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**UNCONSTITUTIONALITY OF THE GOVERNMENT
EMERGENCY ORDINANCE NO. 62/2019. CITIZENS'
RIGHTS, LIBERTIES OF ALL BUYERS OF PREPAID
PHONE CARDS**

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UNCONSTITUTIONALITY OF THE GOVERNMENT EMERGENCY ORDINANCE NO. 62/2019. CITIZENS' RIGHTS, LIBERTIES OF ALL BUYERS OF PREPAID PHONE CARDS

Razvan VIORESCU¹

Abstract

The Romanian Ombudsman has notified the Constitutional Court over a recent emergency ordinance of the government (Government Emergency Ordinance no. 62/2019) which changed the legislation emergency calls and electronic communications, the institution announced on Thursday. The executive order forced all buyers of prepaid phone cards to present their IDs upon acquisition.

The Ombudsman said it found that the ordinance was breaching citizens' rights, liberties and duties and the initiator had to provide better motivation, proof of extraordinary circumstances that would match the restraining of rights.

The ordinance was published last week. It says prepaid cards would not be sold unless ID is provided when purchased starting January 1, 2020, while those who already hold such phone cards would no longer benefit of services starting September 1, 2020 unless they provide their personal data. The data would be stored by the state's special telecoms service STS for 5 years. The ordinance also introduces much bigger fines for false alarm to emergency phone number 112 starting next month.

The changes were hastened in the wake of a major criminal case in which a kidnapped teenager was murdered in the southern town of Caracal this summer, despite her calling to the emergency number repeatedly to call for help. The case was mostly blamed on the incapacity of authorities to react in due time and efficient manner.

Keywords :

Electronic communications, national system for emergency calls, citizens' rights, freedoms and duties, cell-ID localization method, collecting identification data, right to intimate, family and private life, article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

JEL Classification: H1, K3

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I. INTRODUCTION.

The Romanian Government justified the adoption of *Government Emergency Ordinance no. 62/2019* [1], taking into consideration that the access of citizens to the emergency service 112 must be ensured under the best conditions at European level, at high quality standards, whereas the accessibility of caller location information is considered, at European Union level, an essential component of the emergency services operation, and the "cell-ID" location method currently used is not sufficiently accurate in certain situations, taking into account the urgent need that, in addition to the "cell-ID localization method". Emergency dispatchers should be able to benefit from positions as close to reality as possible to those who request assistance through emergency calls to 112, positions that can be provided, in some cases, Google's Emergency Location Service (ELS) technology based on Advanced Mobile Location (AML / ELS) functionality, taking into account the public benefit generated by the implementation of additional means of locating the caller at the unique emergency number 112, by using the opportunities provided by modern equipment in the field of communications and information technology, also keeping in mind that in the dynamics of an emergency situation, the display of the pre-registered data of the subscribers contributes significantly to the reduction of the processing time of the emergency call, as well as the possibility of the operator of the unique emergency call centers to correlate / complete / compare the location and identification information of the caller.

II. REASONS FOR UNCONSTITUTIONALITY OF AN EXTRINSIC NATURE (*prejudice to the provisions of art. 115 paragraph (4) and para. (6), art. 147 paragraph (4), art. 11 and art. 20, art. 26, art. 53, art. 148 paragraph (2) and (4) of the Constitution, as well as of art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms*)

In our opinion the Government Emergency Ordinance no. 62/2019 affects citizens' rights, freedoms and duties, although the Fundamental Law itself prohibits the adoption of emergency ordinances that, through the regulatory object, infringe the rights, freedoms and duties of citizens. In these conditions, the more we appreciate that the delegate legislature imposes a rigorous increase in the motivation of the urgency, of proving the existence of an extraordinary situation, respecting the principle of proportionality of the restriction of the exercise of the rights affected and of the jurisprudence of the Constitutional Court, requirements that the normative act criticized does not meet them.

However, in its case-law, the Constitutional Court sanctioned the unconstitutionality of the normative act when it found that the arguments

invoked in the preamble of the emergency ordinance not only cannot constitute a reason to justify the urgent nature of the regulation, but demonstrate the superficiality and the ignorance of the constitutional norm and the case law of the constitutional court regarding the obligations incumbent on the delegated legislator.

1. violation of art. 115 paragraph (4) of the Constitution

In accordance with Art. 115 paragraph (4) of the Constitution *"The Government may adopt emergency ordinances only in extraordinary situations whose regulation cannot be postponed, having the obligation to motivate the urgency within them"*.

Examination of the constitutionality of the Government Emergency Ordinance no. 62/2019 must start from the analysis of the **cumulative conditions** that allow the Government to legislate: a) the existence of an extraordinary situation; b) its regulation cannot be postponed; c) the urgency to be motivated within the ordinance.

a) Developing the constitutional text, the Constitutional Court has established through jurisprudence that, in order to be in the presence of an extraordinary situation, it is necessary to have an objective factual status, quantifiable, independent of the will of the Government, which endangers a public interest (Decision no. 255/2005, Decision No. 1008/2009). The delegated legislator can regulate by means of an emergency ordinance when, necessarily and unequivocally, the objective circumstances that determine the existence of an extraordinary situation, whose regulation cannot be delayed, require a rapid normative intervention.

Analyzing the preamble to the emergency ordinance, we find that the existence of an extraordinary situation whose regulation cannot be postponed, as well as the urgency of legislative amendments and completions **are not justified at all**.

The arguments used in the preamble regarding the necessity of ensuring the access of citizens to the emergency service 112 in the best conditions at European level, to high quality standards, as well as those regarding reducing the incidence of abusive calls by collecting identification data, are not capable of justifying the extraordinary situation. Nor the urgency of a normative act which, regulating the compulsory collection of personal data and storing them indefinitely, drastically limits the exercise of the right to intimate, family and private life, as we will demonstrate in the following.

Regarding the argument related to the urgent need for the location of those who call 112, we mention this was possible also by the previous regulation. in motivating the normative act, through the preamble of the emergency ordinance, it is supported the need to increase the efficiency of emergency calls management by reducing the incidence of abusive calls

UNCONSTITUTIONALITY OF THE GOVERNMENT ...

made by callers that cannot be identified because they use electronic communications services provided at mobile points for which payment is made in advance.

In addition, the purpose of collecting the identification data does not arise from the examination of the legal provisions nor the assurance of the guarantees that they will be used exclusively for the purpose stated in the preamble. The only provision that seems to outline the purpose of the processing of personal data, but having a vague character, can be found in art. II point 3 of the Government Emergency Ordinance no. 62/2019 [with reference to art. 511 paragraph (6) of the Government Emergency Ordinance nr. 111/2011 regarding electronic communications], in the sense that *"Without prejudice to other applicable legal provisions, the data collected pursuant to this article shall be made available only to the administrator of the Single National Emergency Call System and shall be used by him in accordance with the provisions Emergency Ordinance Government no. 34/2008, approved with modifications and completions by Law no. 160/2008, as subsequently amended and supplemented."*

The purpose pursued by the delegated legislator, namely the reduction of abusive calls by identifying and sanctioning abusive callers, by collecting the identification data of the users of the prepaid cards, is not an extraordinary situation, it is not capable of justifying the urgency of the regulation. Moreover, the legislative solution of collecting and storing personal data for an indefinite period of time justified by the need to sanction abusive appellants appears to be devoid of proportionality in relation to the seriousness of restricting the exercise of the right to intimate, family and private life.

Regarding the requirements formulated by the Constitutional Court, we consider that the motivation of the extraordinary situation and of the urgency in the preamble of the emergency ordinance is insufficient and does not correspond to the requirements of art. 115 paragraph (4) of the Fundamental Law, as they were developed in the case law of the constitutional court.

b) Regarding the condition that the regulation of the situation in question cannot be postponed, we consider that it is not fulfilled.

In this respect, the preamble to the emergency ordinance states that *"the immediate adoption of measures by the Government, by emergency ordinance, would have direct consequences on the management of emergency situations and, implicitly, on ensuring immediate assistance in situations where the life, integrity or health of the citizen, public order, public or private property or the environment are endangered"*.

The analysis of this text does not show the reason that justifies the modification of the regulation of the organization and functioning of the unique national system for emergency calls, the situation that cannot be

postponed or the necessity of introducing the respective modifications by emergency ordinance.

Regarding the completion of the Government Emergency Ordinance no. 111/2011 regarding electronic communications, the justification, according to which *"the non-adoption of the act has the effect of maintaining the impossibility of identifying the end-users of telephony services that benefit from these services through prepaid cards, as well as the impossibility of integrating some advanced modern technologies for locating the caller. to the unique emergency number 112"*, it does not contain the necessary elements for which the situation that cannot be postponed or the need to collect the user identification data of the cards prepaid by emergency ordinance, especially since the same regulation by law was subject to the control of a priori of constitutionality, the same norms introduced being stated as unconstitutional.

Even if such a regulation would be appropriate, useful or necessary, it does not mean that it should be approved as soon as possible, and even less so by the delegated legislator, because, in such a situation, the fundamental principle is violated. of the separation of powers in the state.

Moreover, the urgency of the regulation is not justified either by the provisions contained, since the Government Emergency Ordinance no. 62/2019 does not include any immediate application measures capable of resolving an extraordinary situation. On the contrary, the effective application of the legislative solution regarding the collection of the identification data of the end user of the prepaid SIM card is carried out from January 1, 2020.

As a consequence, the urgency of the regulation is not justified neither in the preamble of the criticized normative act, nor by the measures envisaged.

c) The third condition necessary to be fulfilled when adopting an emergency ordinance refers to the motivation of the urgency within it. Thus, the motivation must be effective, that is, to demonstrate the objective necessity of adopting the regulation in an emergency regime, not just to state this necessity. Motivation not only means justifying the merits of the proposed measures, but especially justifying their urgent nature, that is, it does not have to refer only to the necessity of their adoption, but to the necessity of their adoption by emergency ordinance, or, in this case, these requirements do not are fulfilled. As I showed above, in the preamble of the Emergency Ordinance no. 62/2019 the urgency is stated, without being demonstrated or explained.

In addition, the motivation itself is general in nature, without mentioning concrete information that can justify the urgency of the proposed measures.

2. violation of art. 115 para. (6) of the Constitutes, by affecting the right to intimate, family and private life, provided by art 26 of the Fundamental Law and art. 11 and art. 20 by reference to Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Regarding the condition established by art. 115 paragraph (6) of the Constitution, regarding the prohibition of affecting, by emergency ordinance, the rights, freedoms and duties provided by the Constitution, in its case-law, the Constitutional Court held that, "then when the object of regulation of an emergency ordinance is represented by fundamental rights, freedoms or duties, the intervention of the delegated legislator must be in the sense of not exercising these rights, of establishing a legal regime that will allow the full exercise of all the attributes of these rights." [2].

3. violation of art 147 paragraph. (4) of the Constitution

We notice that in September 2014, a majority decision (Decision no. 461/2014 of the Constitutional Court, M. Of. No. 775 of 24 October 2014) [3] declared unconstitutional legislative provisions which introduced an obligation, incumbent upon service providers, to retain and store identification data pertaining to purchasers of prepaid SIM cards and users of open access internet services. The reasoning departs from the logic of the earlier ruling in July, insofar as in the paradigm of the newer decision blanket retention and storage as such ("first stage") are described as negatively affecting constitutional rights.

Comparing the texts of the normative act found unconstitutional and those of art. II of the emergency ordinance criticized, we find that some contain the same legal solutions:

1. Article II pet. 1 of the criticized normative act, regarding the completion of art. 4 paragraph (1) of the Government Emergency Ordinance no. 111/2011 with the points:

- point 55 regarding the definition of the phrase "identification data of the end user of the SIM card" is similar to point 55 in the area. 4 paragraph (1) of the law found unconstitutional. mentioned above, regarding the definition of the phrase "data needed to identify a subscriber or user "

- points 57 and 58 regarding "identity document" and "identification document" contain the same legal solutions with point 57 at art. 4 paragraph, (1) of the law found unconstitutional. mentioned - "identity document - identity card, electronic identity card, passport or driving license".

We specify that, according to the criticized text, "57. deed of identity - the act provided by the provisions of art. 12 paragraph (3) of the Government Emergency Ordinance no. 97/2005 regarding the record, the

domicile and the identity documents of the Romanian citizens, republished, with the subsequent modifications and completions ”, and the norm to which the reference is made has the following content:” for the purposes of this emergency ordinance, the identity card means the book, the book electronic identity card, provisional identity card and identity card, validity deadline ”.

The second criticized text has the following content: "58. identification act - the act on which the entry, respectively the stay on the Romanian territory, of the natural persons without Romanian citizenship is allowed ”.

2. Art. II point 3 of the criticized normative act contains legal solutions similar to art. I sections 3 and 4 and art. II of the law found unconstitutional by Decision no. 461/2014 of the Constitutional Court:

- the provision of telephony services for prepaid cards is conditioned by the collection of identification data, through a standardized form;

- for prepaid cards already in use, the users have a deadline in which to provide the identification data, after which fulfillment, it is forbidden to provide the mobile phone service for those who have not completed the standardized form;

- in case of loss or theft of the prepaid card, the user has the obligation to notify the supplier, who will immediately stop providing the service.

Therefore, the considerations that determined the finding of unconstitutionality of the legal provisions by Decision no. 461/2014 of the Constitutional Court, also remain valid for the provisions of the emergency ordinance that keep the legislative solutions already found to be unconstitutional.

In a state of law, as Romania is proclaimed in art. 1 paragraph (3) of the Constitution, the public authorities do not enjoy any autonomy in relation to the law. Moreover, the Constitution establishes in art. 16 paragraph (2) that no one is above the law, and in art. 51 that observance of the Constitution, its supremacy and laws is mandatory.

The control of the constitutionality is finalized by decisions, which, according to art. 147 paragraph (4) of the Constitution, are generally mandatory and have power only for the future. If the decision finds unconstitutionality, it produces *erga omnes*. which covers all public authorities, citizens and legal entities under private law. Thus, due to the general binding effect of the decisions of the Constitutional Court, its jurisprudence must be taken into account by all the bodies involved in the process of elaboration and application of laws and ordinances.

UNCONSTITUTIONALITY OF THE GOVERNMENT ...

In addition, the Government Emergency Ordinance no. 62/2019 contravenes the requirements developed by the Constitutional Court through a rich jurisprudence regarding the processing of personal data, through the Decisions no. 1258 of October 8, 2009, no. 440 of July 8, 2014, no. 461 of September 16, 2014 and no. 498 of July 17, 2018.

III. REASONS FOR INTRINSIC UNCONSTITUTIONALITY

1. violation of art. 26 and article 53 of the Constitution, as well as art. 11, art 20 of the Fundamental Law, with reference to art 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms

The right to respect for private and family life benefits from unanimous recognition and international protection, as it results from art. 12 of the Universal Declaration of Human Rights, from art. 17 of the International Covenant on civil and political rights, from art. 8 of the Convention for the defense of human rights and fundamental freedoms, as well as of art. 26 of the Constitution of Romania. These rights, although they are indissolubly linked to human existence, any person having the right to exercise them indefinitely, however, are not absolute rights, but they are conditional.

In the interpretation and application of art. 8 of the Convention, in order to determine whether the interference of the authorities in the private and family life is necessary in a democratic society and if a fair balance is maintained between the different interests at stake, it is necessary to carry out a proportionality test, in order to determine whether this interference is provided by law, if it pursues one or more legitimate purposes and is proportionate to those goals.

Considering the regulatory field of the Emergency Ordinance no. 62 of August 27, 2019, the requirements set by the litigation court must be taken into account constitutional that ruled that in relation to this normative situation and given the directly applicable character of the legal provisions, the legislator must ensure specific protection of personal data, by establishing strong guarantees, attesting the high level of protection of personal data.

Thus, according to Decision no. 1258 of October 8, 2009 The Constitutional Court has ruled that neither the provisions of the Convention for the defense of human rights and fundamental freedoms, nor the Constitution of Romania prohibit the legal consecration of the interference of the state authorities in the exercise of the mentioned rights, but the state intervention must comply with such strict rules. in art. 8 of the Convention, as well as in art. 53 of the Fundamental Law.

According to the principle of proportionality, any measure taken must be adequate - objectively capable of achieving the goal, necessary - indispensable for the purpose and proportional - the right balance between concrete interests to be appropriate to the purpose pursued. Thus, in order to carry out the proportionality test, it is first necessary to establish the purpose pursued by the legislator by the criticized measure and if it is a legitimate one, since the proportionality test can only be related to a legitimate purpose.

The Constitutional Court considered that the lack of precise legal regulation, which precisely determines the scope of those data necessary to identify the natural or legal users, opens the possibility of abuses in the activity of retention, processing and use of the data stored by the providers of electronic communications services for the public. or public communications networks.

The limitation of the exercise of the right to an intimate life must take place in a clear, predictable and unequivocal manner, so as to eliminate, as far as possible, the possibility of arbitrariness or abuse of the authorities in this field.

Beyond this, we also make it clear that, in the field of personal rights, such as the right to intimate life and freedom of expression, as well as the processing of personal data, the unanimously recognized rule is that of guaranteeing and respecting them, respectively confidentiality, the state having, in this respect, mostly negative obligations of abstention, by which, as far as possible, its interference with the exercise of the right or freedom is avoided.

The constitutional principle of the proportionality of the restriction of the exercise of the right to intimate, family and private life is correlated, in this case, with art. 5 paragraph (1) lit. c) of the General Regulation on data protection, which stipulates that personal data processed are appropriate, relevant and limited to what is required in relation to the purposes for which they are processed ("minimizing data").

Therefore, in this sense it is analyzed whether the analyzed text of law fully respects the requirements of the principle of proportionality, both in terms of the extent of the law's limitation measure and in the aspect of its termination as soon as the determining causes have disappeared.

In addition, the Constitutional Court also emphasized that not the justified use, under the conditions regulated by the law, is the one that, in itself, unacceptably prejudices the exercise of the right to an intimate life or the freedom of expression, but the legal obligation of a continuous character, Generally applicable, data storage. However, according to art. II pet. 3 of the Government Emergency Ordinance no. 62/2019 [with

reference to art. 511 paragraph (2) of the Government Emergency Ordinance no. 111/2011], " The processing of the personal data of the end user of the SIM card - natural person or of the legal representative of the end user of the SIM card - legal person, collected according to this article, is allowed until a period of 3 months is fulfilled from the date of cessation of the provision of the public telephony service to mobile points.

When the deadline is fulfilled, the data is deleted or, as the case may be, destroyed. "

Thus, we observe that the text allows the processing of data for an indefinite period that flows between the date of purchase of the prepaid card and the uncertain date of * Termination of the provision of the telephony service for the public at mobile points ", date from which a term of 3 months within to which data processing is allowed.

The retention of these data continuously, regarding any user of electronic communications services for the public or public communications networks, regulated as an obligation of the providers from which they cannot deviate without being subject to the sanctions provided by the normative act, represents an operation. sufficient to generate in the consciousness of the people the legitimate suspicion regarding the respect of their intimacy and the abuse.

Limiting the exercise of personal rights in the consideration of collective rights and public interests, which concern national security, public order or criminal prevention, has always been a sensitive operation in terms of regulation, so that a fair balance between individual interests and rights is maintained, on the one hand, and those of society, on the other.

In this regard, he also noted the European Court of Human Rights in the Klass case and others against Germany, 1978, that taking supervisory measures, without adequate and sufficient guarantees, can lead to "the destruction of democracy under the pretext of defending it."

2. violation of art 148 paragraph. (2) and (4) of the Constitution

As a result of the accession to the European Union, the provisions of the compulsory Community regulations have priority over the contrary provisions of the internal laws, and both the Government and the judicial authority guarantee the fulfillment of these obligations. In this case, the normative act criticized falls under the scope of:

A. Regulation no. 679/2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46 / EC [4].

Regulation no. 679/2016 defines personal data - any information about an identified or identifiable natural person ("the data subject"); an identifiable natural person is a person that can be identified, directly or

indirectly, in particular by reference to an identification element, such as a name, identification number, location data, an online identifier, or to one or more many specific elements, specific to its physical, physiological, genetic, psychological, economic, cultural or social identity (art. 4 pet. 1).

The processing of such data is defined as "any operation or set of operations performed on personal data or on personal data sets, with or without the use of automated means, such as collecting, recording, organizing, structuring, storing, adapting, or modifying, extracting, consulting, using, disclosing by transmission, dissemination or making available in any other way, alignment or combination, restriction, deletion or destruction "(art. 4 pt. 2).

The processing of personal data is subject to the principles specified in art. 5 of this Regulation, of which are the incidents from the letter. b) and c), according to which, the data feel: nb) collected for certain purposes. explicit and legitimate and are not subsequently processed in a manner incompatible with these purposes ("purpose limitations"); c) adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed ("minimizing data"). Given that the purpose of collecting the identification data of all users of prepaid cards is to sanction any abusive callers of the emergency services, we consider that the legislative solution is not adequate, relevant and exceeds the measures necessary to reduce abusive calls. regarding the subsequent processing of the data by their addressee - the administrator The unique national system for emergency calls - so that they are not used in a way incompatible with these determined, explicit and legitimate purposes, we observe that the criticized normative act does not include any provision in this regard. The obligation to process the personal data and to implement the technical and organizational measures to ensure the security of the processing in compliance with the legal regulations applicable in the field of personal data protection - is exclusively the responsibility of the providers of electronic communications services [art. II point 2 of the normative act criticized with reference to art. 50 paragraph (5) of the Government Emergency Ordinance no. 111/2011)]. Guarantees of compliance with the legal provisions in the matter by the data receiver are not provided by law, nor are measures to ensure the adequate security of the personal data that has been made available to them, including protection against unauthorized processing or illegal and against accidental loss, destruction or damage, by taking appropriate technical or organizational measures.

B. Directive 2002/58 / EC on the processing of personal data and the protection of confidentiality in the public communications sector. [5]

UNCONSTITUTIONALITY OF THE GOVERNMENT ...

a. According to the provisions of art. 5 paragraph (1) of Directive 2002/58 / EC on the processing of personal data and the protection of confidentiality in the public communications sector, the Member States have the obligation to ensure, through the national law, the confidentiality of the communications and the corresponding transfer data transmitted through a public communications network. or public electronic communications services. They thus prohibit in particular listening, recording, storing or other types of interception or surveillance of communications and related transfer data by persons other than the user, without the consent of the user concerned, unless this is permitted under the article. 15 paragraph 1.

Alin. (3) in art. 5 of the directive reiterates that "Member States shall ensure that the storage of information or the acquisition of access to information already stored in the terminal equipment of a subscriber or user is only allowed provided that the subscriber or user concerned has given his consent, after receiving it clear and complete information in accordance with Directive 95/46 / EC, inter alia, on the purposes of processing.

However, according to art. I pet. 1 of the emergency ordinance subject to the constitutionality control [with reference to art. 2 paragraph (22) of the Government Emergency Ordinance no. 34/2008], "The transmission of short standardized technical messages containing the location information obtained on the basis of the terminal equipment is carried out without the caller's intention, to the unique number 114." In this normative act there is no provision regarding the obtaining of the user's agreement. for any of the measures taken.

The exceptions provided by the directive mentioned in the user agreement are provided in art. 15 paragraph (3), according to which "Member States may adopt legislative measures to restrict the scope of rights and obligations provided for in Article 5. Article 6, Article 8 (1), (2), (3) and (4) and Article 9 of this Directive, if their restriction is a necessary, appropriate and proportionate measure within a democratic society in order to protect national security (for example, state security), defense, public security or to prevent, investigate, detect and track criminal acts or unauthorized use of electronic communications systems, in accordance with Article 13 (1) of Directive 95/46 / EC. To this end, Member States may adopt, inter alia, legislative measures to allow data retention, for a limited period, for the reasons set out in this paragraph. All measures referred to in this paragraph must comply with the general principles of Community law, including those referred to in Article 6 (1) and (2) of the Treaty on European Union. "

From the analysis of the provisions of the aforementioned normative act, the measure of the obligation to register the users of the

prepaid cards, as well as the transmission of the technical messages regarding the location, is carried out without their consent, being able to restrict the users' right to intimate and private life.

The norm mentioned in the directive is corroborated with art. 53 of the Fundamental Law, which also imposes sine qua non conditions for the restriction of rights and freedoms. In this case, the criticized legal provisions could justify the necessity of the measures taken, but they do not justify the proportionality of the restriction, nor the protected interests - issues regarding national security, defense, public safety, prevention, investigation, detection and prosecution of some criminal facts were not discussed. or unauthorized use of electronic communications systems. Neither the measure of restraint of abusive appeals falls within the express and limiting situations provided by the directive and the Constitution, in which the rights can be restricted.

b. Regarding the location data, art. 9 of the Directive no. 2002/58 / EC provides for the following:

"(1) If the location data other than the transfer data relating to subscribers or users of the public communications networks or the public electronic communications channels can be processed, these data can be processed only if they are anonymous or with the agreement to the respective users or subscribers - to the extent and for the time required to provide an additional service - The service provider must inform users and subscribers - prior to obtaining their agreement, about the type of location data other than the transfer data to be processed, about the purpose and duration of the processing and whether the data will be transmitted to third parties for the purpose of providing additional information. Users or subscribers must at any time have the possibility to withdraw their agreement for the processing of the location data other than the data. of transfer.

(2) If the consent of the user or subscriber for the processing of the location data other than the transfer data has been obtained, the user or subscriber shall, however, continue to have the possibility, by simple means and free of charge, to refuse temporarily processing this data at each connection to the network or each transmission of a communication.

(3) The processing of location data other than transfer data in accordance with paragraphs 1 and 2 shall be limited to acting under the authority of the provider of the public communications network or of the public electronic communications services or of the third party providing the supplementary service. and must be limited to the processing strictly necessary for the purpose of providing the respective additional service. "

Incidents are also the provisions of art. 10 lit. b) from the same directive, which establish exceptions. Thus, "Member States shall ensure that there are transparent procedures regulating how the provider of a public communications network and a public electronic communications service may disregard: [...]"

(b) eliminating the presentation of the call line identification and the temporary refusal or absence of the subscriber or user agreement regarding the processing of the location data for a line in the case of organizations receiving emergency calls and which are recognized as such by the Member States, such as be the criminal prosecution services, ambulance or fire service, for the purpose of effective action following such calls. "

It is observed that the criticized normative act does not respect the above mentioned European requirements, not containing norms in this respect, and consequently it violates the European law.

c. The agreement required by completing the standardized form is a purely formal one, in the absence of which the person does not have access to the SIM card. Without a registered SIM card, in Romania, no person has access to the emergency services, although the technology allows access to the 112 service.

However, in its case-law, the Court of Justice of the European Union, by a recent decision, namely the Decision of 5 September 2019 in Case C-417/18 [6], stated the following:

"21. As regards the answer to the same questions, it is clear from the very wording of Article 26 (5) of Directive 2002/22 that" All calls to the unique European number for emergency calls "are covered by the obligation making available information regarding the caller's location.

22. It should also be recalled that the Court has already held that, in Article 26 (3) of Directive 2002/22, in its original version, which corresponds to paragraph 5 of the same article in the current version of that directive, it follows that provision imposes on the Member States, under the conditions of the technical possibilities, an obligation of result which is not limited to the creation of an adequate normative framework, but requires that the information regarding the location of all the appellants to 112 be effectively transmitted to the emergency departments [7].

23. Therefore, it cannot be admitted that calls to 112 made from a non-equipped mobile phone with a SIM card are excluded from the scope of this provision, "

CONCLUSIONS

As such, we consider that the criticized normative act is in contradiction with the European law and jurisprudence in the field of electronic communications and does not provide an adequate and sufficient framework for the protection of personal data available to the SNUAU administrator. according to the European legislation in this matter, the measure of the collection itself being inadequate in the sense of exceeding the proposed purpose - that of sanctioning the abusive appellants to the Emergency Service.

Compared to the above, we consider that the arguments invoked support the unconstitutionality of the Government Emergency Ordinance

no. 62/2019 regarding the provisions of art. 115 paragraph (4) and para. (6), art. 147 paragraph (4), art. 11 and art. 20, art. 26, art. 53, art. 148 paragraph (2) and (4) of the Constitution, as well as of art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, and asks the Constitutional Court to admit the exception of unconstitutionality.

In conclusion, we find that the legal provisions criticized, although they feel that it is possible to achieve the objective pursued, represent an interference with the rights guaranteed by art. 26 of the Fundamental Law and art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms [8], which does not respect the principle of proportionality between the measures taken and the protected public interest.

REFERENCES

- [1] Government Emergency Ordinance no. 62/2019 for amending and completing the Government Emergency Ordinance no. 34/2008 regarding the organization and functioning of the single national system for emergency calls and for completing the Government Emergency Ordinance no. 111/2011 regarding electronic communications, published in the Official Gazette, Part I, with no. 725 of September 3, 2019
- [2] Decision no. 1.189 / 2008, the Constitutional Court established the constitutional meaning of the verb "to affect", stating that the legal meaning of the notion, under different shades, would be: "to suppress", "to prejudice", "to harm", "to injure", "to have negative consequences". Thus, according to the case law of the Constitutional Court, from the interpretation of Article 115 paragraph (6) of the Constitution it can be deduced that in the field of regulation of fundamental rights, freedoms and duties, the ordinances of urgency cannot be adopted if it "affects", if they have negative consequences, but instead, they can be adopted if, by the regulations they contain, they have positive consequences in the areas in which they intervene.
- [3] Decision no. 461/2014 of the Constitutional Court was admitted the objection of unconstitutionality of the Law for amending and completing the Government Emergency Ordinance no. 111/2011, as a whole.
- [4] Regulation no. 679/2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46 / EC

UNCONSTITUTIONALITY OF THE GOVERNMENT ...

- [5] Directive 2002/58 / EC on the processing of personal data and the protection of confidentiality in the public communications sector.
- [6] Decision of 5 September 2019 in Case C-417/18, " Reference for a preliminary ruling - Directive 2002/22 / EC - Universal Service and Rights to users regarding electronic communications networks and services - Article 26 (5) - Unique European number for emergency calls - Provision of information regarding the caller's location ”
- [7] Decision of 11 September 2008, Commission / Lithuania, C-274/07, EU: C: 2008: 497, paragraph 40
- [8] Convention for the Protection of Human Rights and Fundamental Freedoms