may issue simple ordinances [Article 115 (1) — (3)] or emergency ordinances [Article 115 (4) — (6)]. Thus, the transfer of legislative functions to the executive authority shall be carried out by means of an act of will of the Parliament or, by constitutional route, in exceptional circumstances and only under parliamentary scrutiny.

In light of these considerations, the Court found that the Government's decision to adopt Emergency Ordinance no. 13/2017 amending and supplementing Law no. 286/2009 on the Criminal Code and Law no. 135/2010 on the Code of Criminal Procedure cannot be qualified as an act of arrogation of certain powers, duties or powers which, according to the Constitution, belong to Parliament. It is clear that the Government thus exercises a competence expressly laid down in Article 115 of the Basic Law.

With regard to the competence of the Superior Council of Magistracy on legislative procedures, the Constitutional Court has ruled by settled case-law in the sense that such competence of the Superior Council of Magistracy is legal, given by Parliament's will on the basis of the constitutional text of Article 134 (4), according to which "The Superior Council of Magistracy shall also discharge other powers as determined under its own organic law, in accomplishing its role as a guarantor for the independence of the judiciary.". Although the constitutional rule, expressing the role of guarantor of the independence of justice of the Superior Council of the Magistracy, does not make any specific reference to the obligation of initiators of the draft legislative acts to request the opinion of that authority, the approval of draft legislative acts concerning the activities of the judicial authority is dealt with in the law governing the organisation and functioning of the Superior Council of Magistracy, to which the Basic Law refers.

The Court, however, circumscribed the scope of the term 'legislative acts relating to the activity of the judicial authority', depending on which the legal and constitutional obligation for the competent authorities to seek the opinion of the Superior Council of Magistracy can be determined. In the recitals of Decision no. 901 of 17 June 2009, published in the Official Gazette of Romania, Part I, no. 503 of 21 July 2001, the Constitutional Court held that the term refers only "to legislative acts directly related to the organisation and functioning of the judicial authority, such as the operation of the courts, the career of the magistrates, their rights and

duties, etc., so as not to distort the role of the Superior Council of Magistracy". Consequently, by Decision no. 3 of 15 January 2014, the Court found that draft laws which involve a Council opinion are the legislative acts governing the status of judges and prosecutors (which contain provisions concerning the rights and duties of judges and prosecutors, incompatibilities and prohibitions, the appointment, promotion, suspension and termination of the office of judge or prosecutor, the delegation, the posting and the transfer of judges and prosecutors, their responsibility, etc.), currently governed by Law no. 303/2004, the judicial organisation (courts — organisation/powers/management, Public Ministry — organisation/powers/management, the organisation and functioning of the National Institute of Magistracy, the specialised subsidiary bodies of the courts and prosecutors' offices, the budgets of courts and prosecutors' offices, etc.), currently governed by Law no. 304/2004, as well as the legislative acts on the organisation and functioning of the Superior Council of Magistracy, based on Law no. 317/2004.

The Court held that any other interpretation given to the term legislative acts relating to the activity of the judicial authority would lead to an extension of the powers of the Superior Council of Magistracy that would not be based on clear and predictable criteria, so it would be arbitrary. To accept the hypothesis put forward by the authors of the objection of unconstitutionality, i.e. that the failure to submit to the Council's endorsement the legislative act amending the Criminal Code would be contrary to its constitutional role as a guarantor of the independence of justice, is to accept the argument that the request for an opinion of the Superior Council of Magistracy would be binding in the drafting of all legislative acts. To the extent that any law is likely to bring about a conflicting situation, meaning the the dispute would arrive before a court for settlement, it could be concluded that all legislative acts concern the activity of the judicial authority. However, beyond the lack of legal and logical basis for such an interpretation, the circumstance created would lead to a situation in which the Superior Council of the Magistracy would fulfil powers similar to the Legislative Council, which, in accordance with Article 79 (1) of the Constitution, 'is a specialized consultative organ of Parliament that gives advice on draft normative acts with a view to the systematic unification and coordination of the whole body of laws', which is inadmissible. The Superior Council of Magistracy, as part of the judicial authority, under the provisions of the Basic Law, acting as the guarantor of the independence of justice, cannot be transformed into an advisory body of the Parliament, the primary legislative authority, [or of the Government, delegated legislative authority], without thus affecting constitutional values such as the rule of law or the principle of the separation and balance of powers in a constitutional democracy."

In conclusion, the Court held that the Government has no constitutional or legal obligation to seek the opinion of the Superior Council of Magistracy in matters other than the activity of the judicial authority and that the Superior Council of Magistracy is not legally empowered to issue such an opinion.

**III. The Court by majority vote:**

- found that there was no legal dispute of a constitutional nature between the Executive Authority — the Government of Romania, on the one hand, and the judicial authority — the Superior Council of Magistracy, on the other hand, Emergency Ordinance no.13/2017 amending and supplementing Law no. 286/2009 on the Criminal Code and Law no. 135/2010

on the Code of Criminal Procedure being adopted in the exercise of a Government's powers expressly laid down in Article 115 of the Basic Law.

- found that there was no legal dispute of a constitutional nature between the Executive Authority — the Government of Romania, on the one hand, and the judicial authority — the Superior Council of Magistracy, on the other hand, whereas, by adopting Emergency Ordinance no. 13/2017, the Government did not prevent the judicial authority, represented by the Superior Council of Magistracy, to carry out a constitutional duty consisting in the issuance of an opinion as to the legislative act.

*Decision no. 63 of 8 February 2017 relating to requests for settlement of legal disputes of a constitutional nature between the executive authority - the Government of Romania, on the one hand, and the legislative authority - the Romanian Parliament, on the other hand, as well as between the the executive authority - the Government of Romania, on the one hand, and the judicial authority — the Superior Council of Magistracy, on the other hand, requests formulate by the President of the Superior Council of Magistracy, and by the President of Romania , published in the Official Gazette of Romania, Part I, no. 145 of 27 February 2017* **.**

**By checking the legality and timeliness of the adoption of a Government Emergency Ordinance, the Public Prosecution Office — the Prosecutor's Office attached to the High Court of Cassation and Justice — The National Anti-Corruption Directorate — established that it has the competence to conduct a criminal investigation in an area that goes beyond the legal framework, which may lead to institutional blocking from the perspective of the constitutional provisions enshrining the separation and balance of powers.**

**Keywords:** *legal dispute of a constitutional nature, legislative delegation, government emergency ordinance, law-making appropriateness, criminal investigation, legal responsibility, ministerial immunity*

**Summary**

**I. As grounds for the request of settlement of a constitutional dispute of a constitutional nature**, the President of the Senate argued that there was a legal dispute of a constitutional nature between the Romanian Government, on the one hand, and the Public Ministry, the Prosecutor's Office attached to the High Court of Cassation and Justice — the National Anti-Corruption Directorate, on the other hand, asking the Court to consider whether, by checking the circumstances, the legality and the appropriateness of adopting Government Emergency Ordinance no. 13/2017 amending Law no. 286/2009 on the Criminal Code and Law no. 135/2010 on the Code of Criminal Procedure, the Public Ministry — the National Anti-Corruption Directorate has arrogated the power to conduct a criminal investigation in a field that goes beyond the legal framework, in breach of the Government's competence to adopt legislative acts.

**II. With respect to those complaints, the Court held as follows:**

By way of derogation from the general rule, simple or emergency Government ordinances, administrative acts, are not subject to the legality check by the general courts but, by virtue of their status of primary regulation acts, thus equivalent to the law, they are subject to the constitutional review enshrined by Article 146 (d) of the Constitution. Thus, by virtue of the constitutional rule and of the provisions of Law no. 47/1992, an ordinance, in its entirety or only certain provisions thereof may be subject to the a posteriori constitutional review, i.e. as object of an exception of unconstitutionality. The review covers questions of extrinsic constitutionality, namely the procedure for the adoption of the act, and questions of intrinsic constitutionality, namely the regulatory content of the act. In other words, verification of the legality of simple or emergency ordinances of the Government is intended solely to verifying its compliance with the Basic Law, which enshrines the procedure for the adoption of this type of legislative act and the fundamental rights and freedoms it must comply with within its contents. In accordance with Article 142 (1) of the Constitution, the Constitutional Court is the guarantor of the supremacy of the Basic Law and, in accordance with Article 1 (2) of Law no. 47/1992, it is the sole authority of constitutional jurisdiction in Romania. In other words, according to the constitutional and legal provisions in force, the Constitutional Court alone has the power to carry out the review of the Government's simple or emergency ordinances and no other public authority has any material jurisdiction in this matter. The finding of a lack of conformity with the superior law, the Constitution, deprives of legal effect the legislative act, the sanction applied being aimed only to remove the act from the active fund of the law, without constituting the prerequisites for any legal responsibility by the persons involved in the legislative procedure or in the decision making act.

As regards the control of compliance with the procedure for the adoption of a simple and emergency ordinance by the Government and its regulatory content, in terms of appropriateness, the Court noted that the act of primary regulation (the law, the simple and emergency Government Ordinance), as legal act of power, is the exclusive expression of the intention of the legislator which decides to legislate in the light of the need to regulate a certain area of social relationships and of its specificities.

It follows from an analysis of the case-law of the Constitutional Court that only the existence of objective elements, which could have not been foreseen, can give rise to a situation whose regulation requires expeditious regulation. These elements are ascertained by the Government, which is obliged to give reasons for its intervention in the preamble of the legislation adopted. Therefore, ***the appropriateness of legislating is therefore confined to the decision to adopt or not the legislative act, to pursue active or passive behaviour****, whereas evidence as to the quantifiable, objective elements, which are set out in Article 115 (4) of the Constitution, have been brought. In other words,* ***the decision to legislate only belongs to the delegated legislator****, which, if it decides to regulate a particular legal situation, is bound to comply with the constitutional requirements.*

The Court has held that **the question of whether an emergency order should be adopted, in the light of the decision to legislate, is an attribute of the delegated legislature only, which may be censored solely under the conditions specifically laid down in the Constitution, namely solely on the basis of the parliamentary oversight exercised in accordance with Article 115 (5) of the Constitution**. Therefore, only Parliament can decide

on the fate of the legislative act of the Government, adopting a law approving or rejecting it. During the parliamentary debates, the supreme legislative forum has the power to censor the Government's emergency ordinance, both as regards the legality and *appropriateness* thereof, the provisions of Article 115 (8) of the Constitution stating that the law of approval or refusal shall establish, where necessary, the necessary measures concerning the legal effects produced throughout the application of the ordinance. In the light of the cited constitutional provisions, the Court noted that ***no other public authority, belonging to a power other than legislative power, can control the Government's legislative act in terms of appropriateness of law-making***.

In conclusion, the Court found that the constitutional court is the only one entitled to carry out the review of legality/constitutionality of simple or emergency ordinances of the Government (in terms of both the procedure for adoption and the regulatory content) and no other public authority has any material jurisdiction in this matter. The Court has held that the question of whether an emergency order should be adopted, in the light of the decision to legislate, is an attribute of the delegated legislature only, which may be censored solely under the conditions specifically laid down in the Constitution, namely solely on the basis of the parliamentary oversight exercised in accordance with Article 115 (5) of the Constitution. Finally, the Court noted that in a State of law governed the principle of the separation of powers, Ministers are held accountable for political decisions by political means and not by criminal law.

The Court, given the facts complained against and those taken into account in the order to prosecute in rem, considered that all the elements presented as constitutive material elements of the criminal offences complained of constitute nothing but personal opinions or criticism of the authors of the denunciation on the legality and appropriateness of the act adopted by the Government. Thus, the circumstances of the adoption of the legislative act, the conflicting public positions of the Minister of Justice and of the Prime Minister, followed by the decision to adopt Government Emergency Ordinance no. 13/2017 amending and supplementing Law no. 286/2009 on the Criminal Code and Law no. 135/2010 on the Code of Criminal Procedure, without waiting for the opinion of the Superior Council of the Magistracy and without such being subject to the agenda or the additional agenda of the Government meeting of 31 January 2017, clearly represent aspects related to the legality and the appropriateness of the adoption of the act that is criticised, which cannot be covered by the sphere of competence of the public prosecutors and cannot be subject to criminal investigation.

The Court, having examined the legal situation complained of, such as it was highlighted by the prosecutor in the order to start criminal proceedings in rem, held that, as regards the offence of abetting a perpetrator, as provided for in Article 269 of the Criminal Code, that this offence cannot be committed by adopting a legislative act. It is clear that a leniency (pardon) regulatory instrument or and instrument of decriminalisation of certain offences is favourable to certain persons who have committed the offences covered by that legislative act, but this aspect cannot be construed as meaning 'aiding a perpetrator' as a material element of the offence of abetting a perpetrator. Article 269 of the Criminal Code takes into account other hypotheses, that is to say, strictly individualised acts that can constitute an aid to the perpetrator, thus preventing justice be done in a criminal case. The leniency or decriminalisation legislative acts are always the will of the legislator and its choice is justified

by certain social, legal, economic needs, related to a particular time in the evolution of the society. It is clear that by their regulatory nature, laws and Government ordinances have general applicability and cover an indeterminate number of subjects. In this logic, it becomes possible that such legislation covers also the relatives, friends or acquaintances of the persons enacting it. To accept that is to accept that the primary or the delegated legislator could never adopt legislative acts without being penalised under criminal law, since the more favourable nature of the adopted rules would always favour certain perpetrators. The Court notes that it is precisely the generality of the legislative act, its applicability to an undefined number of persons, differentiates the legislative act from an individual act, which alone is likely to be produce benefits, advantages, aid within the meaning of the criminal law.

It is therefore not acceptable that the primary or delegated authority (whether parliamentarians or ministers) fall within the scope of criminal law by the mere act of adopting, or taking part in the decision making act of adoption of the legislative act, whereas such authority merely exercises a constitutional power. By virtue of the immunity accompanying the decision-making act to legislate, which, as the Court has previously held, is applicable mutatis mutandis also to members of the Government, no parliamentary or minister may be held liable for political opinions or actions carried out for the drafting or adoption of legislative acts having force of law. To admit the contrary is to, indirectly, leave the possibility for intrusion in the legislative process of another power, with the direct consequence of the violation of separation of powers in the State. The lack of legal responsibility for the law-making activity is a safeguard for the exercise of the mandate against any pressure or abuse that might be committed against the person holding the position of parliamentarian or minister, his or her immunity ensuring his or her independence, freedom and security in the exercise of his or hers rights and obligations under the Constitution and laws.

In the light of all the above, the Court found that the state of play described in the legal act instituting proceedings before the judicial body and legally framed in provisions of Article 269 of the Criminal Code, Article 13 of Law no. 78/2000 and of Article 8 (1) (b) of Law no. 115/1999 constitutes the procedural framework taken into account and assumed by the National Anticorruption Directorate, which by the Order of 1 February 2017 ordered the initiatio of the criminal prosecution in rem, with regard to the facts complained of. However, given all the arguments set out above, the judicial body was under the obligation to take no further action, on the basis of Article 294 (3) of the Code of Criminal Procedure, without carrying out criminal proceedings,given the applicability of Article 16 (1) of the same Code, since all the facts complained of in reality concerned aspects of the procedure for the adoption of a legislative act, that is to say, aspects of appropriateness and legality which do not fall under the control of the criminal investigation bodies, regardless of the legal classification established by the public prosecutor. Since, by itself, the adoption of legislative acts cannot constitute the material element of criminal offences, the Court found that the facts complained of through the denunciation which formed the basis for opening the Case File no.46/P/2017, which was recorded on the docket of the Section for combating corruption offences within the National Anticorruption Directorate, cannot be covered by the criminal law, irrespective of the legal classification given.

For these reasons, given that the Order of 1 February 2017 of the National Anti-Corruption Directorate stipulated that “none of the cases preventing the initiation or taking up of criminal

proceedings appears to exist in this case" and as a consequence criminal prosecution was ordered and criminal investigation of the offences mentioned in the denunciation was carried out, it appeared as obvious that the Public Ministry, as part of the judicial authority, considered itself competent to verify the appropriateness, the compliance with the legislative procedure and, implicitly, the legality of the adoption of the Government Emergency Ordinance. Such a conduct is equivalent to a serious breach of the principle of separation of powers, guaranteed by Article 1 (4) of the Constitution, since the Public Ministry not only went beyond the powers laid down in the Constitution and the law, but arrogated powers belonging to the legislative power or to the Constitutional Court. In his activity of interpretation and application of the law, the public prosecutor must strike a balance between the spirit and the letter of law, between the wording requirements and the purpose of the legislator, without having the power to substitute the competent authorities in this area. The obligation incumbent on prosecutors derives directly from the constitutional rules of Article 131 of the Constitution, according to which, in their judicial activity, they represent the general interests of society and defend the order of law and the rights and freedoms of citizens.

In this light, the Court found thatby the examination of the circumstances in which Government Emergency Ordinance no. 13/2017 amending and supplementing Law no. 286/2009 on the Criminal Code and Law no. 135/2010 on the Code of Criminal Procedure was adopted, the Public Ministry – the Prosecutor's Office attached to the High Court of Cassation and Justice – the National Anti-Corruption Directorate arrogated the competence to conduct a criminal investigation in an area which goes beyond the legal framework, which may lead to institutional blocking from the perspective of the constitutional provisions enshrining the separation and balance of powers. Thus, given that the initiation of criminal prosecution involves criminal investigations and inquiry on how the Government has carried out its tasks as delegated legislator, the Public Prosecutor's action ceased to be a legitimate one, and it became abusive, as it went beyond the competence laid down by the legal framework in force. Furthermore, the action of the Public Ministry creates pressure on the members of the Government affecting the proper functioning of this authority in terms of law-making, with the effect of discouraging/intimidating the delegated legislator to exercise its constitutional powers. The launch of en extensive criminal investigation, resulting in inspections at the Ministry of Justice, removal of documents, hearing large numbers of civil servants, state secretaries and ministers brought a state of tension, mental pressure even in the course of some regulatory procedures, creating the preconditions for law-making blocking. Thus, under a feeling of fear triggered by the criminal prosecution activity and formulation of future accusations that may be covered by criminal liability, the Government was blocked in its legislative activity. The circumstance thus created deprives of content the constitutional guarantee relating to the immunity inherent to the law-making activity enjoyed by the members of Government, guarantee aimed precisely at protecting the mandate against any pressure or abuse that might be committed against the person holding the position of minister, his or her immunity ensuring his or her independence, freedom and security in the exercise of his or hers rights and obligations under the Constitution and laws. By its conduct, the Public Ministry — the Prosecutor's Office attached to the High Court of Cassation and Justice — the National Anti-Corruption Directorate acted ultra vires, arrogating a competence which it did not possess — control of the way in which a legislative act was adopted, in terms of the legality and

appropriateness of the act, which has affected the proper functioning of an authority, situation which has its remedy in the provisions of Article 146 (e) of the Constitution, which provides for the resolution of legal disputes of a constitutional nature between public authorities by the Constitutional Court.

**III.** By majority vote, the Court found that there was a legal dispute of a constitutional nature between the Public Ministry — the Prosecutor's Office attached to the High Court of Cassation and Justice — the National Anti-Corruption Directorate and the Government of Romania, generated by the Prosecutor's Office attached to the High Court of Cassation and Justice — the National Anticorruption Directorate arrogation of the task to verify the legality and appropriateness of a legislative act, i.e. Government Emergency Ordinance no.13/2017, in violation of the constitutional powers of the Government and the Parliament, as laid down by Article 115 (4) and (5) of the Constitution, respectively of the Constitutional Court, as laid down by Article 146 (d) of the Constitution.

*Decision no. 68 of 27 February 2017 concerning the request to settle the legal dispute of a constitutional nature between the Government of Romania and the Public Ministry — the Prosecutor's Office attached to the High Court of Cassation and Justice — the National Anti-Corruption Directorate and the Government of Romania, generated by the Prosecutor's Office attached to the High Court of Cassation and Justice — the National Anticorruption Directorate, request formulated by the President of the Senate , published in Official Gazette of Romania, Part I, no. 181 of 14 March 2017.*