N^0 67/2023

To: The European Commission/JUST/Rule of law

The undersigned associations,

The Romanian Magistrates' Association (AMR), a non-governmental, apolitical, national and professional organization of judges and prosecutors, declared "of public utility" by Government's Decision No. 530 on 21 May 2008, email: amr@asociatia-magistratilor.ro, member of the International Association of Judges and of the European Association of Judges since 1994, represented by Judge Andreea Ciucă, PhD, as president,

The National Union of Romanian Judges (UNJR), email: office@unjr.ro, member of the Association of European Magistrates for Democracy and Freedom – MEDEL, represented by Judge Dana Gîrbovan, as president,

The Association of Judges for the Defense of Human Rights (AJADO), a non-governmental, apolitical and professional organization of judges, email: contact@ajado.ro, represented by Judge Florica Roman, as president,

The Romanian Public Prosecutors' Association (APR), a non-governmental, apolitical, national and professional organization of prosecutors, email: apr@mpublic.ro, represented by prosecutor Elena Iordache, PhD, as president,

send the following

ANSWERS
to the targeted questions

1. *In view of the recommendation in the 2022 Rule of Law Report, what are your views on a) the state of play of the implementation of the revised Justice Laws and their impact on judicial independence and b) the functioning of the investigation and prosecution of criminal offences in the judiciary under the new structure replacing the SIIJ?*

a) *The state of play of the implementation of the revised Justice Laws and their impact on judicial independence*

Regarding the status of judges and prosecutors, the new law contains the following obvious setback, consisting in the situations in which the magistrate can be suspended from office, without payment of salary and without the period of suspension constituting seniority in work.

According to the Law which entered into force in December 2022, the magistrate is suspended when he is sent to trial for committing a crime. However, no distinction is made between intentional and unintentional crimes. According to the previous law, the measure of suspension was ordered if it was considered, in light of the circumstances of the case, that the dignity of the profession was prejudiced.

A number of colleagues have expressed concerns about the new provision, because, for example, they have to commute daily over long distances (and the motorway network is very small). They feel a real pressure because if they are engaged in a car accident, even without human casualties, but with the destruction of some goods, they will be suspended from office. Even if the application of the sentence is waived (a possibility stipulated by the Criminal Code), they remain suspended from office and are expelled from their profession.

b) The functioning of the investigation and prosecution of criminal offences in the judiciary under the new structure replacing the SIIJ?

The law dismantling the Section for the Investigation of Offences in the Judiciary (SIIJ) was adopted by Parliament on 28 February 2022.

Consequently, the Criminal Investigation and Forensics Section of the Prosecutor's Office attached to the High Court of Cassation and Justice has competence with regard to crimes committed by judges and prosecutors, members of the Superior Council of Magistracy, judges of the High Court of Cassation and Justice and prosecutors from the Prosecutor's Office attached to the High Court of Cassation and Justice, by the judges from the courts of appeal and the Military Court of Appeal and by the prosecutors from the prosecutor's offices attached to these courts, as well as by the judges of the Constitutional Court of Romania. Also, the prosecutor's offices attached to the courts of appeal have jurisdiction over the offences committed by judges from courts of first instance, tribunals, military tribunals and prosecutors from the prosecutor's offices attached to these courts.

The criminal investigation is carried out by the prosecutors specifically appointed by the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice, at the proposal of the Plenum of the Superior Council of Magistracy, for a period of 4 years, according to the procedure provided by law.

The Superior Council of Magistracy has initiated and completed the selection procedure, for which prosecutors with experience in organised crime and anticorruption litigation have already signed up.

The new procedure adheres to all the standards of independence and impartiality laid down by the CJEU. In fact, the procedure adopted prioritises independence and objectivity when naming specialised prosecutors more than any other procedure available to date (including the selection

procedure for National Anti-corruption Directorate and Directorate for the Investigation of Organized Crime and Terrorism).

In practice, the aspects welcomed by the Venice Commission in its Opinion no. 924/2018 were respected, namely: the involvement of the Superior Council of Magistracy in the selection and appointment procedure, as well as of the prosecutors investigating the crimes in the judicial system; the participation of the Plenum of the Council (which includes judges and prosecutors) is important as the Section will investigate both prosecutors and judges; the precise indication in the law of the criteria and procedural conditions for the selection of the best candidates ensures some important guarantees of quality; providing stronger procedural guarantees for the judges and prosecutors under investigation.

Specifically, the Superior Council of Magistracy organized three sessions for selection of specialized prosecutors, in May, July and December 2022. Accordingly, in May 2022, the Council proposed to the Prosecutor General the appointment of six prosecutors to the Criminal Investigation and Forensics Section of the Prosecutor's Office attached to the High Court of Cassation and Justice. The Prosecutor General only appointed five, without a reasoning for the rejection of the sixth candidate selected by the Superior Council of Magistracy. In July 2022, the Superior Council of Magistracy proposed the appointment of a specialized prosecutor, but the Prosecutor General did not issue either an appointment decision or a decision rejecting the proposal. In December 2022, the Superior Council of Magistracy proposed the appointment of a specialized prosecutor, and he was appointed by the Prosecutor General.

Therefore, a total number of six specialized prosecutors have been appointed to investigate crimes committed by judges and prosecutors, although the number of positions is 15, within the Criminal Investigation and Forensics Section of the Prosecutor's Office attached to the High Court of Cassation and Justice. Although there was a pressing need to fill the 15 positions, none of the 3 selection sessions organized by the Superior Council of Magistracy was launched at the request of the Prosecutor General.

Meanwhile, three of the appointed prosecutors have ceased their activity as a result of their retirement.

It should be pointed out that, even in the context of the obvious insufficiency of human resources, the three specialized prosecutors solved, in only nine months, 66% of the files received from the former Section for the Investigation of Offences in the Judiciary (SIIJ). Specifically, out of the 3,100 files received from the SIIJ on June 7, 2022, the specialized prosecutors within the Criminal Investigation and Forensics Section of the Prosecutor's Office attached to the High Court of Cassation and Justice have solved 2,000 cases so far. It was envisaged that the files older than five years be solved, with priority.

These figures reflect a true efficient the activity, all the more so since the nine months included two months of judicial vacation (July and August), provided by the Law on judicial organization.

Along the same lines, we show that the prosecutors specialized in investigating the crimes committed by judges and prosecutors in tribunals and local courts solved about 50% of the cases received from the former SIIJ. These prosecutors are appointed to the prosecutor's offices attached to the courts of appeal.

2. *What is your view on the implementation of the new provisions, in the revised Justice Laws, regarding the appointment, promotion and dismissal of magistrates, both in executive and leading positions?*

The new Law on the Status of Judges and Prosecutors, which entered into force on December 16, 2022, has partially modified the procedure for appointing vice-presidents of courts of first instance, tribunals and courts of appeal.

Previously, the candidates had to draw up a project on the exercise of the specific duties of the vice-president and to participate in a multiple-choice written test for the examination of managerial and communication knowledge.

Currently, the candidates have to prepare the project, but they no longer have to give a written test. But in addition to the previous procedure, the president must consult the judges of the court before making the proposal for the position of vice-president. After consulting the judges, the president must seek the opinion of the management board. The opinion must be reasoned on the basis of elements regarding the candidate's professional competence and on the basis of the colleagues' perception of him or her. The candidacy documents must be sent to the Superior Council of Magistracy.

Therefore, as in the previous procedure, the appointment of the vice-president is made by the Section for Judges of the Superior Council of Magistracy.

In addition, it is normal to have compatibility between the president's project regarding the exercise of management powers and the vice-president's project. This requirement also existed in the previous law, all the more so because, in the absence of the president, it is the vice-president who replaces him. So, it is only natural for compatibility and trust to exist between the president and the vice-president.

The same procedure exists regarding the appointment of section presidents. The president of the court was and still is the one who makes the nomination, after consultation with the judges and based on the opinion of the management board.

Regarding the executive position, Advocate General Emiliou, in his opinion deliverd on 16.02.2023, concludes that a procedure for promotion of judges based on an assessment of their work and conduct by a board composed of the President and judges of the relevant higher court that are also in charge

of reviewing the judgments delivered by those judges on appeal and of carrying out periodic assessments of their work is compatible with EU law.

According to this opinion, "*the criteria for the evaluation of the candidates' work are openly listed and are, thus, verifiable. Furthermore, they are all relevant for the purposes of forming a view as to the candidates' judicial activity and merit. The Advocate General also notes that the sources of information and evidence upon which the members of the selection board must base their decision in relation to each candidate are rather numerous and diverse. That contributes to making the overall 'effective promotion' procedure appear to be based a priori on an objective, rather than discretionary, assessment. Those elements, along with the fact that the board in charge of conducting the promotion procedure must draft a reasoned report indicating the marks awarded for the criteria applied, as well as the overall mark obtained by the candidate at the close of the procedure, – which the candidate is entitled to challenge -, confirm the absence of a real risk of 'undue discretion' giving rise to a reasonable doubt in the minds of individuals as to the independence of the judges concerned".*

https://curia.europa.eu/jcms/upload/docs/application/pdf/2023-02/cp230034en.pdf

3. *What is your opinion regarding the ongoing reform of the Criminal Code and the Criminal Procedure Code? Are the Decisions of the Constitutional Court impacting the codes satisfactorily addressed by the current drafts in your view?*

a) *The criminal Code – abuse of office*

The new draft of law defines the offence of abuse of office in a way that does not comply with the decisions of the Constitutional Court or with the standards laid down by the Venice Commission or with the ECHR jurisprudence in the field.

The Constitutional Court's Decision 405/2016 found that the provisions of article 246 of the Criminal Code of 1969, are constitutional as regards the abuse of office offence, only if the phrase "defectively performs" in the contents of this law means "performs by breaching the law". The Court also found that at present, any act or omission of a person falling within the qualities required to the active subject, regardless of the severity of the offence committed, may enter the sphere of the incrimination norm. This finding made the Court have reservations in appreciating that this was the intention of the legislator when incriminating the abuse of office. The Court also found that the deeds that under current regulation, can fall within the abuse of office offense**, do not have the intensity needed to trigger the application of criminal penalty.** The Constitutional Court (CCR) found that the legislator hadn't provided **a value threshold of the damage or a specific intensity of the injury, which prompts the Constitutional Court to conclude that, regardless of the damage's value or of the injury's intensity resulting from the deed, the latter can be an offence of abuse of office if the other constituents are also fulfilled.**

The new draft of law does not establish either the seriousness of the damage required for the act to be a crime, nor the direct intention of the official to violate the law in order to obtain a favor for themselves or for another.

Actually, there is no difference between the administrative, patrimonial or disciplinary liability and the criminal liability of a public official, who can be incriminated for any violation of the law, no matter how insignificant the damage may be.

Such an approach is also contrary to the Venice Commission's 2013 recommendations on the relationship between the political ministerial liability and the criminal liability, according to which the national penal provisions on the „abuse of office", „abuse of power", and similar expressions should be interpreted in a restrained sense and enforced at high level, so that they can be invoked only when the deed is serious.

We also underline that, in the western states the criminalization of "abuse of power" was based on the need to protect citizens against state officials who abuse the power they have either to harm them or for the officials to produce a benefit for themselves or others undue. We find this concept in the criminalization of this crime both in Cuza's Penal Code, from 1864, and in Carol's Code, from 1936.

On the other hand, in communist countries, based on the Soviet concept of law, "abuse in service" was the crime through which the communist party - through the prosecutor's office - controlled all public officials. We make it clear that in socialism everyone worked for the state, so any person could be an active subject of the crime of abuse of office. Moreover, different from the western conception of "abuse of power" which emphasized the obtaining of undue benefits/benefits by the official, on the qualified purpose of the crime, the criminalization of the Soviet law emphasized the production of "damage" to the state, regardless of whether the official followed its production or not. Later, following the fall of communism and the implementation of constitutional democracies built on the principle of separation of powers in the state and respect for human rights, some former communist states redefined the crime of "abuse in service" because, through the interpretation and application of this crime, it became unpredictable, a fact emphasized both by the European Court of Human Rights in the case of Estonia, and by the Venice Commission.

Therefore, the proposed definition of abuse of office retains its Soviet nature, contrary to the rule of law and its principles enforced at the level of the European Union.

b) The criminal procedure code – the use of secret evidence in criminal trials

The proposal to amend the Criminal Procedure Code includes a provision that will allow the use of wiretapping obtained by enforcing warrants on national security (a classified procedure) in all cases

where the maximum penalty provided by law is over 5 years – including theft, deception, abuse of office or other common law offenses.

This proposal provides that:

"Art. 139[1] Recordings obtained following performance of specific intelligence activities

(1) Recordings resulting from intelligence specific activities involving the restriction of the exercise of fundamental human rights and freedoms may be used as evidence in criminal proceedings if they result in data or information on the preparation or commission of an offence referred to in Article 139 para. (2) and the legal provisions governing the obtaining of these recordings have been complied with.

(2) The legality of the report based on which the activities in question were authorized, of the warrant issued under it, of the manner in which the authorization is enforced, as well as of the resulting recordings, shall be verified in the preliminary chamber procedure by the judge of the preliminary chamber of the court which, according to the law, has jurisdiction to hear the case at first instance.'

Under Article 345, two new paragraphs shall be inserted after paragraph (1), para. (11) and (12), which read as follows:

'(11). Where the document instituting the proceedings is based on evidence constituting classified information, the judge of the preliminary chamber shall, as a matter of emergency, request the competent authority to declassify or change the classification level and, where appropriate, grant the counsels of the defendants and of the aggrieved party access to classified information, subject to holding the access authorization provided by law. If they do not hold the access authorization provided by law and the defendants or, as the case may be, the aggrieved party, do not appoint another lawyer who holds the authorization provided by law, the preliminary chamber judge shall take steps to ex officio appoint lawyers who hold such an authorization.

(12) After consulting the competent authority, the judge of the preliminary chamber may, by way of order, deny access to classified information on a reasoned basis, if this could lead to a serious threat to the life or fundamental rights of a person or if the denial is strictly necessary to safeguard national security or another important public interest. In this instance, the classified information cannot ground a ruling to convict, to waive penalty enforcement or to postpone the enforcement of the respective penalty.'

These proposals raise serious issues from the perspective of the rule of law, of the right to a fair trial, from the perspective of the observance of the lawyer's independence and of granting an effective right to defense.

In this respect, we would briefly submit the following arguments:

b.1. The amendment proposal involves the widespread use of wiretapping of communications obtained by enforcing national security warrants as evidence in criminal proceedings, these having the character of secret evidence.

This will, once again, create an overlap between the specific intelligence activity and that of criminal investigation, although the two should be clearly circumscribed in a constitutional state.

Moreover, until recently, there was an extremely large number of national security warrants in Romania, given that such a warrant is issued for an extended period of time – up to six months, and can be extended for up to two years. The extremely intrusive character of these measures raises serious concerns related to the observance of citizens' right to private life in their relations with the state.

The number of communication wiretapping warrants for reasons of national security is enormous, no other European state has such a level of surveillance by the intelligence services. An explanation for this huge number of warrants would consist precisely in the fact that, until the Decisions of the Constitutional Court no. 51/2016 and no. 21/2018, which limited the intrusion of intelligence services in criminal proceedings – these were distorted, being used in reality as evidence in criminal proceedings, in violation of the principle of legality and loyalty in obtaining evidence.

The amendment to the Code of Criminal Procedure reintroduces the secret services in justice: the recordings made by the SRI on a national warrant can be used as evidence in criminal trials. This provision it is yet another victory for the SRI, which has expanded its power.

b.2. The secret evidence in court is forbidden or is strictly regulated in the large majority of UE state.

The study NATIONAL SECURITY AND SECRET EVIDENCE IN LEGISLATION AND BEFORE THE COURTS: EXPLORING THE CHALLENGES, made at the request of the LIBE committee, provides a comparative analysis of the national legal regimes and practices governing the use of intelligence information as evidence in the United Kingdom, France, Germany, Spain, Italy, the Netherlands and Sweden. It explores notably how national security can be invoked to determine the classification of information and evidence as 'state secrets' in court proceedings and whether such laws and practices are fundamental rights- and rule of law compliant. The study finds that, in the majority of Member States under investigation, the judiciary is significantly hindered in effectively adjudicating justice and guaranteeing the rights of the defence in ‘national security’ cases.

The United Kingdom and the Netherlands are the only two Member States examined with official legislation allowing for the formal use of classified intelligence information in judicial proceedings. Those are very specific procedure that are definitely not used in large case.

In France, the notion of 'secret evidence' does not exist in the context of a trial: a confidential document or information is not accepted by judges. In criminal law, evidence has to be openly debated and cannot be obtained illegally. A French expert summarised the context in an answer to our questionnaire: French law is based on an absolute prohibition of the communication of classified materials protected by the 'secret défense', including to judicial authorities. This means that any transmission of classified information to the judge, who is not authorised to have access to classified materials because of the rule of separation of powers, is a direct violation of the secrecy of national defence, which is punishable by criminal law. The judiciary can only have access to a record if it has previously been declassified, following a procedure established by law. The principle of equality of arms in France stems from Articles 1 and 6 of the Declaration of 1789, but was only established in law in 2000 as an addition to the Penal Procedures' Code, directly influenced by Article 6 of the European Convention on Human Rights.

However, the mutual trust that exists between the Member States should also involve the establishment of uniform minimum rules in the use of classified documents in criminal proceedings, exclusively in specific cases involving national security in the strict sense of the word – terrorism, espionage, treason, etc.

b.3. Observing the right to defense and the independence of the lawyer

The new amendment to the law regulates the right of the chosen counsel of the party to have access to classified information conditional on their holding an access authorization, i.e. an ORNISS certificate.

In Decision no. 21/2018, the Constitutional Court held that access to secret documents conditioned by the holding of such an authorization does not impact, in essence, the right to a fair trial, but that they cannot rule on the authorization procedure, since they have not been apprised with the special law regulating it.

In other words, the Court have reserved the right to make such an analysis when it is referred to them.

Or, from the perspective of the lawyer's rights and obligations, such a procedure actually impacts their independence and the trust relations that need to exist between the lawyer and their client.

Actually, the procedure requires that the person requesting access authorization express in writing their agreement to be subject to verifications using the methods and means specific to the institutions having competences in the field of national security.

They are also supposed to fill in an extremely detailed questionnaire on issues related to both their own person and to their family (data and addresses of parents, children, etc.), whether they have relatives abroad, customs, etc.

To put it another way, this is an extremely intrusive questionnaire in the sphere of private life, able to outline the character, professional or social conduct, conceptions and living environment of the spouse or concubine of the requesting person, these being relevant and to be taken into account when granting the security permit.

The appropriateness of the approval is to be evaluated based on the verification and investigation of the biography of the person concerned.

The main criteria for assessing compatibility in granting the approval for the issuance of the security certificate / access authorization concern both the personality traits and the situations or circumstances from which security risks and vulnerabilities may result.

The validity of the security certificate/access authorization issued to a person is up to four years, during which time the checks can be resumed at any time.

Furthermore, the security certificate or access authorization shall cease to be valid and shall be withdrawn upon a simple request by ORNISS or by the competent designated security authority. Moreover, the denial to issue the certificate does not have to be reasoned.

Or, the holding by the lawyer of that certificate, therefore, implied their agreement to permanently be subject to surveillance by the intelligence services, that is to say, precisely those secret services which are the providers of classified information used as evidence, the legality of which could be challenged by the lawyer.

To put it differently, those who provide the secret evidence in criminal proceedings are also the ones who have the authority to select the lawyers who can challenge the legality of this evidence, which is not only absurd, but completely contrary to the rule of law.

4. *Despite the judge and prosecutor positions filled since last year, the current occupancy rates remain low, in particular as regards specialised prosecutors. Which impact did the measures taken, including the competitions for entry into judicial professions, have on this issue since last year?*

4.a. It is not in particular with the specialized prosecutors, they have one of the best rates of occupancies in the present. As a first note, it is troubling that your rule of law report is still focus on corruption case rather that the functioning of the judicial system according with the rule of law principals.

According to the data published by the Superior Council of Magistracy, the occupancy rate of the prosecutor positions is very high, both with the National Anticorruption Directorate (DNA) and with the Directorate for Investigating Organized Crime and Terrorism (DIICOT). Thus, on March 8, 2023, 81.54% of the positions were filled with DNA, and 84.31% of the positions were filled with DIICOT, while with the Prosecutor's Office attached to the High Court of Cassation and Justice the occupancy rate was only 41.96%!

https://www.csm1909.ro/ViewFile.ashx?guid=a46bbbda-7e49-463a-904f-d49eea22c596-InfoCSM

One "target" stipulated in the National Recovery and Resilience Plan was to reach a 85% occupancy rate of the positions with the National Anticorruption Directorate, by 1.07.2023.

On the one hand, we rightly ask ourselves why there is such a "target" in the Plan and, on the other hand, why the Plan does not mention any concern about the occupancy of the positions with courts (knowing that the courts also solve corruption cases) and with the other prosecutor's offices? Our question is all the more justified since there is a significant number of courts and prosecutor's offices that have a manifestly lower degree of occupancy than the DNA.

4.b. According to data published by the Superior Council of Magistracy, the number of vacancies in the judiciary has increased compared to last year, reaching 1,000 vacancies for judges and over 800 vacancies for prosecutors, at the beginning of 2023.

The new Laws on Justice, no. 303/2022 on the status of judges and prosecutors, no. 304/2022 on the judicial organization and no. 305/2022 on the Superior Council of Magistracy, **entered into force on 16.12.2022**.

The draft Law nr. 303/2022 on the status of judges and prosecutors, submitted for debate to the Parliament, did not contain changes on the retirement conditions for judges and prosecutors, nor on the amount of the public service pension. Therefore, **after successive debates by articles on the draft of the three Laws on Justice, in the two Chambers of the Parliament, provisions on the right to retirement pension of judges and prosecutors similar to those of Law no. 303/2004 were eventually voted**.

However, after only three days as of the entry into force of Law no. 303/2022, the draft law on the modification and completion of certain regulatory acts in the field of public service pensions was submitted to the Superior Council of Magistracy. The draft law was registered with the Senate under no. 4/2023.

This draft contains amendments on the modification of the procedure, conditions for granting and the amount of the public service pension of prosecutors and judges, including of those who are already retired.

In the versions of the draft law on the status of judges and prosecutors, starting with 2020, on which the courts, prosecutor's offices and professional associations of judges and prosecutors have advanced points of view, no provisions of the kind mentioned in the draft law registered with the Senate under no. L4/2023 were ever included.

The launch in the public area, in October 2022, of a draft emergency ordinance on the modification of the provisions on public service pensions of judges and prosecutors – a draft that was not subsequently confirmed by the executive power – as well as the registration with the Senate of the draft law on the amendment and completion of certain regulatory acts in the field of public service pensions (L 4/2023) represented elements of instability regarding the status of magistrates.

This instability is proved by reference to the "legitimate expectation", a notion in respect of which it has been held, in numerous solutions of the European Court of Human Rights, that it should be understood and interpreted as being grounded in the citizen's right to **legislative coherence and security, so that, under the law, they can assert, preserve and defend their rights. It is about the materialization of the constitutional principle, specific to any rule of law, regarding the supremacy of the law**.

Consequently, between November 2022 and January 2023, 335 applications for relief of their position by retirement, made by judges (246 applications) and prosecutors (89 applications) were registered with the Superior Council of Magistracy.

The seriousness of the situation is proved by the fact that, if between July 2019 and January 2023, i.e. during 43 months, 654 magistrates were relieved of their position, by retirement, in just three months (November 2022 – January 2023) 335 magistrates submitted applications for relief of their position, by retirement!

In other words, relating to the data published by the SCM on the human resources on 1.02.2023, **the number of magistrates who applied for retirement in the latest 3 months is equal to the number of judges with nine courts of appeal together or to the number of prosecutors with as many prosecutor's offices attached to the courts of appeal together** (it should be noted that in Romania there are 16 courts of appeal and 16 prosecutor's offices attached to the courts of appeal).

The obvious and critical lack of human resources caused by this state of affairs will have a major negative impact on the organization of courts and prosecutor's offices activity, on the celerity and quality of the act of justice, whose beneficiary is the citizen.

It is obvious that the crisis was created by the instability of Law regarding the statute of judges and prosecutors, basically by the endless discussion on the retirement conditions and occupational pensions of judges and prosecutors. The judiciary was defined by stability and the system had no real problem regarding this field – a lot of judges DID NOT retire when they fulfilled 25 years of seniority. It is clear that they did not retired after the reform of the Laws of Justice in 2018, but the wave of retirement started to raise in 2020, and now it seems to become a tsunami.

5. *Have there been other important developments regarding the resources and workload of courts and prosecution services since the last Rule of Law Report?*

See question no. 4

6. *Could you comment on developments regarding disciplinary sanctions against magistrates and, notably, on the role of the Judicial Inspection in the disciplinary proceedings?*

6.a.1. According to the draft bill, the Minister of Justice would have had the right to initiate the disciplinary procedure against judges even when the judicial inspection has found that there are not enough elements in this regard. The Minister could have referred the Judicial Inspection and, in this way, could have triggered the procedure of prior verifications that could led to the disciplinary action. Even more, the Minister would have once again become the holder of the disciplinary action against judges.

Such a legal provision would have given the Minister the possibility to file for disciplinary action against judges to the Superior Council of magistracy. Likewise, the Minister of Justice would have been able to contest the decision of the SCM Sections when they have rejected the disciplinary action.

After perseverant and reasoned endeavours taken by our professional associations, together with 2 other associations, this legislative proposal was dropped. According to the law that came into force in December 2022, the minister of justice does not have the competence to initiate disciplinary actions against judges. This was another great success of ours.

6.a.2. As a result of parliamentary debates, the repeal of two disciplinary violations was voted, namely: the manifestations that prejudice the honour or the professional probity or the prestige of justice, committed in the exercise or outside the exercise of work duties; non-observance of the decisions of the Constitutional Court or of the decisions pronounced by the High Court of Cassation and Justice in settling the appeals in the interest of the law.

Inside the judiciary, concerns have been expressed regarding the efficiency of the mechanisms of unification of the judicial practice by the High Court of Cassation and Justice, given that from the

repeal of the second disciplinary violation it can be understood that the decisions of the Supreme Court to unify the practice are no longer binding.

As a reply, it was argued that the binding character of these decisions is stipulated by the Code of Civil Procedure and the Code of Criminal Procedure, and if they are not respected they can incur disciplinary liability. In this respect, reference was made to the disciplinary violation consisting in the exercise of the function in bad faith or with gross negligence.

On the other hand, on 18 May 2021, 23 December 2021 and 22 February 2022, the CJEU gave a series of judgments regarding the justice system, the fight against corruption and the primacy of EU law in Romania.

The aforementioned CJEU judgments laid down the norms and principles which the Romanian judge must refer to when he checks the compatibility of national provisions with European law. Although such decisions by the CJEU are not unusual, in this particular situation, the European Court grants Romanian judges a wide margin of appreciation, which in turn has led to an inconsistent application of CJEU judgments by national courts. For this reason, the Supreme Court was notified, because it alone has been constitutionally charged with assuring a unified jurisprudence and may, for such purposes, pass down generally binding judgments.

7. *Following Decision No. 67 of 25 October, 2022, the High Court of Cassation and Justice, what measures are you taking to mitigate the impact on corruption cases?*

7.a. Decision no. 67/2022 of the High Court of Cassation and Justice has done nothing but bring up again a question of law that has not been disputed until now: the prescription is a substantive law institution, the more favorable criminal law being, therefore, applicable.

In fact, most of the courts consulted by the High Court in the procedure for adopting this decision shared this same point of view.

Thus, it was considered that the rules regulating the prescription interruptive effect of procedural steps are substantive law rules tending to be applied as a more favorable criminal law.

Consequently, the provisions of Art. 155 para. (1) of the Criminal Code, in the form in force during the period 26.06.2018 - 30.05.2022, are likely to be applied as a more favorable law.

The points of view supported by the following courts reflected this approach: the courts of appeal Bacau, Bucharest (one of the points of view), Craiova (one of the points of view), Galaţi, Iaşi (one of the points of view), Oradea, Ploieşti, Suceava, Târgu Mureş and Timişoara, the tribunals of Alba, Arad, Bacău, Brăila, Bucharest, Bihor, Bistriţa-Năsăud, Braşov, Caraş-Severin, Cluj, Covasna, Dolj (one of the points of view), Galaţi, Gorj, Giurgiu, Hunedoara, Ialomiţa, Iaşi, Ilfov, Mehedinţi, Neamţ, Satu Mare, Sibiu, Timiş, Teleorman, Vaslui, as well as the municipal courts of Alba Iulia, Aiud, Bacău, Bistriţa, Băileşti, Beiuş, Braşov, Buhuşi, Calafat, Caracal, Caransebeş, Constanţa, Corabia,

Craiova, Filiaşi, Hârşova, Huşi, Iaşi, Lugoj, Moineşti, Moldova Nouă, Năsăud, Novaci, Oradea, Paşcani, Piatra-Neamţ, Petroşani, Podu Turcului, Răducăneni, Reşiţa, Roman, Roşiori de Vede, Rupea, Satu Mare, Târgu Jiu, Tulcea, Turnu Măgurele, Vaslui and Zimnicea.

To the same effect, Decision No. 1.092 of 18 December 2012 of the Constitutional Court (published in the Official Gazette of Romania, Part I, no. 67 of 31 January 2013), it was shown that the prescription belongs to the substantive criminal law, and not to the criminal procedural law. Therefore, the Constitutional Court ruled that the provisions of art. 124 of the Criminal Code of 1969, which was the object of the exception of unconstitutionality ruled by the Ombudsman, are constitutional insofar as they do not prevent the enforcement of the more favorable criminal law to acts committed under the old law.

The same interpretation, in the sense that the prescription of criminal liability is a substantive law institution, was also given by Decision no. 2 of 14 April 2014, ruled by the High Court of Cassation and Justice – The panel for the unravelling of legal questions in criminal matters (published in the Official Gazette of Romania, Part I, no. 319 of April 30, 2014), in which it was provided that: "For the purpose of reasoning identity, also taking into account the fact that the regulation of the criminal liability prescription by the provisions of art. 153-156 of the new Criminal Code does not differ from the one established by the old Criminal Code in art. 121- 129, it can be stated with certainty that criminal liability prescription is governed by substantive criminal law rules, being likely to benefit from the effects of the application of *mitior lex*".

On the same lines, the Faculty of Law of the University of Bucharest, one of the most prestigious faculties in the country, pointed the following: "*the applicability of the principle of the more favorable criminal law in the matter of interrupting the course of criminal liability prescription is supported both by the specialized literature and by the older jurisprudence and it has been considered that in the matter of interrupting the course of criminal liability prescription, the principle of the more favorable criminal law shall apply. In actual terms, art. 155 para. (1) of the Criminal Code in the form existing between Decision no. 297 of April 26, 2018 and the entry into force of Government Emergency Ordinance no. 71/2022 for the amendment of art. 155 para. (1) of Law no. 286/2009 on the Criminal Code, represents a more favorable criminal law applicable under art. 5 of the Criminal Code."* - point VI of the Decision no 67/2022 of the High Court of Cassation and Justice.

As such, the HCCJ's decision only reasserts a constant interpretation of the Romanian doctrine and jurisprudence.

Consequently, we cannot offer solutions for circumventing the binding effects of the High Court of Cassation and Justice decision, as we seem to be asked based on the question. To rule such solutions is to violate the constitutional principles that establish the competence of the supreme court in ensuring the unitary practice in the legal system, dynamiting the legal security of the country. In

addition, any solution that would lead to the non-application of the mandatory decisions of the supreme court would contravene the provisions of Art. 477 para. (3) Code of Criminal Procedure.

New rules of law cannot be invented, the fundamental principles of law cannot be twisted around just to ensure at all costs the effectiveness of the fight against corruption.

What is important to learn for the future is to avoid the adoption of laws that contravene the Romanian Constitution, because the effects of such laws, which can be declared unconstitutional years after their adoption, will be of the nature of those raised by the Commission.

Or, the draft of laws on the Criminal Code and the Criminal Procedure Code, submitted to the Parliament, have the same vices of unconstitutionality, the mentioned risks being obvious.

8. *How do you assess the effectiveness of prosecution of corruption involving the judiciary under the new structure?*

See question no. 1.b)

9. *Do you see any trends regarding corruption committed by organised crime groups?*

With regard to criminal networks, a tendency towards becoming mixed was noticed, i.e. carrying out criminal activities having extraneity characteristics.

Therefore, the already formed networks have diversified their activity, by including crimes with extraneity elements.

It is known that, for example, human trafficking involves, by its very nature, elements of extraneity. However, it has been noticed that these elements tend to multiply due to the geo-political events at the borders of our country.

J Andreea Ciucă, PhD President of AMR	J Dana Gîrbovan President of UNJR	J Florica Roman President of AJADO	PA Elena Iordache (ret.), President of APR