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**Misdemeanors and Offenses Covered by G.E.O. No. 60/2001 Regarding Public Acquisitions. Aspects of Unconstitutionality. Case Study**

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**Abstract:** The present paper aims to analyze the unconstitutionality found within art. 98 para. 1 of G.E.O. no. 60/2001 regarding public acquisitions, legislative text that establishes both contraventions and offenses committed by different people in public acquisitions procedures. The analyzed expression is a phrase predominantly used by the Romanian legislator in various special laws, namely: “constitutes contraventions and are punished the following acts, unless committed in such conditions as to be considered, according to criminal law, infractions”. The implications of this analysis focuses mainly on public acquisitions but its effects may occur on absolutely any enactment containing the phrase mentioned above. Academic and practical importance of this approach is that although legal rules invoked are abrogated, they continue to produce their effects in the criminal cases of the National Anticorruption Department which are still pending before the courts. Furthermore, the arguments can be used, inclusively for lodging an unconstitutionality objection concerning this phrase in other criminal or civil cases that directly or indirectly concern the public acquisition procedures.

**Keywords:** objection of non-constitutionality; abuse of office; infractions relating to public acquisition procedures

## **1. Introduction**

In fact, the National Anticorruption Department (hereinafter DNA) sent to trial the management bodies of the Company Nuclear Electrica SA (hereinafter SNN) for crimes of abuse of office consisting in infringement of formal procedures of public acquisitions foreseen by G.E.O. no. 60/2001. Jurisdiction of DNA to pursue this was justified by invoking the text of art. 98 para. 1 of G.E.O. no. 60/2001 containing the phrase “constitutes a contravention and are punished the following acts, unless committed in such conditions as to be considered, according to criminal law, infractions”. Even though in the present case had been carried out an inspection by ANRMAP<sup>2</sup>, control completed with an inspection report which ascertained that the acts committed represent contraventions, the Court of Accounts of Romania decided in parallel the referral of DNA for the same deeds, considering, however, that these are infractions and not contraventions. DNA ordered the initiation of prosecution for the mentioned offenses.

In the present case it has been drawn up and submitted for judging a bill of indictment at the Bucharest District Court, indictment that contained numerous references to G.E.O no. 60/2001 and G.D. no.

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461/2001 for implementing G.E.O no. 60/2001. However, the bill of indictment targets allegedly acts of abuse of office and not specific crimes in the public acquisitions procedure.

In the following, we will analyze the unconstitutionality drawn from the text of article 98 para. 1 of G.E.O. no. 60/2001.

The mainly targeted aspects regard the fact that the phrase used by the legislator has an uncertain and unpredictable character which can result in inconsistent application of these provisions nationwide. Emphasis is placed on the lack of objective criteria to differentiate deeds that may be considered misdemeanors of those who meet the elements of the crime.

This legislative gap has as its leading cause the fact that when adopting G.E.O no. 60/2001 the legislator did not have in mind that criminal law does not contain provisions to sanction certain offenses as crimes committed in the public acquisition procedure.

In this context, we see that the same deeds, committed by the same person at the same time and under the same conditions, can be seen by the public institutions as mere misdemeanors, while in the view of judicial bodies, they acquire a criminal character.

The procedural proposed solution is invoking an objection of non-constitutionality before the court that hears the merits of the penal case with the purposes of delivering by the Constitutional Court of Romania of a decision by which either it pinpoints the criteria or limits to which the misdemeanor becomes an offense or to declare the unconstitutionality of these provisions and accordingly by changing them by the legislative authority.

The natural consequence of such a decision is to clarify all situations in the which the Romanian legislator used the phrase “constitutes a contravention and are punished the following acts, unless committed in such conditions as to be considered, according to criminal law, infractions” but failed to establish in the criminal legislation corresponding crimes for misdemeanors.

Without wishing to be an exhaustive approach, this paper aims to present a number of arguments in the favour of the admissibility of the objection of unconstitutionality regarding the phrase itself, regardless of the legal text that contains it.

## **2. General Conditions of Admissibility**

Regarding the general conditions of admissibility provided by the framework law on the Constitutional Court of Romania, in order to file an unconstitutionality exception in front of the Constitutional Court of Romania, any motion must meet the following general conditions:

- *the motion should regard a legal provision applicable in the case;*

Regarding the incidence of art. 98 of G.E.O no. 60/2001 in the present study is relevant is that this legal text is the one that led to the the notification act of law enforcement agencies.

Thus, the Court of Auditors, after inspection, decided to lodge a complaint to the DNA for offenses of abuse of office concerning the public acquisition contracts signed by SC Nuclear Electrica SA with various suppliers, due to the fact that it was not respected the legislation for public acquisitions, namely, art. 98 of G.E.O. no. 60/2001 which states that “constitutes a contravention and are punished the following acts, unless committed in such conditions as to be considered, according to criminal law, infractions”.

Correspondingly, the indictment was based on provisions G.E.O. no. 60/2001, the prosecutor considering that the alleged deeds adduced against the defendants, according to art. 98, constitutes offenses within the criminal law and not misdemeanors in the legal sense provided by the public acquisition legal framework.

- *The exception must be invoked before a court of law or commercial arbitration and*

Since the exception was raised before the Court of Appeal Bucharest into a pending case, we consider that this condition is met.

- *The provisions relied upon has not been found to be unconstitutional by an earlier decision of the Constitutional Court.*

Given that up to this point, regarding the provisions of art. 98 of G.E.O no. 60/2001 there was no objection of non-constitutionality invoked and that following the investigations carried out we have not identified any decision pronounced the Constitutional Court in this regard, we consider that this condition is also met.

- *the provisions challenged in an objection of unconstitutionality to be in force at the time the objection.*

Not only in the this case, but in other similar legal situations, subject to different laws in force illo tempore, have been generated legal situation but remained to be decided after these legal provisions were no longer into force.

Following the principle of tempus regit actum and applying lex mitior, such cases are to relate effectively to the legal provisions, so although abrogated the legal provision still applies in this case.

Otherwise, by applying rigid condition that law or ordinance to be in force at the date of lodging the objection, as well as at the date of its settlement by the Constitutional Court, it removes the relevant legal provisions from the control of constitutionality.

In this regard, the Constitutional Court issued the Decision no. 766/15.06.2011 regarding the term “in force” of the provisions of art. 29 para. (1) and Art. 31 para. (1) of Law no. 47/1992 on the organization and functioning of the Constitutional Court. On this occasion, CCR held that this phrase “in force” “is constitutional to the extent that is interpreted in the sense that they are subject to constitutional review also the laws or ordinances or provisions of laws or ordinances whose legal effects continue to occur after their abrogation”.

On the other hand, the Constitutional Court has ruled in several cases on the legal provisions that were no longer in force at the date of the decision of the Court. A precedent is the Decision No. 1221/12.11.2008, published in the Official Monitor of Romania, Part I, no. 804 of 2.12.2008, in which the Court held that the unconstitutionality of an emergency ordinance found by the Constitutional Court strikes the legislative act as a whole so that the abrogation of certain provisions of the normative act criticized after the objection of non-constitutionality was filed, has no relevance on the outcome of the unconstitutionality. The same solution was adopted by CCR trough the Decision no. 842/02.06.2009, published in the Official Monitor of Romania, Part I, no. 464 of 06.07.2009, Decision no. 984/30.06.2009, published in the Official Monitor of Romania, Part I, no. 542 of 04.08.2009, or by Decision no. 989 din 30.06.2009, published in the Official Monitor of Romania, Part I, no. 531 of 31.07.2009.

Therefore, we consider that art. 98 of G.E.O. no. 60/2001 contravenes to Art. 1 par. 5, regarding supremacy of the Constitution and the law compulsoriness, Art. 16 para. One regarding equality of

rights, art. 21 para. 3 on the right to a fair trial and Art. 23 para. 12 regulating the principle of legality of criminal offenses, of the Romanian Constitution revised.

### **3. The Merits of the Exception of Unconstitutionality**

Art. 98 of G.E.O. no. 60/2001, is devoid of predictability and contrary to art. 1 par. 5 of the Constitution, because the public servant, who could become an active subject of this incrimination, has difficulties to anticipate which are the actual conditions, for the breaching of his duties, against the provisions G.E.O. no. 60/2001, may lead to criminal liability.

The provisions of the law criticized are devoid of predictability and accessibility because from the way of defining the crime cannot be determined accurately the conduct of the material criminal element. We believe that the legislator established an incrimination that has a general character; the provisions criticized having an ambiguous character, with the preposterous hypothesis that exactly the same facts are considered misdemeanors but at the same time, the criminal investigation bodies to order the initiation of criminal action and prosecution, virtually for committing misdemeanors.

The Constitutional Court ruled in its case-law (e.g. Decision no. 1 of January 11, 2012, published in the Official Monitor of Romania, Part I, no. 53 of January 23, 2012) that, in principle, any piece of legislation must meet certain qualitative conditions, among them being the predictability, which means that it must be sufficiently precise and clear in order to be implemented.

With regard to the same compliance requirements of the law, as a guarantee of the principle of legality, European Court of Human Rights, through judgments in Rotaru against Romania (para. 52), Sissanis against Romania (para. 66), Dragotoni, Militaru-Pidhorni against Romania (para. 34) and Beyeler against Italy (para. 109) retained the obligation to ensure these quality standards of the law as a guarantee of the principle of legality under art. 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

European court ruled that can be considered “law” only the norm formulated with sufficient precision in order to enable the citizen to control their the conduct; resorting to expert advice in the field, he must be able to foresee, to a reasonable extent, in regard with the case circumstances, the consequences that might result from a particular deed.

The text of Article 98 of G.E.O. 60/2001 is against Art. 23 para. 12 of the Constitution, as establishes both administrative liability and criminal liability of legal subjects without making a gradual differentiation of the deed and without establishing objective criteria under which a specific deed can be considered a criminal offense.

The Constitutional Court, in its jurisprudence, held that the provisions of criminal law are an expression of art. 23 para. 12 of the Constitution, according to which “Any punishment can be established or applied only in accordance with and pursuant to the law”, as well as those of art. 73 para. 3 h), which regulates the legislator competence to establish criminal offenses, punishments and the execution thereof.

Furthermore, legal texts criticized are deficient in terms of lack of correlation with other similar provisions of the Criminal Code and those regulated by special laws, which is likely to cause confusion, uncertainty and difficulties regarding the interpretation and its application. Therefore, the flaws of drafting the criticized laws determines the violation of a fair trial because the withholding or not of an offense is carried by the court in an arbitrary manner based on subjective appreciations. The norm

criticized also determines infringement of the principle of non-discrimination, since the same act can be interpreted by a prosecutor as a crime, and by another as a misdemeanor.

Relating the argument presented above with the present case, we note that the legislator has fulfilled only in a formal manner its constitutional jurisdiction to legislate, given that the content of art. 98 of Ordinance no. 60/2001 fail to establish with clarity and precision the material object of the crime, causing a lack of predictability of it.

Text under the control of constitutionality does not meet quality conditions of the law, namely, from the phrase “constitutes a contravention and are punished the following acts, unless committed in such conditions as to be considered, according to criminal law, infractions” cannot be determined which are specifically the conditions in which the deeds may constitute a misdemeanor and what are the conditions in which the same acts as the material element of the objective side, represents an offense.

The provisions at issue does not comply with any requirement of accessibility of the law considering that do not define themselves the conditions for the existence of the offense and do not even refer to a normative act of equal rank who would be in connection with, respectively to indicate the conditions under which a deed transcends the contraventional illicit and enters in the scope of criminal illicit.

As an example, in the matter of driving a vehicle under the influence of alcohol, we are in the same situation, and basically the same act is considered a contravention and offense at the same time. But the legislator has expressly provided alcohol limits up to which an act can be considered a contravention and especially the limits from which a deed can be considered a crime.

Thereby, we see that the text of art. 102 par. 3 letter a) G.E.O. no. 195/2002 states that is a misdemeanor and is punishable by the fine provided in the fourth grade of sanctions and the additional sanction of suspension of the right to drive for a period of 90 days, the deed of the driver of a vehicle, agricultural or forestry tractor or tram driving under the influence of alcohol, if the act is not according to the law an offense.

Apparently in this situation the legislator used a generic formulation, that “if the deed is not according to the law a criminal offense”. But analyzing the criminal legislation in force, we find that the text of art. 336 of the Criminal Code regulates the crime concerning the driving a vehicle under the influence of alcohol or other substances text states that: “Driving on public roads of a vehicle for which the law requires holding a driving license to a person who, at the time of collection of biological samples has an alcohol concentration of more than 0.80 g/l of pure alcohol in the blood is punished with imprisonment of one to five years or a fine”.

Hence, applicable law that sanctions driving a car under the influence, includes clear and objective criteria explicitly delineating crimes from contraventions by setting a threshold value of the detected alcohol concentration.

Incidentally, this is the opinion expressed by the Constitutional Court which showed that “prohibited conduct should be imposed by the legislator in the text of the law and not deducted from reasoning of the judge”. (CCR Decision no. 405/06.15.2016)

In criminal matters, the principle of legality of criminal offenses, *nullum crimen sine lege*, *nulla poena sine lege* requires that only the primary legislator (Parliament by Law and Government by Emergency Ordinance) can determine the conduct that the recipient of the law is obliged to respect.

According to the regulation contained in art. 98 lit. a) G.E.O. no. 60/2001, “conducting a public procurement by evading or violating the provisions of this Ordinance and the regulations issued for its

application, constitutes a contravention and is sanctioned unless they are made under such conditions as to be considered according to criminal law as infractions”.

We observe that the same action is either misdemeanor or a criminal offense, depending on a number of criteria not specified in absolutely no criminal law. In other words, the legislator has not made an explicit distinction in the sense of specifying explicit circumstantial elements under which a deed must be analyzed. It is not disputed that it can not be predictive a rule that does not give nor to a court of law nor the public prosecutor an exact description of the offense, unpredictability affecting also the judicial independence.

According to art. 8 par. 4 of Law no. 24/2000 on legislative technique for drafting new legislation, “form and aesthetic of expression must not prejudice legal style, precision and clarity of the provisions” and, according to art. 36 para. 1 of the same law, “legal documents must be written in a language and style specific legal regulatory, concise, sober, clear and precise to exclude any ambiguity with strict adherence to grammar and spelling.”

In such circumstances, we consider that, in drafting laws, the legislator must ensure that the use of terms is performed in a rigorous manner, in a legal language and style which essentially is a specialized and institutionalized language.

We observe that the text of art. 98 of G.E.O. no. 60/2001 violates the provisions of art. 16 para. 1 of the constitution. The text of Article 98 creates a clearly discriminatory situation even between the same subjects given that the actions or inactions of the same person may be regarded as a contravention by ANRMAP and by DNA as crimes. In this situation it would bear a positive conflict of jurisdiction that may not be solved by any court because, as we have shown, the judge cannot set himself up as a legislator and determine where the contravention ends and where the offense begins.

Article 98 of G.E.O. no. 60/2001 violates inclusively the provisions of article 21 para. 3 of the Constitution concerning the right to a fair trial considering that you cannot claim a subject of law to comply with a law that is not clear, precise, predictable and accessible, because he fails to adjust his conduct according to the hypothesis of the normative text. Correspondingly, any subject of law cannot defend properly without knowing exactly what are the charges against him.

Thereby, the phrase “unless committed in such conditions as to be considered, according to criminal law, infractions” from art. 98 of G.E.O no. 60/2001 violates the right to a fair trial because it cannot warn the receiver of the law about the seriousness of the consequences of breaching the law.

Relevant to the present study is the ultima ratio principle applicable in criminal policy of the state of law. By virtue of this general principle the legislator has an obligation to intervene and prosecute a illegal act only as a last resort to protect social values. But it is not enough to find that facts alleged affect protected social value, but this interference must present a certain degree of intensity, severity justifying the criminal sanction.

The unconstitutionality of art. 98 of G.E.O. no. 60/2001 is motivated by the position of the very state institutions with control responsibilities in public procurement and the position of law enforcement agencies.

Another argument in support of the above is the opinion expressed by the Legislative Council when considering legislative proposal concerning the vouchers holiday context in which showed that “provision that states that constitutes a contravention and are punished the following acts, unless committed in such conditions as to be considered, according to criminal law, infractions” is in contradiction with the definition of the misdemeanor in Government Ordinance no. 2/2001 on the legal

regime of misdemeanors which provides that the act described as a contravention in the law can only be a contravention, an one cannot, through interpretation, to change its legal characterization. Precisely to eliminate any confusion between misdemeanor and crimes by government ordinance was abrogated from the misdemeanor definition the comparison with the social danger of the crime and by Law no. 180/2002 was introduced the specification of the principle “the contraventional law defends social values which are not protected by the criminal law”

#### **4. The Position Expressed by the Court**

The court before which was filed the objection of unconstitutionality rejected the criticism arguing that the provisions are not applicable in this case brought before it.

Thereby, the court found that:

“In terms of the relevance of unconstitutionality from the point of view of connection with solving the merits of the case, the Court notes that, indeed, the defendants investigated in the present case were charged, among others, with a series of infringements of G.E.O. no. 60/2001 on the procedure for the award of public procurement contracts.”

However, based on the content of the legal text criticized as well as their pleas, it is observed that solving the unconstitutionality exceptions could not have any effect in the present case.

As we can notice, the defendants from the present case were not prosecuted for committing offenses punishable under the ordinance in question, but for crimes covered by the Criminal Code, not covered by this call for referral to the Constitutional Court, respectively abuse of office with extremely serious consequences, given that the accusation consists, among others, on violation of certain provisions of Ordinance no. 60/2001 on the procedure for the award of public procurement contracts, articles expressly mentioned in the indictment and as well in the judgment of the court of first instance”.

#### **5. Cassation**

Against the decision to reject the objection of unconstitutionality, the defendant through a lawyer filed an appeal to the High Court of Cassation and Justice.

Arguments were mainly related to the condition of admissibility regarding the incidence of the criticized text of the law in the case deferred for trial.

Thus, in regard of the incidence of art. 98 of G.E.O no. 60/2001 in the present case, we see that this text of law is the very foundation of this case being the normative act that was the basis of the prosecution acts and thus the basis for issuing the indictment.

The Court of Accounts decided the notification of the DNA for offenses of abuse of office on public procurement contracts signed by SC Nuclear Electrica SA.

In motivating of the referral, the Court of Accounts retained the infringement of incident legislation on public procurement, provided by art. 98 of G.E.O. no. 60/2001 which states that “constitutes a contravention and are punished the following acts, unless committed in such conditions as to be considered, according to criminal law, infractions”.

The indictment was based on the phrase “constitutes a contravention and are punished the following acts, unless committed in such conditions as to be considered, according to criminal law, infractions”

from art. 98 of G.E.O. no. 60/2001, the prosecutor considering that the alleged facts incriminating the defendant constitutes an offense within the criminal law and not misdemeanors in the legal sense of the public procurement legal framework, as noted by the ANRMAP.

In other words, the only article that would attract jurisdiction of the criminal prosecution authorities is the article 98 of G.E.O. no. 60/2001, if not the deed would have been qualified as contraventions context in which the case file would not have reached the court.

In the indictment, the prosecutor motivates the solution for beginning the criminal action and referral to court on the provisions of G.E.O no. 60/2001 and G.D. no. 461/2001, allegedly infringed by the defendants in the present case, with reference to art. 98 of G.E.O no. 60/2001. Hence, in the indictment, the prosecutor made specific reference to provisions of art. 98 - point f of G.E.O. no. 60/2001.

Furthermore in the indictment, the public prosecutor quotes from the Control report drafted by ANRMAP where is withheld that the deeds “are considered misdemeanors under article. 98 lit. a and c of G.E.O. no. 60/2001”.

Even the public prosecutor in the indictment, in justifying the legality of the notification of the prosecution notes that “according to art. 98 of G.E.O no. 60/2001 constitute contraventions and sanctioned the following deeds, if they are not committed under such conditions as to be considered in the sense of the criminal law, as offenses. Following an audit the Court of Auditors of Romania at SNN on the same contracts, the Court of Auditors of Romania notified DNA”.

Moreover, the court of first instance, in the sentence makes express reference to the provisions of G.E.O. no. 60/2001, using phrases such as “the bidder thus breaching art. 40 para. 1 and par. 3 of G.E.O. no. 60/2001”; “contrary to art. 15 para. 1 of G.E.O. no. 60/2001”; “the court finds that the provisions of art. 12 letter a) G.E.O. no. 60/2001 were inapplicable”; “the selection of the procedure of negotiation with a single source was made in violation of art. 10 of G.E.O. no. 60/2001”; “by accepting the offer were not respected art. 2 letter a) and b) of G.E.O. no. 60/2001”.

Thus, we have the following hypothesis:

- Control authorities respectively ANRMAP and the Court of Auditors in inspection reports, held that public procurements were made in violation of G.E.O. no. 60/2001.
- ANRMAP the only competent authority to establish the facts by which the legal provisions in public procurement are breached or infringed, holds that these alleged breaches are considered misdemeanors;
- DNA, in the indictment holds that the same breaches, considered by ANRMAP as misdemeanors, are crimes under Art. 98 para. 1 of G.E.O. no. 60/2001;
- According to the sentence, the court of first instance, in the conviction considerations withheld alleged violations of the provisions of G.E.O. no. 60/2001.
- according to art. 98 of G.E.O. no. 60/2001 “constitutes contraventions and are punished the following acts, unless committed in such conditions as to be considered, according to criminal law, infractions”:  
a) performing a public procurement by evading or violating the provisions of the present Government Emergency Ordinance or of the norms issued in its application”.

Therefore, the only logical and natural conclusion is that there is an inextricable link between art. 98 of G.E.O. no. 61/2001 and the present case.

In support of the argument set out above, we point out that the case prosecutor, refer to the report of ANRMAP and acknowledge that “the representatives of ANRMAP have determined facts that are



considered contraventions but according to their legal duties, they are unable to determine what constitutes an offense”.

Also, to give an appearance of legitimacy of the solution for trial, the prosecutor shows that:

“In the present case as was shown previously the deeds acquired criminal character through the breach of duties by the public officials and by producing certain damages at the expense of the contracting authority”.

The prosecutor used the phrase “acquired criminal character” in order to justify the criminal proceedings against the defendants for several misdemeanors which he interpreted as being offenses.

The essence of the objection of unconstitutionality is the very unpredictable nature of art. 98 of G.E.O no. 60/2001 which leaves to the discretion of the prosecutor whether certain deeds represent misdemeanors or offenses without the legislator to determine in the text of the legislation which are the objective criteria that must be considered and what is the limit, for the same actions, from which the deed goes beyond the contravention and becomes crime.

We consider that the courts judgment to reject the plea of unconstitutionality is erroneous since the defendants were not charged, “among others” but exclusively with alleged violations of G.E.O no. 60/2001 and of the norms implementing the legislation on public procurement.

## **6. Conclusions**

We see therefore that the phrase *“are contraventions and are sanctioned the following acts, if not committed in such conditions as to be considered by the criminal law as offenses”* involves a number of criticisms from the perspective of constitutionality of the wording.

The unconstitutionality is not aimed solely at the wording but mainly, but targets the fact that subsequently of using this phrase, the Romanian legislator did not have in mind the objective criteria by which to define the contraventional sphere from the criminal one in the public procurement law, as it did in other cases encountered in the legislation.

Thereby, although generic, the previously invoked phrase might become constitutional to the extent that the legislator should intervene and regulate in criminal legislation either a criteria for determining the contraventional sphere from the criminal illicit or by express incrimination of certain deeds as offenses.

The lack of predictability and accessibility of the analyzed legal text could be complemented without the intervention of the legislator also by the Constitutional Court of Romania by issuing an interpretative decision.

Nevertheless, until the intervention of the state in the criminal policy on public procurement legislation, we believe the current legal framework contradicts the fundamental legal provisions of the Constitution and the principles of criminal law.

## **7. References**

Convention for the Protection of Human Rights and Fundamental Freedoms.

Romanian Constitution.

Criminal Code.

Law no. 24/2000 on legislative technique for drafting new legislation.

Law no. 47/1992 on the organization and functioning of the Constitutional Court.

G.E.O. no. 60/2001 regarding public acquisitions.

G.D. no. 461/2001 for implementing G.E.O no. 60/2001.

Decision no. 1 of January 11, 2012 of the Constitutional Court, published in the Official Monitor of Romania, Part I, no. 53 of January 23, 2012.

Decision No. 1221/12.11.2008 of the Constitutional Court, published in the Official Monitor of Romania, Part I, no. 804 of 2.12.2008.

Decision no. 405/06.15.2016 of the Constitutional Court, published in the Official Monitor of Romania, Part I, no. 517 of 08.07.2016.

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