RIGHT TO A FAIR TRIAL IN THE CONTEXT OF CLASSIFIED INFORMATION. A SURVEY IN THE LIGHT OF CCR'S CASE-LAW

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Abstract

The paper intends to analyze the issue of respecting the right to a fair trial in the situation where the effectiveness of the defence depends on documents containing classified information. There is a delicate issue regarding the vulnerability of guarantees of the right to a fair trial in order to ensure the right of defense, given that the parties' lawyers should have access to all the evidence in the file. Obtaining an ORNISS certificate is the solution offered by law, but to really get one can be problematic. Based on various situations occurred during the proceedings, the whole legal regime of classified information and its influence on the conduct of the trial, in the qualitative requirements of fairness imposed by the Constitution and the Convention for the Protection of Human Rights and Fundamental Freedoms, have been subject to the constitutional review exercised by the CCR. This article aims to summarize the case-law of the Constitutional Court, drawing the appropriate conclusions from it, in order to find the most efficient way to harmonize the need to protect the national security by classifying certain pieces of information with the right to access to public information and with the constitutional and conventional imperative of respect for the right to a fair trial.

Keywords: *Right to a fair trial, Classified information, Right to defence, Constitutional review, Constitutional case-law.*

1. Introduction

The right to defence, as an indispensable part of the right to a fair trial, cannot be fully accomplished unless the parties involved in the trial, as well as the trial judge and the prosecutor are able to know in full the contents of the file, including all the evidence it contains. However, there are situations where some important documents on which the accusation is based fall into the category of classified information and are therefore subject to a special regime regarding access to their content. It is about that information, data, documents of interest for national security, which, due to the levels of importance and the consequences that would occur as a result of unauthorized disclosure or dissemination, are protected by law, access to their content being allowed only to certain persons, which meet the conditions strictly provided by Law no. 182/2002 on the protection of classified information[1].

In such cases, there is an issue regarding violation of the principle of equality of arms in the process, for the party unable to read all the information in the file, due to the fact that it does not meet the standards of trust required by law to allow access to this kind of information. For this party, the right to defence remains only illusory and theoretical, contrary to the requirements established by art. 21 para. (3) of the Romanian Basic Law and those established by art.6 para. 1 of the ECHR and Fundamental Freedoms, as well as by the case-law of the ECtHR, which shows that it should have sufficient guarantees to make it concrete and effective.

Even if it generates intense tensions, this issue has not been the subject of analysis of doctrinal studies and has been limited to the jurisdictional area, where a number of courts have faced the issue of providing a fair balance between the need to ensure access to information and, subsequently, the right of defence of the parties to the proceedings - on the one hand - and the interest in protecting national security and safety - on the other. In order break this vicious circle, CCR was asked to analyse various aspects involved in the application of the provisions of Law no. 182/2002 in criminal proceedings, but also in civil or administrative litigation.

Through the solutions it rendered, the CCR brought necessary clarifications, highlighting the vulnerabilities of the legal provisions regarding the classified information, from a constitutional point of view. The present paper aims to make a synthesis of the wide and complex issues contained in its decisions and to underline the practical implications of the case-law of the Constitutional Court in this particularly sensitive matter.

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[1] Published in the Official Gazette of Romania, Part I, no. 248, April 12, 2002.

2. General overview of the legal framework referring to classified information

In a democratic society, where human rights and fundamental freedoms enjoy general respect and are granted both by state authorities and other subjects of law participating in social life, free access to information of public interest, with its multiple implications in the legal field, is essential to ensure a climate based on certainty and predictability, where all individual have the effective opportunity to evolve in accordance with their own aspirations, orienting their development according to clear and firm information landmarks.

The fundamental law of Romania enshrines in art. 31 para. (1) and (2) the right of access to information, stating that "The right of a person to have access to any information of public interest may not be restricted" and that public authorities have an obligation to ensure that citizens are properly informed about public affairs and on matters of personal interest. Also, art. 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, entitled "Freedom of Expression", regulates the right of everyone to freedom of expression, which includes freedom to hold opinions and to receive and share information and ideas.

As a consequence of the cited constitutional provisions, Law no. 544/2001 regarding the free access to information of public interest has been adopted[2]. It provides, in art. 1, that free and unrestricted access to any information of public interest is one of the fundamental principles that guides the relations between individuals and public authorities.

However, there are certain categories of information that go beyond the realm of the public interest, being in an area protected by law due to the fact that, by their nature and content, making such information public may harm crucial values, such as national security and safety. As a result, legislation has been enacted in many states to protect such information against espionage, compromise, or unauthorized access, sabotage, or destruction, while creating conditions for it to be distributed exclusively to those who are entitled to know them[3]. A study drawn by Transparency International UK's Defence and Security Programme[4], dated February 2014, made a detailed review of current legislation across 15 countries and the EU, namely Austria, Australia, Czech Republic, Germany, Estonia, Hungary, Lithuania, Macedonia (FYR), Mexico, New Zealand, Poland, Republic of South Africa, Slovenia, Sweden, United Kingdom and the European Union. The report has also analysed, at a certain level, the system in the United States of America and took a glimpse at the NATO information standards. Basically, it shows that the freedom of information (FOI) has been gradually gaining ground all over the world and this development is positive for raising the accountability and transparency of defence and security forces. Accordingly, national security and defence sectors, which are traditionally inaccessible, have to increasingly accommodate new values of transparency and accountability.[5]

Based on the study developed, the report draws the guiding lines regarding the good practice in secrecy classification legislation. Firstly, any restriction on right to information has to meet international legal standards which have to be also present in the applicable national legislation. Secondly, the authority to withhold or classify information needs to be well defined and has to originate from a legitimate source of power and be performed in line with procedures prescribed by published legal rules. Thirdly, the report states that information may be protected by classification and/or exempted from disclosure if there is a real and substantial likelihood that its disclosure could cause serious harm. Finally, if information is withheld there should be procedures accessible to all that allow for substantial review by independent bodies.[6]

The report makes some interesting findings, featuring the negative practices that some countries adopt. The Polish law, for instance, allows for eternal classification of certain sensitive data. To similar effect in Lithuania the classification period of state secrets can be extended by 10 years as many times as needed.[7]

Surprisingly, the study states that "Austria is perhaps the farthest behind global trends as it has failed to accommodate either the developments of the right of access to information or to introduce transparency measures into its classification system. The Austrian system is an anomaly in Europe since secrecy is still the default position and access to information is treated as an exception."[8]

The fore mentioned report also notices that „little is known about the information standards within NATO since not many documents on the subject are

[2] Published in the Official Gazette of Romania, Part I, no. 663 of October 23, 2001.

[3] See the explanatory memorandum to Law no. 182/2002 on the protection of classified information, available at http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?cam=2&idp=2517.

[4] *Classified Information A review of current legislation across 15 countries & the EU*, report available at http://ti-defence.org/wp-content/uploads/2016/03/140911-Classified-Information.pdf.

[5] *Idem*, p. 4.

[6] *Ibidem.*

[7] *Classified Information. A review of current legislation across 15 countries & the EU*, p. 5.

[8] *Ibidem.*

made public. However, from the few that are, a number of weaknesses in the system are highlighted. These include not defining rules of protection and thus making the system prone to arbitrary classifications, not listing the subjects which may require classification, and not developing an expiry of classification periods".[9]

In Romania, Law no. 182/2002 on the protection of classified information aims to protect classified information and confidential sources that provide this type of information and states, in this regard, that the protection of this information is done by establishing the national system of information protection[10]. At the same time, as established by art. 4 of the law, the main objectives of the protection of classified information are the protection of classified information against espionage, compromise or unauthorized access, alteration or modification of its content, as well as against sabotage or unauthorized destruction. It also aims achieving the security of computer systems and the transmission of classified information.

According to art. 15 b) of Law no. 182/2002, constitutes classified information "information, data, documents of interest for national security, which, due to the levels of importance and consequences that would occur as a result of unauthorized disclosure or dissemination, must be protected".

Moreover, the law expressly states that measures resulting from the application of the law are intended to prevent unauthorized access to classified information; to identify the circumstances as well as the persons who may endanger, by their actions, the security of the classified information; to guarantee that classified information is distributed exclusively to persons entitled to know it; to ensure the physical protection of the information, as well as of the personnel necessary for the protection of the classified information[11].

An landmark statement is contained in art. 3 of Law no. 182 of 2002, according to which no provision thereof may be interpreted as limiting access to information of public interest or ignoring the Constitution, the Universal Declaration of Human Rights, Covenants and other treaties to which Romania is a party, regarding the right to receive and disseminate information.

3. The institutional framework created in Romania to protect classified information

The complexity and importance of this area and the seriousness of the negative consequences that could result from compromising intelligence has required the creation of an institutional infrastructure to carry out the operations necessary to protect this type of information and those who come into contact with it. Precisely in view of the maximum importance of this area, it has been established that the entire activity regarding it will be carried out under the dome of the Supreme Council of National Defence, which will ensure the coordination at national level of all classified information protection programs[12].

Considering the legislation and practice in the matter developed in various other countries, Law no. 182/2002 prescribed the establishment of the Office of the National Register of State Secret Information (ORNISS) under the subordination of the Romanian Government. Together with the Office of State Secrets Surveillance within the Romanian Intelligence Service and the National Security Authority under the Ministry of Foreign Affairs, it implements the national standards for the protection of intelligence[13].

The Office of the National Register of State Secret Information organizes – among others - the lists of information in this category and the length of time for keeping the information in certain classification levels[14].

The national standards for the protection of classified information are established by the Romanian Intelligence Service, with the consent of the National Security Authority. An important provision sets that these standards must be in line with the national interest as well as with NATO criteria and recommendations. However, the law gives priority to NATO rules in the event of a conflict between them and internal rules on the protection of classified information[15].

4. Legal guarantees established in order to maintain the rule of law

The Romanian legislator has shown a democratic spirit in this matter, given that the rigidity and strictness of these legal provisions cannot be misused by the public authorities involved, because a system of guarantees has been imagined to counteract such non-democratic tendencies. As such, art. 20 of Law no. 182/2002 enshrines the right of any Romanian natural

[9] *Ibidem.*
[10] Art. 1 of the Law no.182/2002.
[11] Art. 5 of the Law no. 182/2002.
[12] Art. 14 of the Law no. 182/2002.
[13] As stated in the explanatory memorandum to Law no. 182/2002.
[14] See art. 14 and 21 of the Law no.182/2002. See, for practical details, www.orniss.ro.
[15] Art. 6 of the Law no. 182/2002.

or legal person to appeal to the authorities that have classified the respective information. The appeal may concern either the classification of the information itself, or the duration for which it was classified, or the manner in which a certain level of secrecy has been assigned. The appeal will be resolved in accordance with the law of administrative litigation.

Another guarantee likely to serve the realization of the right of free access to information consists in the fact that the declassification of the information classified as state secrets it is possible, by Government decision. Moreover, the law prohibits the classification of information, data or documents as state secrets in order to conceal violations of the law, administrative errors, limiting access to information of public interest, unlawfully restricting the exercise of certain rights or harming other legitimate interests. At the same time, information, data or documents related to a fundamental scientific research that has no justified connection with national security cannot be classified as state secrets. [16]

Access to state secret information is also allowed to other persons, but only on the basis of a written authorization, issued by the head of the legal entity holding such information, after prior notification to the Office of the National Register of State Secret Information.[17] This is the so-called "ORNISS certificate", which is issued on secrecy levels, following verifications carried out with the written consent of the person concerned. The validity of the authorization is up to 4 years. During this period the checks may be resumed at any time.

5. Control of constitutionality, as a means of ensuring fundamental human rights facing the requirement to protect classified information

5.1. The issue of access to classified information of the parties or their representatives (lawyers) in the proceedings

Probably the most difficult problem to overpass in terms of ensuring the proper confidentiality and integrity of classified data has been the need to balance national security concerns with granting citizens the right to a fair trial, when this kind of information is necessary to be exposed in order to find the truth and solve the situation in legal manner during a fair trial.

Issues regarding the clash between the fundamental right to access the information of public interest and the mechanism meant to protect the classified information were often brought in front of the Romanian courts. It has been argued that the right to a fair trial is endangered as the provisions of Law no. 182/2002 prevent persons who are parties to a trial from becoming aware of the content of certain classified documents, for the sole reason that they do not fall into the category of persons for whom a security certificate has been issued. The criticisms of unconstitutionality claimed that the legislative solutions implemented by the Romanian legislator through Law no. 182/2002 seriously violates the necessary balance between the need of the State to protect state secrecy and the rights and interests of the parties to the process.

In 2008, a few years after entering in force of the Law no. 182/2002, the Constitutional Court accepted[18] the fact that the said law contains specific rules on access to classified information of certain persons who have the status of parties to a process, respectively provided that the security certificate is obtained, and must be met in advance the requirements and the specific procedure for obtaining it, provided by the same law. The Court found that the criticized provisions of the law did not have the effect of absolutely blocking access to certain information, but conditioned it on the performance of certain procedural steps. These steps are justified by the importance of such information, the violation of the right to fair trial or the principle of uniqueness, impartiality and equality of justice for all. On the other hand, the Constitution itself provides, according to art. 53 para. (1), the possibility of restricting the exercise of certain rights - including guarantees related to a fair trial - for reasons related to the defence of national security.

The Constitutional Court considered that the strict regulation of access to information classified as state secrets, that establishes conditions that must be met by persons who will have access to such information, as well as verification, control and coordination of procedures that grant access to this information is a necessary measure to ensure the protection of classified information, in accordance with the constitutional provisions aimed at protecting national security[19].

Moreover, in its case-law[20], the Court has ruled that "it is the exclusive competence of the legislator to establish the rules of the process before the courts", as well as that "the legislator may establish, in view of

[16] See art. 4 para. 3 to para. 5 of the Law no. 182/2002.
[17] Art. 28 of the Law no. 182/2002.
[18] Decision no. 1120 of October 16, 2008, published in the Official Gazette of Romania no. 798 of November 27, 2008.
[19] *Idem*.
[20] Decision of the Plenum no. 1 of February 8, 1994, published in the Official Gazette of Romania, Part I, no. 69 of March 16, 1994 and Decision no. 407 of October 7, 2004, published in the Official Gazette of Romania, Part I, no. 1112 of November 27, 2004.

special situations, special rules of procedure and the ways for exercising procedural rights."

More recently, The Court noted[21] that the criticized legal provisions contained in Law no. 182/2002 do not exclude the access of lawyers to classified information that constitutes a state secret and, respectively, a service secret, this access being ensured under the conditions of Law no. 182/2002 and of the Government Decision no. 585/2002 for the approval of the National Standards for the protection of classified information in Romania[22]. In this sense, the analysed law provides, at art. 28 para. (1), that access to state secret information is allowed only on the basis of a written authorization, issued by the head of the legal entity holding such information, after prior notification to the Office of the National Register of State Secret Information. These provisions apply, according to art. 31 para. (3) of the same law, in the field of secret service information as well. In turn, Government Decision no. 585/2002 provides, in art. 33, that access to classified information is allowed, in compliance with the principle of the need to know, only to the persons holding a security certificate or access authorization, valid for the level of secrecy of information necessary for the performance of duties. Both of the above-mentioned normative acts regulate procedural norms for access to the two categories of information. However, all these legal provisions constitute means of access that guarantee to the different professional categories - therefore also lawyers - the access to all the information they need to exercise their legal role in the criminal process, including those regulated by the criticized text, constituting thus guarantees of the right to defence, access to justice and the right to a fair trial.

The Constitutional Court concluded that the strict regulation of access to classified information, including in terms of setting conditions that must be met by those who will have access to such information, does not have the effect of effectively and absolutely blocking access to information essential to the settlement. but it creates precisely the normative framework in which two conflicting interests - the particular interest, based on the fundamental right to defense, respectively the general interest of society, based on the need to defend national security - coexist in a fair balance, which gives satisfaction both legitimate interests, so that neither of them is affected in its substance. Consequently, the infringement of the rights of the defense and of a fair trial cannot be sustained.

5.2. The issue of access of judges to classified information during trials

5.2.1. Magistrates' access to classified information until 2013[23]

Quite soon after rendering the fore mentioned decision, the CCR dealt with an exception of unconstitutionality[24] raised *ex officio* during the same trial as the one in which it was raised and the previous exception. This time, the criticism of unconstitutionality was formulated in view of the possibility of the judge of the case to have access to the evidence in the file which represents classified information only after obtaining an ORNISS certificate. But the verifications performed regarding magistrates by an institution outside the judiciary would collide with the constitutional provisions regarding the competence and the role of the Superior Council of Magistracy. At the same time, one of the essential components of the professional conduct of judges is the observance of the obligation of confidentiality of this kind of documents. Also, the access of all parties to a fair trial must be viewed both from the perspective of an impartial court and from the perspective of equality of arms, which requires that all parties be able to defend themselves knowingly and may administer the evidence or have access to the evidence so as not to create a clear disadvantage for one of them.

Examining the objection of unconstitutionality, the Court noted[25] that the legal provisions on persons to have access to classified information, the protection of such information by procedural measures, their level of secrecy, and the prohibition of classifying certain categories of information or access to secret information state, does not represent impediments likely to affect the constitutional rights and freedoms, being in full agreement with the invoked norms of the Fundamental Law. Also, they do not rule out the possibility of the judge having access to state secret information, in compliance with the rules of procedural nature provided by law.

The Court considered that it could not be accepted that different categories of magistrates were created in the same judicial system. That is because, for reasons

[21] By Decision no. 805 of December 7, 2021, published in the Official Gazette of Romania, Part I, no. 247 of March 14, 2022, para. 21.

[22] Published in the Official Gazette of Romania, Part I, no. 485 of July 5, 2002.

[23] When Law no. 255/2013 for the implementation of Law no. 135/2010 regarding the Code of Criminal Procedure and for the modification and completion of some normative acts that modified the provisions of art. 7 of Law no. 182/2002 on the protection of classified information, in the sense of introducing judges, prosecutors and assistant magistrates of the High Court of Cassation and Justice among the holders of the right of access to classified information constituting state secret, respectively service secret, provided and taking the oath.

[24] See, for a detailed analyze of the exception of unconstituionality as a way to contest the constitutionality of a norm by means of constitutional review performed by the Constitutional Court, Benke K., S.M. Costinescu, *Controlul de constituționalitate în România. Excepția de neconstituționalitate*, Hamangiu Publishing House, Bucharest, 2020.

[25] See also Decision no. 1335 of December 9, 2008, published in the Official Gazette of Romania, Part I, no. 29 of January 15, 2009.

of expediency, not all employees of an institution should obtain security certificates. On the other hand, the magistrates accredited to hold, to have access and to work with classified information, although they meet the requirements for appointment and professorship of the position they hold, in accordance with the provisions of Law no. 303/2004 on the Statute of Judges and Prosecutors, they are evaluated only from the perspective of honesty and professionalism regarding the use of this information. Thus, there can be no sign of equality between the criteria for appointment as a magistrate and those necessary to obtain authorizations for access to classified information, especially since for the latter the access is limited by compliance with the principle of need to know, given aspects of vulnerability or hostility as a result of pre-existing conditions (such as the relationship environment, previous workplace, etc.) and the indisputable loyalty or character, habits, relationships, discretion and lifestyle of the person concerned. It is natural to be so, because otherwise there is a risk of creating a breach in the national system of protection of classified information, which, unlike the specific activity of the act of justice, cannot be covered by invoking causes of incompatibility or recusal. As a result, the criticized regulations are a procedural remedy for situations in which the presumption of honesty or professionalism of the person who manages classified information is questioned.

In addition, the Constitutional Court stated that the statements of the said decisions are in accordance with the jurisprudence of the ECtHR. Thus, by the Judgment of February 9, 1995 in the *Vereniging Weekblad Bluf Case! v. the Netherlands*, the Strasbourg court ruled that access to public information may be restricted in order to protect the national interest, in accordance with the provisions of art. 10, para. 2, of the Convention for the Protection of Human Rights and Fundamental Freedoms, according to which, for national security, territorial integrity or public safety, the protection of law and order and the prevention of crime, the protection of health or morals, the protection of the reputation or rights of others to prevent the disclosure of confidential information or to guarantee the authority and impartiality of the judiciary. Therefore, in order to comply with the provisions of the Convention, the restrictions on freedom of information must meet the following conditions: a) be provided for by law; b) have a legitimate purpose; c) be necessary in a democratic society.

Also, in its judgment of 8 July 1999 in *Surek v. Turkey*, the ECtHR ruled that it was up to the State to decide whether and when it was necessary for certain information to remain confidential and, consequently, the State has a wide margin of appreciation in this matter.

In the present case, the Court notes that the restrictions on access to information are provided by law - Law no. 182/2002 -, have a legitimate purpose - the protection of classified information and confidential sources that provide this type of information, by establishing the national system of information protection - and are necessary in a democratic society.

5.2.2. Magistrates' access to classified information after 2013

Since 2013, the legislator's vision has broadened, opening up to a more efficient realization of the right to a fair trial, by consecrating a different legal regime for magistrates than the previous one. Thus, by Law no. 255/2013 for the implementation of Law no. 135/2010 regarding the Code of Criminal Procedure and for the modification and completion of some normative acts that include criminal procedural provisions[26], the provisions of art. 7 of Law no. 182/2002 on the protection of classified information, in the sense of introducing judges, prosecutors and assistant magistrates of the HCCJ among the holders of the right of access to classified information constituting state secret, respectively service secret, provided and taking the oath[27].

The Constitutional Court noted that, although the explanatory memorandum of Law no. 255/2013 does not refer to the considerations that formed the basis of this legislative amendment, it aimed at ensuring access to classified information to the three categories of magistrates regulated by Law no. 303/2004 on the status of judges and prosecutors, in order to guarantee the speedy settlement of criminal cases. This legislative solution was possible considering the fact that the three categories of magistrates represent public positions and, regarding them, the provisions of Law no. 303/2004 provide for a procedure for the appointment and taking of the oath, the condition of the lack of criminal record and of the fiscal record, as well as the condition of the good reputation in order to be admitted to the National Institute of Magistracy.

Moreover, the Law no. 303/2004 stipulates in the task of judges, prosecutors, assistant magistrates and specialized auxiliary staff certain obligations that denote their ability to get acquainted without risk with

[26] Decision no. 1335 of December 9, 2008, published in the Official Gazette of Romania, Part I, no. 29 of January 15, 2009.

[27] Prior to this moment, the access to classified information that constitutes a state secret, respectively a service secret, was also guaranteed, under the condition of validating the election or appointment and taking the oath, for the following categories of persons: President of Romania; prime minister; ministers; deputies; senators. All other categories of persons were required to obtain an ORNISS certificate in order to have access to such information.

the content of classified information. It is about the obligation to give an annual statement on one's own responsibility stating whether the spouse, relatives or relatives-in-law up to and including the 4th degree are exercising a function or carrying out a legal activity or criminal investigation or investigation activities, as well as the place their work; the obligation to make an authentic statement, on one's own responsibility, according to the criminal law, regarding the affiliation or non-affiliation as an agent or collaborator of the security bodies, as a political police; the obligation to complete annually a holographic statement on one's own responsibility, according to the criminal law, showing that they were not and are not operative workers, including undercover, informants or collaborators of any intelligence service. Violation of these obligations is considered so serious that it is sanctioned with dismissal from the position held, respectively that of judge or prosecutor. All these declarations are registered and submitted to the professional file, respectively they are archived at the human resources department. Or, all the obligations previously shown are such as to guarantee the fulfilment by the magistrates of the conditions of honesty provided in art. 7 para. (1) of Law no. 182/2002. [28]

Unlike the magistrate positions shown above, according to art. 1 para. (1) of Law no. 51/1995 for the organization and exercise of the legal profession, the legal profession is free and independent, with autonomous organization and functioning, under the conditions of the aforementioned law and the status of the profession, but the obligation to give such statements is not provided in the task lawyers. Considering the differences in the regulation of the conditions of good reputation and dignity, respectively, in order to occupy the position of magistrate, respectively to hold the profession of lawyer, the guarantees of honesty that magistrates present through the annual statements they give, as well as the different nature of the two professions (civil service and liberal, respectively), the Court noted that the different legal regime provided by the legislator regarding the two professional categories for access to classified information is based on objective and reasonable criteria, which justify the procedure for verifying the honesty of lawyers, prior to granting access to classified information. [29]

5.3. The access of the parties and their defenders to the classified information starting with 2018

An admission decision of the Constitutional Court[30] radically changed the relationship of the parties or their lawyers with the evidence containing classified information, greatly facilitating their access. Thus, the Constitutional Court verified the constitutionality of the provisions of art. 352 para. (11) and (12) of the Code of Criminal Procedure, according to which, if the classified information is essential for solving the case, the court urgently requests, as the case may be, total declassification, partial declassification or transfer to another degree of classification. The court can also request allowing access to classified information for the defendant's lawyer, and if the issuing authority does not allow that, those pieces of classified information may not serve as a solution to a conviction, waiver or postponement of the sentence in question.

The exception of unconstitutionality resolved by the Constitutional Court was raised by the Prosecutor's Office attached to the HCCJ - National Anticorruption Direction, on the grounds that the right to a fair trial and the principle of equality before the law of citizens are violated because the legal norm allows the exclusion from criminal proceedings of evidence that constitutes classified information, as a result of an unreasonable and discretionary decision of the administrative authority that classified the information and refuses to declassify it or the defendant's defence counsel (lawyer) has access to it.

Given that the evidence is at the heart of any criminal case and that classified information, which is considered "essential to the resolution of the case", has probative value in criminal proceedings, on the one hand, and that the adversarial principle is an element of the principle of equality of arms and of the right to a fair trial, and on the other hand, that the legality of the administration of evidence has a direct influence on the conduct and fairness of criminal proceedings, the Constitutional Court held that the defendant must have access to classified information to combat or support with the accuser, the legality of the administration of this evidence. As such, at the end of the preliminary chamber proceedings, the evidence consisting of classified information and on which the court notification is based must be accessible to the defendant in order to ensure the possibility of challenging their legality. Only in such a situation can they substantiate a solution of conviction, waiver of the application of the sentence or postponement of the application of the sentence, adopted as a result of a fair criminal trial.

[28] Decision no. 199 of March 24, 2021, published in the Official Gazette of Romania, Part I, no. 640 of June 30, 2021, para. 15, 16 and 18.
[29] Decision no. 199 of March 24, 2021, para. 19 and 20.
[30] Decision no. 21 of January 18, 2018, published in the Official Gazette of Romania, Part I, no. 175 of February 23, 2018.

Thus, it is not the court of first instance that has to request, *ex officio*, as a matter of urgency, as the case may be, the total declassification, partial declassification or transfer to another degree of classification and allowing access to them for the defendant's defence counsel. The issue of classified information, essential for the settlement of the case, respectively the verification of the legality of the administration of such evidence, must have already been solved in the preliminary chamber, so before moving on to the procedural phase of the trial on the merits. That is because in this stage of criminal proceedings, there can be no evidence consisting of classified information inaccessible to the parties, without violating the provisions of art. 324-347 of the Code of Criminal Procedure and the case-law of the Constitutional Court in the matter of the preliminary chamber procedure.[31]

With regard to the request made by the judge requesting the public authority which ordered the classification to allow the defendant's defence counsel access to the classified information, the author of the exception argued that the condition of the right of access to classified information violates the right to a fair trial in terms of uncertainty of access to such a procedure. On the other hand, the author argued that the protection of classified information could not have priority over the defendant's right to information.[32]

With regard to the fact that the protection of classified information cannot take precedence over the accused's right to information, the Court, starting from the finding that classified information has probative value in criminal proceedings, found that the criticized rules, as amended, places the defendant (through his lawyer) in a more difficult position than the previous law, in the sense that, in addition to maintaining the requirement of access authorization in his respect, the defendant's lawyer needs the consent of the issuing authority of classified information on access to this information. Therefore, following the judge's assessment of the "essential nature of the case" of the classified information and the need to ensure access to it, by virtue of the right to information, corollary of the right to a fair trial, a public administrative authority may deny the defendant's defence counsel access to classified information. Due to the issuing authority's refusal to allow access to the classified documents / information, they remain inaccessible to the defendant and, consequently, "cannot be used to rule on a sentence, waive the sentence or postpone the sentence".

Or, such a legislative solution, which conditions the use of classified information, qualified by the judge as essential for solving the criminal process, by the accept of the issuing public administrative authority, is likely to prevent judicial bodies from fulfilling their obligation under art. 5 para. (1) of the Code of Criminal Procedure, that of "ensuring, on the basis of evidence, the finding of the truth about the facts and circumstances of the case, as well as about the person of the suspect or defendant". [33]

The Court found that the criticized legislative solution upset the right balance between the general and private interests, imposing an impediment to the defendant's right to information, with direct consequences on his right to a fair trial, an impediment that is not subject to any form of judicial review. In such a case, access to classified information is not conditioned only by the completion of procedural steps in order to obtain an authorization provided by law, but, after completing the legal procedure and obtaining the necessary authorizations, the defendant's defence counsel may be denied. This has the effect of absolutely block of access to classified information. The legal consequences are all the more serious as the request for access to this information does not belong to the defendant / defendant's defence counsel, but to the judge of the case, who previously found it essential to resolve the criminal case, assigning it probative value. It is obvious that it is no longer possible to discuss equality of arms and, implicitly, a fair trial. [34]

Furthermore, the Court found that the criticized legal provisions are likely to create discrimination even within the category of defendants in a case, the issuing authority of the classified act having the possibility to selectively allow their defenders access to classified evidence, so that, depending on the decision of the administrative authority, the defendants in identical or similar situations, in the same criminal case, some could be convicted and others acquitted, based on criteria that, according to the law, cannot be subject to judicial review[35].

Given the need to find out the truth in criminal proceedings and the explicit requirement of the Code of Criminal Procedure that a person should be convicted only on the basis of evidence proving his guilt beyond a reasonable doubt, the Constitutional Court held that any information that could be useful to find out the truth must be used in criminal proceedings. Thus, if classified information is indispensable to the finding of the truth, access to it must be provided by the judge of the case, both to prosecution and defense, otherwise the

[31] Decision no. 21 of January 18, 2018, para. 31 and 32.
[32] *Idem*, para. 58.
[33] *Idem*, para. 62.
[34] *Idem*, para. 63.
[35] *Idem*, para. 64.

equality of arms and respect for the right to a fair trial are enfringed. On the other hand, access to classified information may be refused by the judge, who, although noting its essential role in resolving the case before the court, considers that access may seriously endanger the life or fundamental rights of another person or that the refusal is strictly necessary to defend an important public interest or may seriously affect national security[36]. Therefore, only a judge can judge on the conflicting interests - the public interest, regarding the protection of information of interest for national security or for the defense of a major public interest, respectively the individual interest of the parties to a case, so that, through the solution it pronounces, to ensure a fair balance between the two.[37]

The Court concluded that the protection of classified information cannot take precedence over the right to information of the defendant and over the guarantees of the right to a fair trial of all parties to the criminal proceedings, except under express and restrictive conditions provided by law. Restriction of the right to information can only take place when it is based on a real and justified purpose of protecting a legitimate interest in the fundamental rights and freedoms of citizens or national security, the decision to refuse access to classified information always belonging to a judge.[38]

5.4. Administrative contentious review of acts concerning defence and national security

An interesting decision regarding the guarantees of respect for fundamental rights through the possibility of contesting administrative acts before the administrative contentious courts concerned the provisions of art. 5 para. (3) of the Law on administrative contentious no. 554/2004, according to which "Administrative acts issued for the application of the state of war, state of siege or emergency, those concerning defence and national security or those issued for the restoration of public order, as well as for removing the consequences of natural disasters, epidemics and epizootics can only be attacked for excess of power. "The Constitutional Court found[39] that the phrase "those concerning national defence and security" contained therein was unconstitutional.

The exception of unconstitutionality was raised by reference to the provisions of art. 126 para. (6) of the Constitution, which exempts from the rule of judicial control of administrative acts only military command acts, so that an extension, by law, of the notion of "military command acts" beyond the real will of the constituent contradicts with the Basic Law. The court held that, in order to avoid over-power of the institutions in the field of national security, defence and public order, national law must allow judicial control over them in an effective manner, in order to comply with the requirements of a fair trial.

Examining the exception of unconstitutionality, the Constitutional Court held that, the para. (6) of art. 126 of the Constitution establishes that the courts, by way of administrative litigation, exercise judicial control over the administrative acts of public authorities This kind of control is guaranteed and only two categories of acts are absolutely excepted - those of military command and those relating to relations with Parliament - which, by their nature, are not subject to judicial review in any form.

From a constitutional point of view, art. 126 para. (6) is the only seat of the matter regarding the administrative acts exempted from the judicial control[40], and art. 5 para. (3) of Law no. 554/2004, even if it is an organic law, cannot provide other exceptions, without thereby violating the indicated constitutional text, the provisions of which are limiting and imperative.

The Court found that the constitutional provisions mentioned must be interpreted restrictively on the basis of the rule *exceptio est strictissimae interpretationis*, any other exception to the judicial review of administrative acts being an addition to the Constitution, not allowed by its supreme character and its preeminence over all under-constitutional laws.

The term "excess of power", used in the text of the criticized law, has the meaning, according to art. 2 para. (1) letter n) of the law - "exercising the right of appreciation of public authorities by violating the limits of the competence provided by law or by violating the rights and freedoms of citizens". Thus, since the administrative acts regarding the defence and national security, except for the excess of power, to which the text that is the object of the exception of unconstitutionality refers, are not among the exceptions expressly provided by art. 126 para. (6) of the Constitution, it follows that they must be subject to judicial review.

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[36] Elena Anghel, *The reconfiguration of the judge`s role in the romano-germanic law system*, published in CKS-eBook, 2013, file:///C:/Users/user/Downloads/100_cks_2013.pdf.

[37] Decision no. 21 of January 18, 2018, para. 70.

[38] *Idem*, para. 71.

[39] By Decision no. 302 of March 1, 2011, published in the Official Gazette of Romania, Part I, no. 316 of May 9, 2011.

[40] See, for further details on this issue, Elena Ștefan, *Acts extempt from the judicial control of the contentious administrative*, published în CKS e-Book 2016, pp. 534-538, http://cks.univnt.ro/cks_2016/CKS_2016_Articles.html and Claudia Marta Cliza, *Administrative acts exempted from judicial review by administrative courts*, published în CKS e-Book 2014.

6. Conclusions

The present paper aims to summarize the issue of classified information concerning criminal cases, when the evidence that seeks to find out the truth and establish the guilt or innocence of the accused comprise this kind of information. To this end, we first set out the relevant regulatory framework and then we depicted the difficulties faced by the parties' lawyers. Until the amendment, in 2013, of Law no. 182/2002, not even the judges were granted the right of access to classified information, unless they obtained an ORNISS certificate.

The case-law of the Constitutional Court has clarified this issue to a large extent, examining up to what point a reasonable balance can be struck between the right of access to public interest information and the national security defence interest.

As there is a growing tendency at the international level to open up public access to a wide and various range of information, it remains to be analyzed in the future the degree to which the Romanian state will agree to provide a greater number of certain types of information subject to classification. Such an approach would increase the need for transparency and democratization of information, which is desirable in a state governed by the rule of law.

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