ASOCIAŢIA FORUMUL JUDECĂTORILOR DIN ROMÂNIA ***(Romanian Judges' Forum Association)***
ASOCIAȚIA MIȘCAREA PENTRU APĂRAREA STATUTULUI PROCURORILOR ***(Movement for the Defence of the Status of Prosecutors Association)***
ASOCIAȚIA INIȚIATIVA PENTRU JUSTIȚIE ***(Justice Initiative Association)***

Remarks on the "laws of justice"
(new drafts announced by the Ministry of Justice on 21 July 2022)

General Remarks

The new drafts of the "laws of justice", published on 21 July 2022 by the Ministry of Justice,[1] are basically the current laws in force, with certain modifications, being completely different from the versions presented and undertaken before the European Commission.

It is simply incomprehensible why the adoption of such drafts, in the proposed form, is still necessary. Although the Government of Romania has undertaken to ensure the harmonisation of the legislation regarding the organisation and functioning of the justice in accordance with the principles of the international instruments ratified by Romania, as well as taking into account all the recommendations formulated within the European mechanisms (CVM, GRECO, the Venice Commission, the EC Report on the rule of law) and the CCR decisions, the "laws of justice" published on 21 July 2022 maintain the same retrograde provisions and block any kind of reform.

Thus, the principle of loyal cooperation provided for in Article 4 para. (3) of the Treaty on the European Union is violated by the Minister of Justice, the European partners being deceived without any restraint in an insidious and endless game. It follows from this principle that the EU Member States are required to take all necessary measures to guarantee the applicability and effectiveness of Union law, as well as to eliminate the illegal consequences of a violation of this law and that such an obligation falls, within its powers, to each body of the Member State concerned [see in this regard Judgment of 17 December 2020, Commission/Slovenia (ECB Archives), C-316/19].

Despite the commitments made before the European Commission, almost all the harmful changes criticised by international bodies in recent years are maintained: promotion competitions at the High Court of Cassation and Justice, as well as in executive offices at the courts of appeal, tribunals and prosecutor's offices attached to them (being the only form of promotion allowed by law until 31 December 2025) do not have a meritocratic character and remain under the total control of the Section for Judges of the SCM, the Judicial Inspection is minorly cosmeticized, the role of the National Institute of Magistracy, through the Scientific Council, in the appointment of inspectors, is completely removed, the freedom of expression of magistrates is seriously affected, the obligation to refrain from "defamatory

[1] https://www.just.ro/proiect-de-lege-privind-statutul-magistratilor/

manifestation or expression in relation to the other powers of the State" is maintained, and the operation of the SCM essentially in sections violates the constitutional architecture of this board authority, in which the Plenary is the adequate form of organisation.

It is very strange that the elimination of all these aspects was considered essential for the independence of the judiciary in the drafts published by the Ministry of Justice, represented by the current minister, on 30 September 2020 and 22 June 2022, and their revision was undertaken without reservations before the European Commission, and, via the new draft of 21 July 2022, the necessary changes are abandoned without any explanation, without transparently mentioning who proposed the new provisions, given that, in June 2022, the Ministry of Justice announced that it would not reopen the public debate on the drafts.

Also, regulations were introduced that ensure the possibility for the general prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice to refute with reasons all the measures and solutions adopted by the prosecutor (including the prosecutors of DNA (National Anti-Corruption Directorate)/DIICOT (Organised Crime and Terrorism Department)), provisions likely to violate the obligations undertaken by Romania through the Treaty of Accession to the European Union to ensure the independence of the DNA. *De facto*, by these drafts, all the progress made by Romania in the fight against corruption and organised crime is compromised and an attempt is made to control the activity of the two specialised prosecutor's offices by the political factor, through the Prosecutor General of Romania, who is eminently appointed by political reasons.

The filling by competition of the office of vice-president of the court/deputy of the first prosecutor of the prosecutor's office is eliminated, which constitutes a setback, as this regulation envisages the creation of a dependency of those who fill managerial offices in the courts/prosecutor's offices to the Section for Judges/Prosecutors and the president of the court/head of the prosecutor's office, who will propose their deputies. A clientelist system is thus configured within the judiciary, which is unacceptable, because it endangers the very independence of the judicial system.

In addition, at a time when more than 1000 judge and prosecutor positions are vacant, it is proposed to increase the period of training at the National Institute of Magistracy from 2 years to 3 years, a proposal that is not based on any impact study, nor any needs analysis or evaluation of the situation of the personnel in the judicial system. Increasing the training period will lead to chronic staff shortages and an imbalance in the medium term for courts and higher-level prosecutor's offices by correlation with the seniority required for promotion.

In this context, the desire of the executive power to create a judicial system, in which the decision-making power is held by the majority of the Section for Judges of the Superior Council of Magistracy, the leadership of the Public Ministry and the presidents of the courts, with a discretionary character and ignoring the board participation when making decisions of interest, remains obvious.

Practically, through these laws, the judicial system experiences an unacceptable setback, its independence being seriously endangered, although the guarantees of independence regarding judges ensured at the time of accession to the European Union should have remained intangible after accession, as already established by

the CJEU by Judgment of 20 April 2021, pronounced in the *Repubblika* case, C-896/19.

Specific Remarks

1. Serious impairment of the independence of the National Anti-Corruption Directorate/DIICOT

The new drafts eliminate the provision according to which "the National Anti-Corruption Directorate is independent in relation to the courts and the prosecutor's offices attached to them, as well as in relations with other public authorities, exercising its duties only under the law and to ensure its compliance".

Although there still is a legal provision in the sense that the National Anti-Corruption Directorate/DIICOT enjoys operational and functional independence, however, this is not clearly formulated, the text being subject to various interpretations.

Also, although it is mentioned that DNA/DIICOT is an autonomous structure (Art. 93/85 of the Law on judicial organisation), the law nevertheless regulates the fact that the one who leads the Directorate (DNA/DIICOT) is the Prosecutor General of Romania. This provision, together with the one that establishes the right of the general prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice to deny/control any solution given by the prosecutors from these structures contradicts the claimed principles (of autonomy and functional independence) and drastically limits the effective functioning of these structures.

The Chief Prosecutor of the National Anti-Corruption Directorate/DIICOT is qualified as a secondary authorising officer. The financing of current and capital expenses is ensured from the State Budget, the funds intended for the National Anti-Corruption Directorate/DIICOT being highlighted separately in the budget of the Prosecutor's Office attached to the High Court of Cassation and Justice. Practically, these provisions also remove the financial independence that these structures should have and also affect the functional/operational independence of the institutions since the chief prosecutors, in order to have adequate funding, depend on the will of the Prosecutor General of Romania, who is appointed by political reasons.

In this sense, the Venice Commission ruled the following:

"[A]lthough not proposing or advocating in favour of a unique or universal model of anti-corruption agency, the above instruments clearly define an international obligation for states to ensure institutional specialisation in the sphere of corruption, i.e., to establish specialised bodies, departments or persons (within existing institutions) in charge of fighting corruption through law enforcement.

Key requirements for a proper and effective exercise of such bodies' functions, as they result from the above instruments, include:

- independence/autonomy (an adequate level of structural and operational autonomy, involving legal and institutional arrangements to prevent political or other influence);

- accountability and personnel;

- specialised and trained staff;

- adequate resources and powers.

The use of special prosecutors in such cases has been successfully employed in many

countries. The offences in question are specialised and can better be investigated and prosecuted by specialised staff. In addition, the investigation of such offences very often requires persons with special expertise in very particular areas. Provided that the special prosecutor is subject to appropriate judicial control, there are many benefits to and no general objections to such a system." (CDL-AD(2014)041, Interim Opinion on the draft law on Special State Prosecutor's Office of Montenegro, paragraphs 17, 18 and 23).

Therefore, the essence of the fight against corruption and organised crime is to ensure the real, effective independence of the structures (prosecutor's offices) and prosecutors that work in this field.

***De facto*, through these drafts, the progress made by Romania in the fight against corruption and organised crime is compromised and an attempt is made to control the activity of the two specialised prosecutor's offices by the political factor, through the Prosecutor General of Romania, who is eminently appointed by political reasons.**

2. The possibility of the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice to refute with reasons all the measures and solutions adopted by the prosecutors (including the DNA/DIICOT prosecutors)

According to the new regulation proposed on 21 July 2022, the measures and solutions adopted by prosecutors can be refuted with reasons by the superior hierarchical prosecutor or **by the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice**, when they are judged as illegal or unfounded.

This text seriously affects the obligations undertaken by Romania through Annex IX of the Treaty of Accession of Romania to the European Union, entitled "Specific commitments undertaken, and requirements accepted, by Romania at the conclusion of the accession negotiations on 14 December 2004 (referred to in Article 39 of the Protocol)", in which, paragraph (4) lists a series of requirements related to the independence of the DNA: "*To considerably step up the fight against corruption and in particular against high-level corruption by ensuring a rigorous enforcement of the anti-corruption legislation and the effective independence of the National Anti-Corruption Prosecutors' Office (NAPO) (...); NAPO must be given the staff, financial and training resources, as well as the equipment necessary for it to fulfil its vital function.*"

Practically, due to the fact that the political factor controls the election of the General Prosecutor of Romania, and the person who will fill this office will depend on those who appointed him/her, either for the renewal of the mandate, or in order not to be subject to revocation, the granting of the right to invalidate the acts/measures ordered by the prosecutors from any level of the prosecutor's offices (including DNA and DIICOT) will mean a serious attack on their independence and could lead to the *de facto* abolition of the structures specialised in the fight against corruption or organised crime, likely to affect, at the same time, the effective character of the investigations, the collection of evidence and the speed of procedures. Such regulation represents an unacceptable setback.

Moreover, the Venice Commission opposed to such a solution in its opinions:

"The Law on the organisation and procedure of the Office of Procurator should define the procuracy as a system of relatively independent authorities preferably organised in correspondence to the court system. It would be for the higher authority to control the level immediately below. ***However, the highest authority should not directly control the lowest one. In this way, the system of prosecution would be protected against direct political intervention or influence****." (CDL-INF(1996)006, Opinion on the Draft Constitution of Ukraine, Section VII, p.14).*

3. Promotion to the High Court of Cassation and Justice and appointment to leadership positions at the same court are fully controlled by the Section for Judges of the SCM

The promotion competition at the HCCJ is not meritocratic and remains under the total control of the Section for Judges of the SCM.
It consists of a test with the objective of evaluating the judicial decisions drafted by the candidates (by a subcommittee consisting of two HCCJ judges appointed by the HCCJ president and a lawyer or university professor, appointed by the Section for Judges) and an interview held in front of the Section for Judges of the Superior Council of Magistracy.
The National Institute of Magistracy is completely bypassed and the role of the president of the HCCJ increases, both by being present at the interview, in the composition of the Section for Judges, and by directly appointing the majority of the members of the subcommittee for the evaluation of drafted judicial decisions.
Practically, this competition is reduced to an appointment made by the majority of the members of the Section for Judges of the Superior Council of the Magistracy (which can be, for example, the president of the HCCJ, 4 judges and the minister of justice), controlling the entire procedure.
The interview held in front of the Section for Judges of the Superior Council of Magistracy cannot be challenged in court.
By maintaining the interview test and abandoning the written test to verify legal knowledge, the professional standards are relativised, with an effect on the quality of the work of the judges of the supreme court, and the dose of subjectivity is increased. On the other hand, the subject of the interview is identical to that of the checks carried out by the Judicial Inspection in the procedure provided for by the Regulation on the promotion to the offices of judge at the High Court of Cassation and Justice. In other words, **all the data that form the object of the interview can already be found in the Report drawn up by the judicial inspectors** on the occasion of the checks that have this very object: "the integrity of the candidates and the way in which the candidates relate to values such as the independence of the judiciary and the impartiality of the judges, the motivation and their "human and social" competencies. The inequity in the regulation of promotion procedures at the higher courts is all the more obvious as the degree of professional exigency must be directly proportional to the hierarchy of the courts in the Romanian judicial system, as it is necessary for the supreme court to carry out their work by judges who have proven that they have thorough theoretical and practical knowledge in the specialisation for which they are applying. The differential treatment applied by the legislator, unjustified objectively and rationally - in the conditions where obtaining the degree of tribunal and court of appeal is done following a very rigorous

theoretical examination, organised by the NIM -, is contrary to Art. 16 para. (1) of the Constitution.
These provisions disregard the international acts that enshrine the fundamental principles regarding the independence of judges - the importance of their selection, training and professional conduct, respectively the objective standards that must be observed both when entering the profession of magistrate and when establishing the promotion modalities.
The Committee of Ministers of the Council of Europe has constantly recommended the governments of the Member States to adopt or strengthen all the necessary measures to promote the role of judges, individually, but also of the judiciary, as a whole, in order to promote their independence, applying, in particular, the following principles: "*All decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency*" (see Recommendation No. 94/12 of 13 October 1994 of the Committee of Ministers within the European Council on the Independence, Efficiency and Role of Judges)
On the evaluation of the judgments, regulated as an eliminatory test to access the interview test, the Venice Commission expressed serious reservations: "*Regular evaluations of the performances of a judge are important instruments for the judge to improve his/her work and can also serve as a basis for promotion* (***therefore, they cannot serve as the main criterion for promotion, but only as a basis; for example, the access to the written exam level after obtaining good or very good grades following the evaluation of judgments is sufficient***). It is important that the evaluation is primarily qualitative and focuses on the professional skills, personal competence and social competence of the judge. **There should not be any evaluation on the basis of the content of the decisions and verdicts, and in particular, quantitative criteria such as the number of reversals and acquittals should be avoided as standard basis for evaluation.**" (*CDL-AD (2011)012, Joint Opinion of the Venice Commission and OSCE/Office for Democratic Institutions and Human Rights on the constitutional law on the judicial system and status of judges of Kazakhstan, para. 55).*
Instead, the method of conducting the promotion exam in the legislation prior to 2018 observed the recommendations of the European Commission formulated over time within the CVM reports, as a materialisation of the obligation that Romania undertook at the time of accession to create a body of magistrates recruited exclusively on performance criteria.

Thus, in the **Report of 22.07.2009 regarding the progress made by Romania within the Cooperation and Verification Mechanism**, it was noted that "***Appointment procedures took place and new competitions were organised in accordance with the objectives established to ensure objectivity and high staff qualifications***"[2].
The same type of report concluded, in 2011, within the recommendation regarding the responsibility of the judicial system, as being necessary to ***"Demonstrate a track record in transparent and objective management decisions within the judiciary, for example through appointments, disciplinary decisions, appraisals and the promotion system to the High Court of Cassation and Justice"***[3].

[2] See https://ec.europa.eu/transparency/regdoc/rep/1/2009/RO/1-2009-401-RO-F1-1.pdf
[3] https://ec.europa.eu/transparency/regdoc/rep/1/2011/RO/1-2011-460-RO-F2-1.pdf

In implementing these recommendations, Law No. 300/2011, which amended Law No. 303/2004 and was promoted even by the current minister of justice, noted in the statement of reasons that "***both the interview, as a procedure for promotion to the supreme court, and the lack of an actual procedure for verifying the professional competence of the candidates, do not ensure the necessary requirements of transparency and objectivity for promotion to the office of judge at the High Court of Cassation and Justice. These aspects have been the object of constant criticism by the magistrates and some of their professional associations, who requested the amendment of the law in order to guarantee the promotion to the office of judge at the supreme court based on competence criteria and in a transparent manner, and the need to remedy these deficiencies was also emphasised by the European Commission***." Therefore, that law introduced the competition as a way of promotion to the supreme court, made up of the component evidence of the evaluation of drafted court decisions, an interview held before the SCM Plenary, not only the Section for Judges, and a written test, with theoretical and practical nature.
This legislative change was appreciated in the CVM reports.

Thus, "**The appointments made in August within the High Court of Cassation and Justice were criticised for the lack of transparency and objectivity. However, Romania adopted a new law in December, which was reintroduced by the government to reform the practice of appointments within the High Court of Cassation and Justice. The Law introduces substantial improvements to appointment procedures and may make an important contribution to the reform of the High Court. The impact of this law will depend on the will of the competent institutions to ensure its implementation.** The enactment of the law should be followed by speedy filling of vacancies, especially in the criminal branch, through a **transparent and merit-based recruitment process**."
The CVM report of the European Commission of 18 July 2012 showed the following:
"In parallel, the Parliament has also passed a number of other important legislative measures. The "Small Reform Law" which entered into force in 2010 brought concrete improvements to the consistency and efficiency of the judicial process. Legislation was also amended to strengthen the accountability of the judiciary and to reform appointments to the High Court of Cassation and Justice. Such measures provide the opportunity to address public concerns about the objectivity of judicial appointments and the disciplinary process in the judiciary: it will take a sequence of good examples to turn around the negative legacy of the past. Romania also improved the appointment procedures to the High Court of Cassation and Justice at the end of 2011 by adopting more transparent and objective procedures which allow for a more comprehensive and objective independent assessment of the merit of candidates. This represents an important step in improving the accountability of the High Court of Cassation and Justice."
As long as Romania is still subject to the monitoring of ensuring an independent justice, through the Cooperation and Verification Mechanism, we appreciate that the validity of the criteria that determined the amendment of Law No. 303/2004 in 2011, according to the recommendations of the European Commission and the requests of the magistrates, maintains its full validity.
After the harmful legislative changes of 2018, through the ***ad hoc*** **Report on Romania (Rule 34) adopted by the Group of States against Corruption (GRECO**),

at the 79th Plenary Meeting (Strasbourg, 19-23 March 2018), the following were noted:

"31. The intended amendments still contain a proportion of subjectivity in the selection and decision process concerning promotions, which contemplates a two-phased promotion procedure, the latter phase consisting of an assessment of one's past work and conduct. The amendments also provide for the SCM to develop and adopt rules on the procedure for organising such assessments including appointments to the responsible commission and the particular aspects to be assessed. The GET heard fears that this new system would leave more room for personal or political influences in career decisions, which could impact the neutrality and integrity of the justice system and it would thus be essential that the SCM develops appropriate rules to guard against such risks, including ***clear and objective criteria to guide the future decisions of the selection commission****. 32. Because of the risks and uncertainties referred to above, GRECO recommends that i) the impact of the changes on the future staff structure of the courts and prosecution services be properly assessed so that the necessary transitional measures be taken and ii) the implementing rules to be adopted by the SCM for the future decisions on appointments of judges and prosecutors to a higher position provide for adequate, objective and clear criteria taking into account the actual merit and qualifications."*

On the other hand, the involvement of a lawyer in the selection process of judges for the HCCJ is not justified, to the extent that other categories of legal professions, including prosecutors, are excluded. It generates the possibility of an unfair ascendancy for certain lawyers with a corresponding vulnerability for the judge promoted to the supreme court.

It is also provided that any person may send written notices or observations in relation to published documents to be considered for evaluation, although the Venice Commission disapproved in its opinions of such a procedure: "***Submitting a candidate's performance as a judge to scrutiny by the general public****, i.e. including by those who have been the object of unfavourable rulings****, constitutes a threat to the candidate's independence as a judge and a real risk of politicisation.***" - *CDL-AD(2010)026,* Joint opinion the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe on the Law on the Judicial System and the Status of Judges of Ukraine, §§60.

In conclusion, the method of promotion to the HCCJ regulated by these drafts constitutes a regression in the matter of the independence of the judicial system, a violation of the recommendations of international entities and, last but not least, an attempt to maintain the control of a part of the SCM over the recruitment at the level of the supreme court.

In order to improve the procedures for the appointment as a judge at the High Court of Cassation and Justice, also taking into account the recommendations of the European Commission formulated over time within the CVM reports, the following aspects must be urgently regulated:

• **re-introduction** of the specialised knowledge test;

• **the selection of competition commissions** must be carried out ***exclusively by drawing lots***, at the level of the National Institute of Magistracy; the nomination rules should be more detailed, there should be transparent criteria for registration in the database and for nomination to committees, as well as rules for limiting the number of participations;

• **the ban on the appointment** as a member in any other commission established for the selection of judges for a period of three years from the date on which that judge was appointed as a member of a competition commission regarding the offices reserved for judges in the judicial system;
• **the ban on the appointment** as a member of these commissions of persons outside the body of magistrates who have carried out political activity or at least the appearance of political activity at least three years prior to the appointment;
• **the regulation** of clear criteria to avoid conflicts of interest between the members of the competition commissions;

Regarding the access to leadership positions at the HCCJ (president, vice-presidents, section presidents), the Statute Law also regulates total control by the Section for Judges, the promotion to these top positions not being based on meritocracy and competitiveness. Moreover, the provision from Art. 144 para. 2 of the Statute Law (introduced by this draft), whereby the president of the HCCJ will give an opinion on the compatibility of the managerial plan drawn up by the candidate for the office of vice-president/section president with their managerial plan is likely to create a clientelist system, in which the people who want to fill these offices will have to obey the president of the supreme court, otherwise not having any chance in this endeavour.

The only way to have persons with high professional competence in the top offices at the supreme court and not persons approved by the Section for Judges/president of the HCCJ is for the promotion to leadership positions to take place through a meritocratic competition organised by NIM.

4. Effective promotion to appeal courts, tribunals and prosecutor's offices attached to them violates the independence of judges, and promotion to leadership positions is likely to create a clientelist system. The inadmissibility of creating privileges for those who hold leadership positions

The effective promotion competition consists of taking a test with the objective of evaluating the activity and conduct of the candidates in the last 3 years of actual activity.
This is regulated in parallel with the on-the-spot promotion procedure (the latter in the form of a written exam that can lead to a meritocratic selection), this parallelism having no justification whatsoever. **The immediate effect will be *the generation of a caste of magistrates favoured within the profession***, judges and prosecutors with access one by one, only on the basis of interview and analysis of the documents of the last three years, to the higher courts, without supporting any theoretical or practical competition, while the rest of the magistrates will be required to follow the effective promotion procedure with difficult theoretical and practical tests.
According to the drafts, until 31 December 2025, the provisions regarding the competition or the on-the-spot promotion exam at the courts and prosecutor's offices will not apply. In such conditions, for a period of 3 years, the form of promotion will be exclusively the effective promotion (respectively, taking a test with the object of evaluating the activity and conduct of the candidates in the last 3 years of activity actually carried out), devoid of meritocracy. In practice,

it tends to eliminate the meritocratic competition, as it is hard to believe that promotion on the spot will be still used after 1 January 2026.
The competition organisation committee, the subject development and correction committee and the appeals settlement committee, as well as the evaluation committee, are appointed by the Section for Judges, respectively the Section for Prosecutors of the Superior Council of the Magistracy, any role of National Institute of Magistracy being completely eliminated.
In the case of effective promotion, the evaluation commissions are set up at the level of each court of appeal/prosecutor's office attached to the court of appeal and are made up of: the president of the court of appeal, who is also the president of the commission, and 4 other judges with the appropriate specialisation of the sections within which their vacant positions are open to competition, proposed by the governing board of the court of appeal; for promotion to courts or specialised courts, commissions can be constituted in the same way, and their members can also be appointed from among the judges of the courts in the district of the court of appeal, who have the specialisation corresponding to the sections within which the vacancies are open to competition, the general prosecutor of the prosecutor's office attached to the court of appeal, who is also the president of the commission, and 4 other prosecutors with the specialisation corresponding to the section within which the vacancies are open to competition, proposed by the board of directors of the prosecutor's office attached to the court of appeal; for the promotion to the prosecutor's offices attached to the courts or specialised courts, commissions can be set up in the same way, and their members can also be appointed from among the prosecutors from the prosecutor's offices attached to the courts in the district of the prosecutor's office attached to the court of appeal, who have the specialisation appropriate to the sections within which the vacancies are open to competition.
The need for this change was not justified by any study carried out by the Superior Council of Magistracy, the problems reported during the 15-year period of application of the previous promotion procedure based on a written exam referring only to aspects of better organisation and regulation, of the type of establishing an effective length of service at the lower court or better selection of the examination boards, and not the actual way of conducting the promotion examination, which was predictable for the entire judicial body.

In the Ad-Hoc Report on Romania (Article 34 of the Regulation) adopted by GRECO during the 79th Plenary Meeting (Strasbourg, 19-23 March 2018), the following were emphasised in relation to the changes made to the justice laws in 2018 next: "31. *The intended amendments still contain a proportion of subjectivity in the selection and decision process concerning promotions, which contemplates a two-phased promotion procedure, the latter phase consisting of an assessment of one's past work and conduct. The amendments also provide for the SCM to develop and adopt rules on the procedure for organising such assessments including appointments to the responsible commission and the particular aspects to be assessed. The GET heard fears that this new system would leave more room for personal or political influences in career decisions, which could impact the neutrality and integrity of the justice system and it would thus be essential that the SCM develops appropriate rules to guard against such risks, including clear and objective criteria to guide the future decisions of the selection commission.*".

In the case of effective promotion, the examination based on meritocratic criteria is completely eliminated, giving priority to the subjective assessments of the members of a committee appointed to the proposals of the presidents of the courts of appeal (who totally control the governing board of the court of appeal in the new drafts), which will gradually determine the emergence of attitudes of hierarchical subordination towards the judges of the higher courts and towards the colleagues who will fill leadership positions, as well as serious friction between the members of the body of judges.

Formally, the president of the court of appeal is part of a commission for evaluation with a view to promotion, but also of the evaluation commission of all judges of the court of appeal, thus accumulating a large decision-making power, both regarding the way of evaluating judges within the court of appeal, as well as regarding the appointment of judges who will actually be promoted to the court of appeal. In the case of Bosnia and Herzegovina, the Venice Commission determined that "[…] *a provision looks problematic as it defines the President of the Court as a central figure in the process of the evaluation of judges. This may not only lead to a conflict of interest, but also result in malpractice, limiting the independence of individual judges.*" *CDL-AD(2013)015, Opinion on the Draft Law on the Courts of Bosnia and Herzegovina, para. 66*

In reality, in recent years, prior delegation to the higher court of judges who have obtained the appropriate hierarchical rank, on the spot, based on the legislation amended in 2018, has become a practice, setting up a type of trial period so that judges can be subsequently actually promoted, which is specific to traineeships, not to magistrates with extensive experience. It creates a type of system of dependent judges within a judiciary that should be independent.

Regarding the filling of the leadership positions of vice-president/section president at the level of courts, tribunals and courts of appeal (similar in the case of prosecutors), the Statute Law (Art. 168) provides that this is done by the Section for Judges of the SCM at the proposal of the president of the court/head of the prosecutor's office.

Therefore, the provision eliminates the competitive filling the office of vice-president/deputy first prosecutor, which constitutes a setback, through this rule aiming to create a dependence of those who fill in managerial offices in courts/prosecutions on the Section for Judges/Prosecutors and by the president of the court/head of the prosecutor's office.

In this way, a clientelist system is configured within the judiciary, which is unacceptable, because it endangers the independence of the judicial system itself, but also the independence of judges/prosecutors in the conditions where the presidents/vice-presidents of courts/prosecution leaders have important duties covering the activity and career of judges/prosecutors (they are part of the commissions for evaluating the professional activity of judges/prosecutors or of the commissions for the evaluation of those who wish to be effectively promoted to tribunals/courts of appeal/prosecutor's offices attached to them).

We believe that these provisions must be removed, as it is necessary for the real independence of the system that the offices of president/vice-president and even section president at the level of the courts, respectively chief prosecutor/deputy prosecutor, be filled by competition.

If the version presented to the European Commission proposed to introduce a meritocratic system, based on the principle of the need for the heads of the prosecutor's offices to have a thorough knowledge of criminal law and criminal

procedure, which would guarantee the effective exercise, in accordance with the law and the needs of the proper conduct of the criminal investigation, of the duties of verifying the legality and soundness of the acts and solutions of the prosecutors, which involved testing knowledge in the field of criminal law and criminal procedure, the version of 21.07.2022 goes back without any justification to these aspects; moreover, the Scientific Council of NIM is removed from the procedure and the Judicial Inspection is introduced, which, through the conclusions of the control reports, can influence the selection procedure. As for the leadership positions for which competitions are organised, they are reduced only to the presidents of courts and the general prosecutor of the prosecutor's office attached to the court of appeal and the first prosecutor, the vice-presidents of the courts and the deputy heads of the prosecutor's offices being eliminated from the procedure; this change involves a risk of generating real fiefdoms controlled by the head of the prosecutor's office or the court and its clientele. There is no logical justification for this proposed change; on the contrary, the existence of a vice-president or deputy chief prosecutor whose appointment/revocation does not depend in any way on the head of the unit would guarantee the existence in the management of the court or prosecutor's office of a person with the role of censor/monitor to help maintain a healthy, open climate.

Art. 212 para. 8 of the Statute Law (newly introduced in the draft) provides that judges/prosecutors who have held a leadership position (a full mandate) have the possibility to request that the pension be calculated by referring to the gross employment allowance and the increments corresponding to the leadership position. Such a provision creates an unjustified privilege. Given that the draft eliminates the objective criteria for promotion to leadership positions, it is obvious that there is a danger that only certain people will successively fill various leadership positions just to benefit from this privilege or that such provisions will be used to reward the services rendered by some judges/prosecutors.

Likewise, the legal extension of the mandates of those who hold leadership positions by another year has no justification other than to create a privilege. This provision seems to be *intuituu personae*, including to the benefit of some of the members of the current SCM. However, the law cannot regulate personal situations and benefits.

In conclusion, the method of effective promotion, the system of promotion in leadership positions at the level of the courts and prosecutor's offices, which are intended to be implemented through these drafts, constitute a huge setback, violating the independence of magistrates and a fundamental principle in a state of law and namely, of meritocracy.

These guarantees of independence of judges ensured at the time of accession to the European Union should have remained intangible after accession, as the CJEU has already established: *"(...) It was therefore on the basis of the provisions of the Constitution in force prior to that reform that the Republic of Malta acceded to the European Union under Article 49 TEU. Article 49, which provides for the possibility for any European State to apply to become a member of the European Union, states that the European Union is composed of States which have freely and voluntarily committed themselves to the common values referred to in Article 2 TEU, which respect those values and which undertake to promote them. In particular, it follows from Article 2 TEU that the European Union is founded on values, such as the rule of law, which are common to the Member States in a society in which, inter alia,*

justice prevails. In that regard, it should be noted that mutual trust between the Member States and, in particular, their courts and tribunals is based on the fundamental premiss that Member States share a set of common values on which the European Union is founded, as stated in that article [see, to that effect, Opinion 2/13 (Accession of the European Union to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraph 168, and judgment of 27 February 2018, Associação Sindical dos Juízes Portugueses, C-64/16, EU:C:2018:117, paragraph 30]. It follows that compliance by a Member State with the values enshrined in Article 2 TEU is a condition for the enjoyment of all of the rights deriving from the application of the Treaties to that Member State. A Member State cannot therefore amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law, a value which is given concrete expression by, inter alia, Article 19 TEU [see, to that effect, Judgment of 2 March 2021, A.B. and Others (Appointment of judges to the Supreme Court – Actions), C-824/18, EU:C:2021:153, paragraph 108]. The Member States are thus required to ensure that, in the light of that value, any regression of their laws on the organisation of justice is prevented, by refraining from adopting rules which would undermine the independence of the judiciary [see, by analogy, Judgment of 17 December 2020, Openbaar Ministerie (Independence of the issuing judicial authority), C-354/20 PPU and C-412/20 PPU, EU:C:2020:1033, paragraph 40]. In that context, the Court has already held, in essence, that the second subparagraph of Article 19(1) TEU must be interpreted as precluding national provisions relating to the organisation of justice which are such as to constitute a reduction, in the Member State concerned, in the protection of the value of the rule of law, in particular the guarantees of judicial independence [see, to that effect, Judgments of 19 November 2019, A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court), C-585/18, C-624/18 and C-625/18, EU:C:2019:982, and of 2 March 2021, A.B. and Others (Appointment of judges to the Supreme Court – Actions), C-824/18, EU:C:2021:153].”

In the matter of competitions for filling leadership positions at the level of courts and prosecutor’s offices, we formulate the following proposals:

• the regulation of a ban to exercise more than two mandates in a leadership position, regardless of whether they were obtained by competition (president/vice-president) or by appointment (section president) and regardless of whether it is the same court or different courts, since there are eternalised people in leadership positions;
• the relief from judicial activity of judges who exercise leadership positions should have a regulation of principle in the law; it is provided by Art. 93 para. 2 only for the members of the evaluation commissions, but in fact it is practiced in all leadership positions. Also, it does not have to be complete, since the relieved people lose contact with the judicial activity and no longer perceive its difficulty. These persons should, by virtue of the leadership position they fill, take care that the judges have an adequate volume of activity, which would allow them to study cases and observe the deadlines for drafting judgments, but such an obligation is not provided for in the law;
• the appointment of competition commissions by NIM. The appointment of these commissions by the SCM, and not by the Scientific Council of the NIM, represents a de facto control of the Council over the NIM.

5. Limiting the freedom of expression of judges and prosecutors

One of the provisions proposed by the new drafts stipulates that "*Judges and prosecutors are obliged, in the exercise of their duties, to refrain from defamatory manifestations or expressions, in any way, towards the other powers of the State - legislative and executive*", provision similar to the one in force, introduced by the amendments to the justice laws in 2018, and which was severely criticised by the Venice Commission, the Consultative Council of European Judges and the Consultative Council of European Prosecutors.

Thus, through the Draft Opinion issued on 13 July 2018, the Venice Commission noted the following: *"122. Under the proposed new Article 9 (3) of Law No. 303/2004, judges and prosecutors "are obliged, in the exercise of their duties, to refrain from defamatory manifestation or expression, in any way, against the other powers of the State - legislative and executive."*

123. This provision has raised concerns among Romanian magistrates, who fear that it may prevent them from criticising other State powers when addressing cases involving the State and may be used as a tool for political pressure against them.

124. According to the Venice Commission Report on freedom of expression of judges,[4] based on a review of European legislative and constitutional provisions and relevant case law, freedom of expression guarantees also extend to judges. Moreover, in view of the principles of the separation of powers and the independence of the judiciary, permissible limits of a judge's freedom of expression call for closer scrutiny. As ruled by ECHR, opinions expressed by judges on the adequate functioning of justice, which is a matter of public interest, are protected by the European Convention, "[…] even if they have political implications, and judges cannot be prevented from engaging in the debate on these issues. Fear of sanctions may have a discouraging effect on judges expressing their views on other public institutions or policies. This dissuasive effect is detrimental to society as a whole."[5]

125. Drawing on the ECHR's case law on the matter, the Venice Commission points to the importance of a "contextual" approach in defining those permissible limits.[6] The wider domestic political, historical and social background is also of particular importance.

126. It is obvious that, as a key pre-requirement for recognising impartiality of judges and of the judiciary, in general, both judges and prosecutors have a duty of restraint, as part of the standards of conduct applying to them.[7] As stated in the Opinion No. 3 on ethics and responsibility of judges of the Consultative Council of

---

[4] Venice Commission, Report on freedom of expression of judges, CDL-AD(2015)018, paras. 12, 80-84.

[5] See *Baka v. Hungary, Application no. 20261/12*, Chamber Judgment, 27 May 2014, para. 101; see also Grand Chamber Judgment, 23 June 2016, para 125.

[6] All specific circumstances, including the office held by the judge, the content of the statement, the context in which the statement was made, the nature and severity of the penalties imposed, the position held by a particular judge and matters over which he/she has jurisdiction, are to be taken into account when examining such matters.

[7] See ECHR, *Prager and Oberschlick v. Austria*, Judgment of 26 April 1995, para. 34, *Alter Zeitschriften Gmbh no. 2 v. Austria*, Judgment of 18 September 2012, para. 39.

European Judges (CCJE[8] "[…] a reasonable balance needs to be struck between the degree to which judges may be involved in society and the need for them to be and to be seen as independent and impartial in the discharge of their duties." The European judges' body further specifies that, while necessary criticism of another state power or of a particular member of it must be permitted, "the judiciary must never encourage disobedience and disrespect towards the executive and the legislature" (CCJE Opinion No. 18 on the position of the judiciary and its relation with the other powers of State)).[9]

127. In the CCJE view, "an equal degree of responsibility and restraint" is expected from the other powers of the State", including with regard to reasonable criticism from the judiciary. Removals from judicial office or other reprisals for reasonable critical expression towards the other powers of the State are unacceptable (reference is made to ECHR Baka v. Hungary). More generally, unwarranted interferences should be solved through loyal cooperation between the institutions concerned and, in case of conflict with the legislature or the executive involving individual judges, an effective remedy (a judicial council or other independent authority) should be available).[10]

128. From this perspective, the new obligation imposed on Romanian judges and prosecutors appears to be unnecessary at best and dangerous at worst. It is obvious that judges should not make defamatory statements with respect to anyone, not only with respect to state powers. It seems unnecessary to specify this by law.

129. On the contrary, it seems dangerous to do so, especially as the notion of defamation is not clearly defined and this obligation relates specifically to other state powers.[11] This opens the way for subjective interpretation: what is meant by "defamatory manifestation or speech" for a member of the judiciary "in the exercise of their duties"? What are the criteria to assess such conduct? What is, for the purpose of this prohibition, the meaning of the notion of "power"? Does it refer to persons or to public institutions? What is the impact of the new obligation on the SCM task of defending judges and prosecutors, by publicly expressed statements, against undue pressure by other state bodies?

130. In addition, the new provision cannot be justified as a reflection of the principle of loyal co-operation between institutions, the importance of which was

---

[8] CCJE (2002) Op. No. 3 on ethics and responsibility of judges, Strasbourg, 19 November 2002; see also United Nations "Basic principles on the independence of the judiciary" (1985), Article 8 stating that judges "shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary."

[9] Consultative Council of European Judges (CCJE), Opinion No. 18 on "The position of the judiciary and its relation with the other powers of state in a modern democracy", CCJE (2015) 4, para 42.

[10] Idem, para. 43

[11] According to the information available to the Venice Commission, there is no definition in Romanian law of defamatory statements or expression, nor legislative provisions specifically regulating such conduct. Section III of Romanian Civil Code contains provisions on the respect for private life and the dignity of the person (including private life, dignity and personal image). Article 70 of the Civil Code protects the right the freedom of expression, in line with article 30 of the Romanian Constitution, within the limits established by article 75 of the Civil Code (where reference is made to the limits allowed by the law and the international treaties or conventions to which Romania is a Party for the exercise of the constitutionally protected fundamental rights). It is noted that previous provisions of the Romanian Criminal code criminalising defamation and insult were abolished in 2006, by art. I, para. 56, of Law No.278/2006. This provision was subsequently declared as unconstitutional (on 18 January 2007). On 18 October 2010, the High Court of Cassation and Justice clarified that insult and defamation should not be re-criminalised following the decision of the Constitutional Court.

underlined by the Venice Commission already in 2012 in respect of Romania.[12] *If this were the motivation of the provision, the same obligation would have to be imposed on all state powers, including with respect to criticism of judges by holders of political office.*
131. There are serious doubts as to how such a general restriction on magistrates' freedom of expression could be justified. At least from the point of view of necessity and legal clarity, the restriction may be seen as problematic under Article 10 ECHR. It should therefore be deleted."

Consultative Council of European Judges, by Opinion of the CCJE Bureau following an application dated 25 April 2019 by the Romanian Judges Forum Association as regards the situation on the independence of the judiciary in Romania, noted the following:
"55. The amendments to the Law on the Statute of Judges and Prosecutors prescribe that judges and prosecutors are obliged, in the exercise of their duties, to refrain from defamatory manifestation or expression, in any way, against the other powers of the State - legislative and executive.
56. It is notable that the notion of defamation is not clearly defined in Romania and the above-mentioned obligation relates specifically to other state powers[13]*. It raises in fact a lot of questions. First of all, it is not clear what is the rationale for the specific reservation "in the exercise of their duties" and how it will be applied. Secondly, the law should evidently protect all persons and legal entities from defamation, and not just the legislative and executive powers. Therefore, the selective approach of the new provision in these two key aspects is very questionable.*
57. In this way, one may presume that judges should refrain from defamatory statements in general, and in respect of everybody, including the legislative and executive powers. The CCJE Bureau notes in this regard that the legislative and executive powers have the same obligations.
58. The CCJE Bureau wishes to recall that the European Court of Human Rights (hereafter the ECHR) has recognised that it is of fundamental importance in a democratic society that the courts inspire confidence in the public[14] *and therefore judges must be protected against destructive attacks lacking any factual basis. Moreover, since they have a duty of discretion, judges cannot respond in public to various attacks, as, for instance, politicians are able to do*[15]*. Judges should express themselves above all through their decisions; discretion and the choice of words are important when judges give statements to the media on cases pending or already decided in accordance with the law*[16]*.*
59. In the view of the CCJE, "there is a clear line between freedom of expression and legitimate criticism on the one hand, and disrespect and undue pressure against the judiciary on the other. Politicians should not use simplistic or demagogic arguments to make criticisms of the judiciary during political campaigns just for the sake of argument or in order to divert attention from their own shortcomings.

[12] See CDL-AD(2012)026, paras. 72-73.
[13] See the Venice Commission's Opinion on Amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organisation, and Law No. 317/2004 on the Superior Council for Magistracy in Romania, CDL-AD(2018)017, para. 130.
[14] ECHR *Olujic v. Croatia*, 2009
[15] ECHR *De Haes and Gijsels v. Belgium*, 1997
[16] ECHR *Daktaras v. Lithuania, 2000; Olujic v. Croatia*, 2009

Neither should individual judges be personally attacked. Politicians must never encourage disobedience to judicial decisions let alone violence against judges, as this has occurred in some Member States[17].
60. The judges, for their part, have, as a bottom line, the same right to freedom of expression under the ECHR as everybody else, and they, "like all other citizens, are entitled to take part in public debate, provided that it is consistent with maintaining their independence or impartiality. The judiciary must never encourage disobedience and disrespect towards the executive and the legislature[18].
61. The CCJE has also underlined that there is a "need to strike a balance between the judges' freedom of opinion and expression and the requirement of neutrality[19]. *At the same time, it should be noted that this statement was made in the context of the "extra-judicial conduct of judges"*[20]. *The quote in paragraph 60 of the present Opinion likewise refers to the conduct of judges outside their duties.*
62. In this way, the CCJE Bureau wishes to underline that, as it is evident from the above quotes, judges may be subject to a certain degree of restraint, however this should relate to their extra-judicial conduct. Putting limitations on judges in the exercise of their duties, as done by the Amendments to the Law on the Statute of Judges and Prosecutors, may result in arbitrary and abusive interpretations and it carries the risk of obstructing judges in the course of their work.
63. The Venice Commission has also mentioned that the rationale for such a new provision in the Romanian legislation is questionable since there is a risk that it may prevent judges from criticising other state powers when addressing cases involving the state and may be used as a tool for political pressure[21].
64. The CCJE Bureau also notes that the European Commission's above-mentioned Progress Report on Romania under the CVM has emphasised that the key problematic provisions included in particular restrictions on the freedom of expression for magistrates[22].
*65. **In this context, the CCJE Bureau concludes that the new obligation imposed on Romanian judges, limiting their freedom of expression, is not necessary, raises many questions, may be subject to arbitrary and abusive interpretations endangering judicial independence, and it recommends that it be removed.**"*

Finally, we draw attention to the fact that this provision is particularly problematic in the context in which Romania has to implement the decision handed down by the European Court of Human Rights in the *Kovesi v. Romania* case, in which it was found that, with respect to the applicant, as a chief prosecutor at DNA, her right to free expression was violated by the fact that she

[17] See CCJE Opinion No. 18 (2015) on the position of the judiciary and its relation with the other powers of State in a modern democracy.
[18] Ibid., para 42
[19] See CCJE Opinion No. 3 (2002) on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, para 33
[20] Ibid., Section A(1)(b) "impartiality and extra-judicial conduct of judges"
[21] See the Venice Commission's Opinion on Amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organisation, and Law No. 317/2004 on the Superior Council for Magistracy in Romania, CDL-AD(2018)017, para 124.
[22] See the Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism (Strasbourg, 13.11.2018 COM(2018) 851 final), Section 3.1 (Benchmark one: judicial independence and judicial reform. Justice laws and legal guarantees for judicial independence), page 3.

was revoked from this position precisely because she was critical of the amendments that the Parliament brought to the justice laws.

6. The operation of the SCM essentially almost exclusively in sections violates the constitutional architecture of this board authority, in which the Plenary is the constitutionally adequate form of organisation

The Constitutional Court specified, by Decision no. 331 of 3 April 2007 that the provisions of Art. 35 related to the provisions of Art. 27 para. (3) from Law No. 317/2004 express the powers of the Superior Council of the Magistracy, as they were regulated by Art. 134 of the Basic Law.

The Constitution expressly provides only for the duty of court ***in the field of disciplinary liability*** of judges and prosecutors that it is carried out by the Council through its sections (Art. 134 para. 2). However, such a specification is missing from the content of Art. 134 para. (1) and (4) of the Constitution. These provisions establish the role of the Superior Council of the Magistracy as a whole, respectively in its Plenary, regarding the adoption of decisions, in general (both for the proposal to the President of Romania for the appointment of judges and prosecutors, with the exception of trainees, under the law, as well as for other duties established by its organic law, in fulfilling its role as guarantor of the independence of the judiciary).

The separation of decision-making powers regarding the career of magistrates should not affect the role of the Superior Council of Magistracy which, in its plenary composition, represents the guarantor of the independence of the judiciary according to Art. 133 para. (1) of the Romanian Constitution.
Therefore, all the duties of the SCM regarding the general and common aspects of the career of magistrates and the organisation of courts and prosecutor's offices fall exclusively under the competence of the Plenary of the SCM.
The fact that there are separate sections for judges or prosecutors does not imply that the decisions handed down by these sections are final or that complaints against them are also resolved by each section in question. **The constitutional architecture of the Superior Council of the Magistracy, a board body, involves the appeal to the Plenary of the decisions of each section (except for the decisions of the disciplinary sections, also as a result of the exception enshrined in a constitutional text).**
The only form by which the strict separation of the careers of judges and prosecutors can be carried out, without the risk of declaring such a change unconstitutional, is a constitutional review. In France or Belgium, traditional constitutional models and for Romania, the presidents of the supreme courts have spoken for the unity of the judiciary within the same council.[23]

7. Composition of governing boards at courts and prosecutor's offices

[23] See, for details, the Journal of the Forum of Judges no. 1/2017, pg. 15-16- http://www.forumuljudecatorilor.ro/index.php/archives/2706, and the webpage https://www.courdecassation.fr/venements_23/derniers_evenements_6101/magistrature_bertrand_37040.html.

The governing board becomes a screen for the decisions of the court presidents/vice-presidents. The president of the court, benefiting from the help of the vice-presidents and section presidents, proposed by the same, has the role of leading the administrative activity of the court, carrying out the decisions of the governing board, which is a governing body with determined competence. In principle, the president of the court, the vice-presidents and the presidents of the section have an executive role, as the decision-making role belongs to the governing board.

Requiring that the governing board be composed of the president, vice-presidents, section presidents and only 2 judges elected for a period of three years, it is obvious that, in making decisions regarding the organisation of the court, the number of judges in the board will always be higher than the number of judges democratically elected by the court's judges. In addition, the judges who have to implement the decisions of the board (vice-presidents, section presidents) are at the same time the judges who help the president in his/her managerial activity. Thus, the execution office will be confused with the decision-making office, the president and his/her team effectively taking over any decision-making attribute within the court, with the consequence that the management team will implement and accomplish their own decisions. However, the decision-making component should rest with all judges and can be exercised through democratically elected representatives.

The statement of reasons for the Law on judicial organisation, by reference to Opinion No. 19 (2016) of the Consultative Council of European Judges (CCJE), contains a pseudo-argument: while the Opinion refers to the role of the presidents in the operation of the court, the duties of the governing board, as they appear from the provisions of this law, concern the organisation and management of the court, that is, different matters.

Thus, the Statement of reasons notes the following: *"As pointed out in Opinion No. 19 (2016) - The role of court presidents - of the Consultative Council of European Judges (CCJE), "Court presidents are responsible for ensuring the proper functioning of the court, including the management of personnel, material resources and its infrastructure. It is essential that they have the skills and resources to carry out this duty effectively". "Also, the presidents of the courts should have the authority to establish within them organisational units or divisions, as well as individual posts or positions, to respond to the various needs related to the activity of the courts.* ***When the presidents of the courts intend to make significant changes in the organisation of the court, the judges must be consulted."***
It is easy to see that the duties of the governing board are confused with those of the general assembly of judges, since the Opinion stipulates the obligation to consult the judges (which is carried out in general meetings), not the governing board. From the reading of the Opinion, a contrary conclusion emerges: its intention is to diminish the discretionary power of the president, not to increase it.

This aspect was taken into account upon the Substantiation Note of Law No. 247/2005 on the reform of property and justice and other measures, by which the composition of the governing boards was changed for the following reasons: "*The change in the composition of the governing boards of the courts and prosecutor's offices represents another important aspect to mention, the measure being set up in order to ensure wider access of judges and prosecutors to the decision-making process within the institution where they operate. Thus, in addition to establishing*

a 3-year mandate for the governing boards, their composition will include the president of the court and a representative number of judges or prosecutors at the level of each category of courts and prosecutor's offices. In the current regulation, the governing board was mainly composed of judges or prosecutors with leadership positions, which in reality does not ensure a democratic and extensive access of judges and prosecutors to the decision-making process. As a result of their election by the general meetings, the possibility of revoking the governing boards by those who elected them, in case of improper exercise of their duties, was also established.

The change in the composition of the governing boards was thought of in connection with the assignment of additional duties to those provided for at present, duties which are, currently, within the competence of the heads of the courts and prosecutor's offices. Thus, the governing boards will establish the composition of the court panels at the beginning of each year, as well as the composition of the sections and specialised panels. In this way, the role of the head of the court or prosecutor's office becomes more responsible, i.e., of carrying out the measures ordered by the representatives of their members."

Therefore, returning to the situation prior to these changes is likely to precisely affect the idea of democratising the decision/management in the courts and ensuring a counterweight in relation to the duties of the court president, vice-president and section presidents. The de jure inclusion in the governing board of all these persons and the election of a very small number of other magistrates in the general assembly is likely to transform the governing boards into the support team of court presidents.

In order to avoid the indefinite occupation of a place in the board by the same judges, it is necessary to limit the mandates of elected members of the board, so that all judges are encouraged and motivated to participate in the decision-making. Likewise, the creation of decision centres motivated by biased interests is avoided.

Compared to a representativeness of 1/3, one of 1/5 is weak, disproportionate and unjustified, concentrating, within several courts, the executive and decision-making power in the hands of a single person. The form of the law prior to the entry into force of Law No. 207/2018 stipulated that only in the case of some courts (judges/specialised tribunals) with a number of 3 judges or less, the powers of the Board were exercised by the president of the court. Maintaining the amendment brought by Law No. 207/2018 has no justification in eliminating a democratically elected body.

The de jure inclusion of the vice-president in the governing boards does not observe the balance that must be maintained regarding the decisions that must be taken in a court according to the law, even more so as the president of the court nominates the vice-president and the other persons in the court's management.

The judges of each court must be given the freedom to decide who are the judges who will represent them in the governing board because, in this way, the actions of the court leadership will be kept in balance by means of the governing board chosen by the majority of the judges active in the court. This way of appointing the judges from the boards constitutes an important guarantee that the measures are taken objectively and thus avoids any appearance of lack of impartiality regarding the adopted solutions.

Similar aspects are also valid regarding public prosecutors. The de jure inclusion in the governing board of the first deputy and the deputy chief prosecutor and the chief district prosecutors does not observe the balance that must be maintained regarding the decisions that must be taken in a prosecutor's office according to the law. Prosecutors must be given the freedom to decide who are the prosecutors who will represent them in the governing board.

8. Lack of a real reorganisation of the Judicial Inspection. All inspectors selected under the empire of the previous regulation, by a chief inspector with unlimited powers, will remain in office. The mandate of judicial inspectors must be for a maximum of 4 years and cannot be renewed. The disciplinary action will be able to be exercised within a period of 3 years, and not 2 years from the date of the action, a provision likely to generate pressure in the system

The Romanian Judges' Forum Association, the *Defence of the Status of Prosecutors* Association and the *Initiative for Justice* Association have constantly requested the abolition of the Judicial Inspection and the creation of two judicial inspection structures with distinct legal personality, one for judges and, respectively, another one for prosecutors.

In the architecture of judicial inspection activities, at the moment, the chief inspector has key powers, which were consolidated by the changes of 2018: he/she appoints judicial inspectors, designates inspectors with leadership functions, manages the activity of the Judicial Inspection and disciplinary procedures, organises the distribution of files, establishes the specific areas of activity with regard to which control is exercised, is the main issuer of instructions/orders and has the ability to initiate a disciplinary procedure himself or to approve/confirm the classification solution of the notification given by an inspector during the prior checks.

Through these changes, the Judicial Inspection became, practically, a pyramid-type public authority, unique within the judicial system, at the disposal of a single person, with an extended discretionary power (including in the adoption of the normative organisational framework, the confirmation/denying of the decisions of the judicial inspectors etc.). In this structure, the magistrates (judges and prosecutors) appointed as judicial inspectors by the chief inspector are fully subordinated to the same, with the risk of their functional independence being substantially affected.

By the decision of the Grand Chamber of the Court of Justice of the European Union pronounced in the related cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, it follows that Article 2 and the second subparagraph of Article 19(1) TEU as well as Decision 2006/928 must be interpreted as precluding a national regulation adopted by the government of a Member State which allows the latter to make interim appointments in the leadership offices of the judicial body charged with carrying out disciplinary investigations and exercising disciplinary action against judges and prosecutors without observing the ordinary appointment procedure provided for by national law when this regulation is likely to give rise to legitimate doubts regarding the use of prerogatives and functions of this body as an instrument of pressure on the activity of the respective judges and prosecutors or of political control of this activity. *("200. Consequently, since those occupying leadership positions within such a body are likely to exert a decisive influence on its activity,*

the rules governing the procedure for appointment to those positions must be designed – as the Advocate General noted, in essence, in para. 269 of his Opinion in Cases C-83/19, C-127/19, C-195/19, C-291/19 and C-355/19 – in such a way that there can be no reasonable doubt that the powers and functions of that body will not be used as an instrument to exert pressure on, or political control over, judicial activity. (...) 205 In particular, national legislation is likely to give rise to doubts such as those referred to in paragraph 200 above where, even temporarily, it has the effect of allowing the government of the Member State concerned to make appointments to the management positions of the body responsible for conducting disciplinary investigations and bringing disciplinary proceedings against judges and prosecutors, by disregarding the ordinary appointment procedure laid down by national law.")
Thus, the national legislative provisions regarding the interim appointment of the chief inspector of the Judicial Inspection can no longer be applied, due to the contradiction with European Union law, and all documents issued during the interim period (09.05.2018-05.14.2019) by this chief inspector (among which the Regulation on the organisation and operation of the Judicial Inspection or the documents appointing some inspectors selected for this purpose, including the chief inspector) are null (*the domino principle*).

Based on the same decision of the CJEU, all CVM Reports will have to be duly taken into account by Romania, considering the requirements of the principle of loyal cooperation provided for in Article 4(3) TEU. On this basis, they will no longer be able to be ignored by any internal public authority in Romania.

The CVM report of November 2018 also highlighted serious concerns about the Judicial Inspection: the frequency with which disciplinary proceedings were initiated against magistrates who publicly opposed the direction followed by the reform of the judicial system, the disclosure of documents to the press (then used by politicians to attack the judicial institutions) and the extension of the leadership's mandate by the government, and recommended: "*The immediate appointment, by the Superior Council of Magistracy, of the interim leadership team of the Judicial Inspection and the appointment, within three months, by competition, of a new leadership of the Judicial Inspection*".

Criticisms are repeated in the CVM Report published on 06.08.2021÷ „*2018 and 2019 were marked by controversy about the approach of the SCM towards the position of the Chief Inspector, as the SCM effectively extended the term of the incumbent, despite the controversy relating to a temporary interim prolongation on the basis of a Government Emergency Ordinance. A preliminary ruling request was brought to the Court of Justice of the EU on the compatibility with Articles 2 and 19(1) TEU of the power for the Government to carry out interim appointments to management positions within the Judicial Inspection responsible for conducting disciplinary proceedings against judges and prosecutors. In its judgment of 18 May 2021, the CJEU ruled that national legislation cannot give rise to doubts that the powers of a judicial body responsible for conducting disciplinary investigations and bringing disciplinary proceedings against judges and prosecutors might be used an instrument to exert pressure on, or political control over, the activity of those judges and prosecutors. The Court held that national legislation is likely to give rise to such doubts where, even temporarily, it has the effect of allowing the government of the Member State concerned to make appointments to the*

management positions of the body responsible for conducting disciplinary investigations and bringing disciplinary proceedings against judges and prosecutors, by disregarding the ordinary appointment procedure laid down by national law. The judgment revives the purpose of the 2018 recommendation. The authorities with oversight on the Judicial Inspection, in particular the SCM, will have to take the judgment into due consideration, also in light of the repeated concerns raised with the activity of the Judicial Inspection.

In recent years, judicial institutions, including the SCM itself, have highlighted concerns with the lack of accountability of the Judicial Inspection, citing the high proportion of cases brought by the Inspection eventually rejected in court, the concentration of all decision making with the Chief Inspector and the limits on the oversight powers of the SCM. More generally, these developments have raised questions on whether the provisions in the Justice laws for appointing the management of the Judicial Inspection and its accountability offer sufficient guarantees and achieve the right balance between judges, prosecutors and the SCM. The new draft justice laws of March 2021 on which the Minister of Justice requested the opinion of the SCM, modifies the provisions on the appointment of the Chief and deputy Chief Inspectors, as well as the control mechanisms regarding the activity of the Judicial Inspection, giving stronger oversight powers to the SCM and involving the National Institute of Magistracy in the competitions for entering the Judicial Inspection. In the reporting period, judicial institutions reported an overall reduction in the activity of the Judicial Inspection, namely fewer ex-officio disciplinary proceedings raising concerns about objectivity. However, there remain cases where disciplinary investigations and heavy sanctions on magistrates critical of the efficiency and independence of the judiciary have raised concerns. Examples include disciplinary proceedings with proposal of preventive suspension from office until the finalisation of the disciplinary investigation and the decision of the SCM against judges from magistrate associations who have resisted the backwards changes of 2017-2019 and brought preliminary ruling requests to the European Court of Justice (the disciplinary investigation concern group conversations leaked from a private social network group).”

The 2021 report on the rule of law (Chapter devoted to the situation of the rule of law in Romania), published by the European Commission, took note of the start of the disciplinary investigation for the commission of disciplinary misconduct representing the exercise of the function in bad faith or serious negligence towards a judge from the Pitești Court of Appeal, as a result of the application in a litigation, on 7 June 2021, of the decision of the Court of Justice of the European Union of 18 May 2021, pronounced in related cases *C-83/19, C-127/19, C- 195/19, C-291/19, C-355/19 and C-397/19*, Association of Romanian Judges’ Forum and others. In principle, a disciplinary procedure is incompatible with the rules of European Union law if it affects the essence of the procedure regulated by Article 267 TFEU and, with it, the very foundation of the Union itself, having a dissuasive effect on any Romanian magistrate called to apply the mandatory rules of European Union law, including the jurisprudence of the Court of Justice of the European Union, pursuant to Art. 148 of the Romanian Constitution. A body tasked with opening disciplinary proceedings, such as the Judicial Inspectorate, should at least demonstrate a certain degree of operational and investigative independence.

Therefore, considering the current organisation, it is necessary to abolish the Judicial Inspection and create two judicial inspection structures with distinct legal personality, one for judges and another for prosecutors, with the removal of functioning on a subordinate hierarchical system. Each judicial inspector must be independent in issuing solutions, cases must be assigned randomly, and access to the offices of judicial inspector (prosecutor or judge) must operate on the basis of an examination based on objective and meritocratic criteria. Also, the chief inspectors/deputy inspectors for the two structures must be chosen on the basis of a competition (with specialised written test and psychological test), since only in this way can a real independence of the governing bodies from the SCM and the political factor be ensured.
In this way, the suspicions regarding the "fabrication of files" for certain magistrates considered inconvenient by interest groups that have parts of the mass media under their control or that want to control the judicial system will be removed.
Such a solution was welcomed by the Venice Commission in the case of Bulgaria (Opinion No. 1002/2020 of 20 November 2020) and would correspond to the principle of separation of careers, introduced in the legislation on judicial organisation and the status of magistrates in 2018 *(Art. 1 para. 2 of Law No. 303/2004 provides the following: "(2) The career of the judge is separate from the career of the prosecutor, judges cannot interfere in the career of prosecutors, nor prosecutors in that of judges.")*

Regarding the way of recruiting judicial inspectors according to the drafts, they are practically selected by two judges of the HCCJ (respectively two prosecutors of the HCCJ) and a NIM trainer. However, given that the promotion procedure at the HCCJ is not a meritocratic one (see above), being totally controlled by the Section for Judges of the SCM, and the role of the NIM being a purely decorative one, it is obvious that the recruitment of judicial inspectors will also be subject the will of one of the Council Sections. In other words, the Section for Judges, which, at the same time, also has the role of a disciplinary court, will *de facto* choose the judicial inspectors (who will notify the two structures of the Council with disciplinary actions), and the renewal of their mandate will depend on the same section, all these aspects leading to the idea that, in reality, it is still desired that those who will be part of the Judicial Inspection do not have effective independence.

Regarding the increase of the limitation period for disciplinary liability from 2 years to 3 years, we appreciate that this solution introduced in the drafts is not a justified one, the only goal pursued by the political factor being the exercise of even greater pressure on the magistrates.

9. The possibility by the Judicial Inspection of attacking the solutions to reject the disciplinary actions issued by the disciplinary sections of the SCM is contrary to the principles developed by the Venice Commission

This possibility was, moreover, criticised by the Venice Commission in numerous opinions: "*[…]* Once the disciplinary commission of the Supreme Judicial Council has decided in favour of the judge, this decision should be final. *[…]*" (CDL-AD(2002)015,

Opinion on the Draft Law on Amendments to the Law on the Judicial System in Bulgaria, §5).

"*Article 40 provides that the decisions of the Superior Council of Magistracy can be appealed to the Supreme Court of Justice "by the persons who filed complaints, by the judicial inspection or by the judge in question*". *It is not clear why the judicial inspection should be able to appeal. The appeal should be allowed to the interested parties – the applicant and the judge concerned.*" (CDL-AD(2014)006, Joint Opinion of the Venice Commission, the Directorate for Human Rights (DHR) within the General Directorate for Human Rights and the Rule of Law of the Council of Europe and the Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the Draft Law on the Disciplinary Liability of Judges from the Republic of Moldova, §§81, 84).
The statute of limitation of the disciplinary liability should also be provided after the exercise of the action, because, at present, the disciplinary liability after the exercise of the disciplinary action is imprescriptible, the same as for the crime of murder.

10. The presence of court presidents in the evaluation process of judges from that court (similar for prosecutor's offices). Removal of the evaluation regarding judges from the HCCJ.

We propose the exclusion of court presidents, vice-presidents or section presidents from the process of evaluating the activity of judges (similar for prosecutor's offices).
Regarding the evaluation procedures of judges, the Venice Commission established the following:
"[...] This provision looks problematic *as it defines the President of the Court as a central figure in the process of the evaluation of judges*. This may not only lead to a conflict of interest, but also result in malpractice, limiting the independence of individual judges." (*CDL-AD(2013)015, Opinion on the Draft Law on the Courts of Bosnia and Herzegovina, para. 66)*
"It is important that the evaluation system be neither used nor seen to be used as a mechanism to subordinate or influence judges." (*CDL-AD(2013)015, Opinion on the Draft Law on the Courts of Bosnia and Herzegovina, para. 66)*
"Another source of concern is the part of the Law related to the evaluation of the performance by the courts' presidents (see Articles 118 et seq.). It appears that the court's presidents are scored mostly on the basis of the performance of the ordinary judges. This may push presidents to become "productivity watchdogs" within their courts and may ultimately undermine judicial independence." (CDL-AD(2015)042, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of 'The former Yugoslav Republic of Macedonia", §106)
"[...] [T]he use of serving judges to evaluate their colleagues has the potential of causing some difficulties. It could lead to bad personal relationships between colleagues and has the potential to further undermine the morale of the judiciary. Alternatively, where judges receive favourable evaluations, this could give rise to allegations of cronyism. There is a danger that such a system could lack credibility." (CDL-AD(2014)007, Joint Opinion on the Draft Law amending and supplementing the Judicial Code (evaluation system for judges of Armenia), §§62, 67, 69-70 and 75).

Regarding the evaluation, Art. 89 para. 2 of the Statute Law provides for the elimination of the evaluation of judges from the supreme court. Such a provision is not justified, being discriminatory. It is unjustified as long as the judges of the High Court perform the same activity as their colleagues from the other courts. Given that the objective of the assessment is to establish the level of professional competence of judges and aims to improve professional performance, increase the efficiency of the courts and public trust in the judicial authority, maintain and strengthen the quality of the judicial system, there is no reason why these objectives should not also apply to judges, respectively to their activity at the level of the supreme court. They also have the duty to improve their professional performance, to increase their professional skills, and the evaluation is meant to encourage them in this sense. Removing the evaluation risks leading to a cap, with no input to improve. The measure is also discriminatory because there is no different situation in the case of supreme court judges in relation to the other colleagues. Seniority in the profession cannot be assimilated with high skills. Anyway, no matter what level of jurisdiction the judge is at, he/she needs to perfect, update his/her knowledge and continue professional training, and the evaluation is a way of stimulation for this purpose. Also, there is no reason why the president, vice-presidents, section presidents of the HCCJ should not be evaluated both from a professional and managerial point of view. The best professionals must reach these top positions, and the management activity needs to be appreciated from the point of view of quality, all the more since the people who fill them want to renew their mandate.

11. Introducing the evaluation criterion of judges/prosecutors consisting of the number of modified/rescinded/cancelled decisions, respectively imputable solutions/measures seriously affects the independence of magistrates

By introducing the evaluation criterion consisting of the number of decisions modified/rescinded/cancelled for imputable reasons, the principle of functional independence of judges is violated.

As the Venice Commission constantly shows, the criteria underlying the analysis of judgments and the evaluation of conduct cannot argue for the meritocratic promotion of judges to executive positions: "*Regular evaluations of the performances of a judge are important instruments for the judge to improve his/her work and can also serve as a basis for promotion. It is important that the evaluation is primarily qualitative and focuses on the professional skills, personal competence and social competence of the judge. There should not be any evaluation on the basis of the content of the decisions and verdicts, and in particular, quantitative criteria such as the number of reversals and acquittals should be avoided as standard basis for evaluation*." (CDL-AD (2011)012, Joint Opinion of the Venice Commission and OSCE/Office for Democratic Institutions and Human Rights on the Constitutional Law on the Judicial System and Status of Judges in Kazakhstan, para. 55).

"*If there were to be a measurement of workloads, systems would need to be in place to evaluate the weight and the difficulty of different files. (…) Simply counting the number of cases dealt with is crude and may be completely misleading. At most, such a measurement may serve as a useful tool to indicate a possible problem but can do no more than this and certainly should not be determinative of a problem.*

Measurement of the "observance of procedural periods" (…) again may point to a possible problem, but it is important that the judge be given an opportunity to explain any apparent failings in this regard.

Measuring the "stability of judicial acts" (…) is questionable. It effectively means counting the number of successful appeals. Such a measure should be avoided because it involves an interference with the independence of the judge. (...) Where a case is overturned on appeal, who is to say that the court of first instance got it wrong and the appeal court got it right? The decision of the judge of the first instance court quashed by the Court of Appeal could well later be supported by the decision of the Court of Cassation, the Constitutional Court or the European Court of Human Rights. (...)

The proposal (…) to measure the average duration of examination of cases is inappropriate for similar reasons to those already referred to above, in relation to the counting of cases in general. Who is to say that a judge who takes longer over a case is not doing a more thorough job than the speedier colleague? (…) The judge seeking to meet these time frames might be tempted to disregard what would normally be seen as necessary under the law and his or her interpretation of it.

(…) "The "quality of justification" (reasoning) is often a problem in new democracies and coherent reasoning should be promoted. Logical argumentation, clarity, and other aspects are of interest and are dealt with in Opinion No. 11 of the CCJE on Quality of Judicial Decisions. (...) – (CDL-AD(2014)007, Joint opinion on the draft law amending and supplementing the judicial code (evaluation system for judges) of Armenia, §§37-39, 43, 49)

"*The legal interpretation provided by a judge in contrast with the established case law, by itself, should not become a ground for disciplinary sanction unless it is done in bad faith, with intent to benefit or harm a party at the proceeding or as a result of gross negligence. While judges of lower courts should generally follow established case law, they should not be barred from challenging it, if in their judgment they consider right to do so.*" (CDL-AD(2014)006, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe and the Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the Draft Law on Disciplinary Liability of Judges of the Republic of Moldova, §22. Also see CDL-AD(2015)042, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "The Former Yugoslav Republic of Macedonia", §44)

"*20 points may be gained by a judge from another type of assessment, described in the third paragraph of Article 104: it is an assessment of the quality of the legal reasoning in 10 sample judgements (5 selected randomly and 5 selected by the judge him/herself). This assessment is made by a three-member commission composed of judges of the higher court drawn by lot. This is an interesting model; however, such assessment should only extend to such aspects as the style and clarity of drafting, and not call into doubt the validity of the decisions taken by the judge.*" (CDL-AD(2018)022, Opinion on the law amending the law on the judicial council and on the law amending the law on courts of "The Former Yugoslav Republic of Macedonia", §49)

Also, The Consultative Council of European Judges (CCJE), by Opinion No. 17 (2014) on the evaluation of judges' work, the quality of justice and respect for judicial

independence, established that (para. 6): ”*the fundamental rule for any individual evaluation of judges must be that it maintains total respect for judicial independence. When an individual evaluation has consequences for a judge's promotion, salary and pension or may even lead to his or her removal from office, there is a risk that the evaluated judge will not decide cases according to his or her objective interpretation of the facts and the law, but in a way that may be thought to please the evaluators. Therefore, any evaluation of judges by members of the legislative or executive arms of the state is especially problematic. However, the risk to judicial independence is not completely avoided even if the evaluation is undertaken by other judges. Judicial independence depends not only on freedom from undue influence from external sources, but also requires freedom from undue influence internally, which might in some situations come from the attitude of other judges, including presidents of courts.*”

12. The lack of a central role given to the Prosecutors' Section of the SCM in the appointment of high-ranking prosecutors to leadership positions

The need for this role was established by the Venice Commission in an opinion on Romania: *“44. The Venice Commission, when assessing existing appointment methods, has paid particular attention to the necessary balance between the need for the democratic legitimacy of the appointment of the head of the prosecution service, on the one hand, and the requirement of depoliticization, on the other. From this perspective, in its view, an appointment involving the executive and/or the legislative branch has the advantage of giving democratic legitimacy to the appointment of the Chief Prosecutor. However, in this case, supplementary safeguards are necessary to diminish the risk of politicisation of the prosecution office.* ***As in the case of judicial appointments, while different practical arrangements are possible, the effective involvement of the judicial (or prosecutorial council), where such a body exists, is essential as a guarantee of neutrality and professional, non-political expertise.”*** (Venice Commission, Preliminary Opinion of 13 July 2018 on Draft Amendments to Justice Laws in Romania).

“*The Venice Commission, when assessing different models of appointment of Chief Prosecutors has always been concerned with finding an appropriate balance between the requirement of democratic legitimacy of such appointments, on the one hand, and the requirement of depoliticization, on the other. Thus, an appointment process which involves the executive and/or legislative branch has the advantage of giving democratic legitimacy to the appointment of the head of the prosecution service.* ***However, in this case, supplementary safeguards are necessary in order to diminish the risk of politicisation of the prosecution office.***

The establishment of a Prosecutorial Council, which would play a key role in the appointment of the Chief Prosecutor, can be considered as one of the most effective modern instruments to achieve this goal. *[…]*

[…] [T]he nomination of the candidate should be based on his/her objective legal qualifications and experience, following clear criteria laid down in the Draft Law. It is not sufficient for a candidate for such a high office to be subjected to the general qualification requirements that exist for any other prosecutorial position;

the powers of the Chief Prosecutor require special competencies and experience. […]"
(CDL-AD(2015)039, Joint Opinion of the Venice Commission, of the Consultative Council of European Prosecutors (CCPE) and the office for Democratic Institutions and human rights (OSCE/ODIHR) on the Draft Amendments to the Law on the Prosecutor's Office of Georgia, paras. 19, 20 and 27).
Thus, the recommendations of all international institutions were in the sense that the appointment and dismissal in the highest positions in the prosecutor's offices should be carried out through a transparent procedure and based on objective criteria, within which the Section for Prosecutors within the Superior Council of Magistracy should be given a more important role.
We underline the fact that strengthening the system of checks and balances within the procedures for appointing prosecutors to the highest positions in the Public Ministry cannot be based only on the good faith of a politician/politicians.
Also, an extremely large number of job categories within PHCCJ, DNA and DIICOT in which the appointment is political are maintained. Maintaining a system of political appointment of department heads is not justified, especially since they continue to actually work on cases, which generates the risk that a politician placed in a key position in the State may influence the course of a criminal investigation by imposing the appointment of the chief district prosecutor.

13. Expanding the sphere of influence of the General Prosecutor of Romania regarding the secondment and delegation of prosecutors in offices. Approval by order of the Minister of Justice of the internal order regulations for prosecutor's offices

The secondment and delegation of prosecutors to offices must be the responsibility of the Section for Prosecutors of the SCM, as long as such a structure exists, part of the constitutional authority that guarantees the independence of the judiciary. In addition, the General Prosecutor of Romania becomes the holder of the disciplinary action. Also, according to the new draft, internal order regulations are approved by order of the Minister of Justice, upon the proposal of the general prosecutor of the Public Prosecutor's Office attached to the High Court of Cassation and Justice or, as the case may be, the chief prosecutor of the National Anti-Corruption Directorate or the head prosecutor of the Directorate for Investigating Organised Crime and Terrorism, with the advisory opinion of the Section for Prosecutors of the Superior Council of Magistracy. Such a provision essentially affects the role of the Section for Prosecutors of the SCM, which is transformed into a decorative object.
Moreover, this provision, viewed together with the one regarding the possibility of the Prosecutor General of Romania to deny any solution/measure adopted by any prosecutor within the Public Ministry, under the conditions in which the appointment of the Prosecutor General is eminently political according to the drafts, prove the fact that a total control by the political factor over prosecutors is desired, especially of those from DNA/DIICOT. Instead of following the recommendations of international institutions to strengthen the independence of prosecutors, including the specialised ones (DNA/DIICOT), to increase their efficiency, these drafts not only intend to destroy the haze of independence that prosecutors displayed until now, but also establish an insidious political control over their activity, because whoever will control the appointment of the Prosecutor General will be able to practically control the pyramid that is created in the prosecutor's office system.

14. Lack of universal suffrage for the election of SCM members. Other aspects regarding the election of SCM members

The novelty introduced by the Draft Law on the Superior Council of Magistracy presented on 30.09.2020 referred to the form of universal vote for the election of Council members, abandoned by the new draft without any justification. The provision was beneficial because it ensured greater representativeness and legitimacy of those who will be elected.

The current form of election of the members of the Superior Council of the Magistracy is not justified under the conditions in which each member must represent the entire judicial system, and not just the judges or prosecutors at the level of the court/prosecutor's office corresponding to the degree held. This being the case, it follows that a candidate for the SCM must not and cannot be designated a priori by the court/prosecutor's office from which he/she originates. It is imperative to understand this aspect, otherwise the interests at the level of each court/prosecutor's office will lead to the arbitrary removal of some candidates.

Therefore, in the situation where universal suffrage would be instituted, there would no longer be any rationale for maintaining a preliminary step, namely, the designation, by secret, direct and personal vote, of one candidate of the courts/prosecutor's offices for the position of member of to the Superior Council of Magistracy from among the judges/prosecutors/military prosecutors who submitted their candidacy. This filter violates the right to be elected and creates the conditions for generating agreements/networks to appoint a certain candidate, with the risk that the representative body of the judiciary becomes a place where the interests of those who supported a certain candidate collide.
Also, *it does not result what is meant by "personal interest, which influences or could influence the objective and impartial fulfilment of the duties provided for by law"*, a condition for applying in the elections for the SCM. Who, when and according to what criteria checks the fulfilment of the condition of the absence of a personal interest? The regulation is not clear, and its application is not predictable.

15. Lack of short and clear imperative terms regarding the organisation of new elections in case of termination of the membership of the Superior Council of the Magistracy before the expiration of the mandate, for the vacant seat

The obligation to quickly organise elections for the vacant seat of a member of the Superior Council of the Magistracy must be expressly provided for, without giving the possibility of interim mandates controlled by the will of the other members of the SCM.
The *sine die* presence of an interim member of the SCM, for example in the composition of the disciplinary panel of the Section in disciplinary matters for judges, in which he/she participates only as a result of the will of his/her colleagues not to organise elections for the position that the interim member fills is likely to raise serious questions about his/her independence. The presence of a judge in a court panel (with which the disciplinary panel of the SCM is assimilated) cannot be conditional, dependent on the will of the other members, but must be unconditional.

16. Increasing the duration of the courses of judicial auditors within the National Institute of Magistracy to 3 years

The increase of the training period from 2 years to 3 years is excessive and is not based on any impact study, no needs analysis and no evaluation of the situation of the staff in the judicial system. The 3-year training has the risk of making this form of access to the profession undesirable, compared to accessing the other legal professions and the possibility of entering the magistracy through other ways, namely with 5 years of experience in another legal profession. Increasing the training period will lead to chronic staff shortages and an imbalance in the medium term for courts and higher-level prosecutor's offices by correlation with the seniority required for promotion.

No impact study has been carried out in this respect. Considering the extremely large number of vacancies at the courts and prosecutor's offices and the retirement trends of recent years, increasing the period of training at the NIM will lead to even greater vulnerability of the judicial system and, implicitly, to the impairment of the independence of the professional body since even fewer judges and prosecutors will be able to resolve the millions of cases before the courts and prosecutor's offices, which will lead to a decrease in the quality of the judicial act, the impossibility of resolving cases quickly, to the physical and mental wear and tear of those who remain in system, all of which can cause errors.

17. Increasing the effective seniority required for appointment as prosecutors within the DNA and DIICOT (at least 10 years as a prosecutor or judge), respectively the effective seniority requirements for the promotion of judges and prosecutors to tribunals, specialised tribunals, courts of appeal and public prosecutor's offices attached to them, as well as at the Prosecutor's Office attached to the High Court of Cassation and Justice, will make the functioning of the courts and prosecutor's offices vulnerable

There is no selection basis for this seniority (at least 10 years as a prosecutor or judge), the directorates are already operating with a chronic staff shortage that will generalise in this hypothesis, considering the huge number of vacant prosecutor positions in the judicial system (over several hundred). A seniority of at least 10 years as a prosecutor or judge currently means 12 years (including the 2 years in the NIM) and, assuming the amendment of the magistrate statute law, this shall mean 13 years.

The problem was flagged as worrying in the Report on the rule of law in Romania published by the European Commission on 13 July 2022– "*Challenges remain in recruiting prosecutors within the DNA, in particular due to dissuasive seniority requirements. In March 2021, the DNA had a 75% occupancy rate of prosecutors, and in March 2022, this rate remained the same. Under the RRP, Romania committed to increase it to 85% by 30 June 2023. In order to be appointed to the DNA, the law currently states that prosecutors must have at least 10 years seniority. The seniority requirement has been identified as a major reason for the limited number of applications to fill in the existing vacancies. Other factors include the high workload, relatively low salaries and the oral examination that is broadcast (contrary to examinations in other prosecution departments). A competition to recruit 29 prosecutors was organised in the first half of 2022, but only 11 people*

applied, of which two have withdrawn their candidacy. Given that on 14 July 2021, the Constitutional Court declared unconstitutional a law decreasing the seniority requirement to seven years, the government intends to maintain the ten-year seniority requirement for appointment in DNA. Finally, the possibility for magistrates to be delegated, seconded and transferred to the DNA are also limited. The DNA relies on a significant proportion of delegated prosecutors and has requested that the seventeen prosecutors that ceased working in the Directorate would be replaced by prosecutors by delegation, but only judicial police officers were seconded. Given the shortage of prosecutors in the DNA, delegation, secondment and transfer remain important tools."

The importance that the European Commission attaches to this subject is proven by the fact that it is the subject of one of the recommendations contained in this year's report on the rule of law in Romania: "**to address the operational challenges of the National Anticorruption Directorate, including in terms of the recruitment of prosecutors, and to closely monitor the impact of the new system of investigation and prosecution of judicial corruption offences**".

Also, the limits of 7 years of seniority in the position of judge or prosecutor, for promotion to office or, as the case may be, the rank of court judge or specialised court and prosecutor at the prosecutor's office attached to the court or at the prosecutor's office attached to the specialised court, 9 years of seniority in the position of judge or prosecutor, for promotion to office or, as the case may be, the rank of judge of the court of appeal and prosecutor at the prosecutor's office attached to it, respectively 10 years of seniority in the position of judge or prosecutor, for promotion to office or, as the case may be, the rank of prosecutor at the Prosecutor's Office attached to the High Court of Cassation and Justice will be able to determine significant deficiencies and the impossibility of filling vacant positions, considering the current deficit of over 1,000 vacant positions for judges and several hundred vacant positions for prosecutors.

18. Elimination of the provisions related to the secondment of judicial police officers and agents to prosecutors' offices

In the draft law on judicial organisation - version 21.07.2022 - any reference to the judicial police officers assigned to prosecutor's offices, provided for in the current Law on judicial organisation No. 304/2004 which regulates the secondment of judicial police officers and agents to prosecutors' offices, either in order to carry out the activities provided for by Art. 142 para. (1) of the Code of Criminal Procedure, or in order to quickly and thoroughly carry out the activities of ascertaining and prosecution of crimes in the economic, financial, fiscal and customs fields, is eliminated *de facto*. In fact, in the current draft law on judicial organisation (version 21.07.2022), the term "judicial police" is mentioned 4 times, in provisions of a general nature, without any practical value (said mentions are also found in Law No. 364/2004 on the organisation and functioning of the judicial police or in the Criminal Procedure Code), the term "judicial police officers and agents" being completely eliminated from the text of the law. For comparison, in the current Law on judicial organisation No. 304/2004, the term "judicial police" is mentioned 41 times, of which the term "judicial police officers and agents" is found 32 times.

Also, comparing the draft law on judicial organisation (version 22.06.2022) in the version presented to the European Commission, the term judicial police is mentioned 25 times, of which the term "judicial police officers and agents" is found 18 times. Although, apparently, we also find in the version presented to the European Commission fewer mentions of the terms "judicial police", respectively of "judicial police officers and agents", it is a simple legislative improvement, a better synthesis and systematisation, removing the parallels in the current law, on the merits, the scope of regulation of the posting of judicial police officers and agents, within the prosecutor's offices, being extended, in the version presented to the European Commission, compared to the current regulation.

After a version was presented to the European Commission that responded to a certain extent to the need of prosecutors within the Public Ministry to benefit, in the interest of justice, from the support of their own judicial police bodies or, at least, of judicial police officers posted within the prosecutor's offices, probably in order to mislead the European bodies, the Ministry of Justice, possibly under the pressure of interest groups within the Ministry of Internal Affairs, fundamentally modifies the legislative draft, completely eliminating the institution of the posting of judicial police officers within the prosecutor's offices, going as far as removing from the text of the law of any mentions to judicial police officers and agents. If it is regulated in this way, the already reduced power of prosecutors to carry out an effective and efficient investigation in complex, difficult and important cases will be annihilated.

Relevant in this sense are also the judgments of the Venice Commission within the same Opinion regarding the draft law on the specialised Prosecutor's Office in Montenegro:

"[*the OECD Report on Specialised Anti-Corruption Institutions] suggests that specialised anti-corruption departments or units within the police or prosecutor's office be subject to separate hierarchical rules and appointment procedures, or that police officers dealing with corruption cases, although institutionally placed within the police, report on individual cases only and directly to the competent prosecutor*." (CDL-AD(2014)041, Interim Opinion on the Draft Law on Special State Prosecutor's Office of Montenegro, para. 55).

Therefore, it is necessary, for the proper functioning of the prosecutor's office units and especially the specialised ones (DNA/DIICOT), for the speedy and efficient conduct of criminal investigations, that judicial policemen are posted within them under the direct management and direct control of the prosecutors.

The elimination of the above provisions from the new drafts, in the conditions where there is no adopted or proposed separate normative act to organise the functioning of the judicial police, is inexplicable, the only goal that the legislator could pursue with this measure is to make criminal investigations more difficult, the inefficiency of the prosecutor's offices and especially the slowing down to the point of stopping the anti-corruption/anti-organised crime fight.

The efficiency of teamwork, under the leadership of the prosecutor, proven by the results obtained at the level of the specialised structures of the Public Ministry (DNA and DIICOT), but also at the level of the other units subordinated to the Prosecutor's Office attached to the High Court of Cassation and Justice in the priority areas of action (in particular, through the actions carried out together with judicial police officers from the General Anticorruption Directorate), represents an additional argument for the short-term expansion of this activity organisation model and the

supplementing of the legislative framework in Romania regarding the judicial police. An organisation of a judicial police within the Public Ministry would represent the solution capable of responding to the needs of efficiency and impartiality of justice in the criminal prosecution stage, it would best respond to the constitutional requirements, as well as to the need to maintain the balance between State authorities, not allowing an entity belonging to the executive (MAI) to interfere in the exercise of the powers of the Judicial Authority. Given that judicial police officers can order measures that restrict the fundamental rights of individuals, it is essential that their status excludes any possibility of receiving, directly or indirectly, orders relating to criminal prosecution activity outside the judicial system. To ensure this requirement, the professional career of judicial police workers must depend exclusively on the performance in carrying out the criminal investigation activity, and the prosecutor must be the only one in a position to assess the quality of the criminal investigation activity performed by the judicial police worker. As long as there is the possibility of influencing the course of the professional career of the judicial policeman by the Minister of the Interior, the latter will be able to have an ascendancy over that policeman and, through him/her, over the course of the investigation.
Until the time of the organisation of our own judicial police, a temporary solution would be the secondment of judicial police officers to the prosecution units within the Public Ministry. Also, for the judicial police officers who will continue to function within the specialised structures of the Ministry of Administration and the Interior, it is necessary to relieve them immediately of any duties that do not concern criminal investigation activity, and the professional evaluation of these judicial police workers should fall under the responsibility of the prosecutor's offices that exercise the coordination, control and management of criminal investigation activities.

19. Elimination of the provisions regarding the possibility of recusal of the members of the disciplinary sections of the SCM

The presence of a judge/prosecutor (in respect of whom there are serious doubts of lack of independence) in the disciplinary panel cannot be conditioned by a numerical criterion that would require the panel to be composed only of members of the Section for Judges/Prosecutors of the SCM, bypassing the independence and impartiality criteria. **As long as the sections are courts in disciplinary matters, the procedural provisions regarding recusal/abstention must apply to them, as there is no reason to the contrary.**
Mutatis mutandis, in this respect, the principles stated by the ECHR in the Harabin v. Slovakia case are applicable. This decision is based on a request made by the president of the Slovak Supreme Court of Justice, who was disciplined, in a procedure carried out before the Constitutional Court, vested by law with this competence and during which the recusal of 7 of the 13 judges of the Court. Finding the violation in question of Art. 6 para. 1 of the Convention, namely the right to be tried by an impartial court, the Court pointed out the following: "*136. The Constitutional Court, **when balancing between the two positions, namely the need to respond to the request for exclusion of its judges and the need to maintain its capacity to determine the case, failed to take appropriate stand from the point of view of the guarantees of Article 6 of the Convention in that it did not answer the arguments for which the exclusion of its judges had been***

requested. (…) 140. The reasons invoked by the Constitutional Court, namely the need to maintain its capacity to determine the case, cannot therefore justify the participation of two judges who had been excluded for lack of impartiality in earlier cases involving the applicant and in respect of whose alleged lack of impartiality the Constitutional Court failed to convincingly dissipate doubts which could be held to be objectively justified."

The organisational system of the Section for Judges/Prosecutors in disciplinary matters within the Superior Council of the Magistracy does not provide remedies for such situations and also offers the possibility for a member of the SCM to be a judge of his/her own case, an aspect contrary to the right to a fair trial and the independence of the judiciary *lato sensu*.

For any panel of judges in Romania, according to the rules of civil procedure, there is the possibility of replacing an incompatible judge. There is also the possibility of delegating the court, when, due to exceptional circumstances, the competent court is prevented from functioning for a longer time (the High Court of Cassation and Justice, at the request of the interested party, will appoint another court of the same degree to judge the trial).

However, these rules are not applied to the disciplinary procedure, causing an obvious violation of the principles of due process.

Art. 47 of the Charter of Fundamental Rights of the European Union enshrines in clear terms the right to court: any person whose rights or freedoms guaranteed by European Union law have been violated has the right to an effective appeal before a court, in compliance with the conditions set out in this article. Everyone has the right to have their case resolved fairly, publicly and within a reasonable time by an independent and impartial tribunal, previously established by law.

In the Explanations of the European Parliament relating to the Charter of Fundamental Rights, published on 14.12.2007,[24] referring to Art. 47 – Right to an effective remedy and to a fair trial-, it is shown that the second paragraph corresponds to Article 6(1) of the ECHR which reads as follows: "In the determination of his/her civil rights and obligations or of any criminal charge against him/her, everyone is entitled to a fair and public hearing within a reasonable time by an *independent and impartial* tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

Impartiality is defined, according to the case law of the European Court of Human Rights, as the absence of any prejudice of any preconceived idea regarding the solution in a certain process.

The impartiality of the court, in the sense of Art. 6, para. 1 of the European Convention, involves, in the light of the constant case law of the European Court, two tests: a *subjective* one, which concerns the personal convictions of a certain judge in a certain case, and another *objective* one, **aiming to establish whether a judge has offered sufficient guarantees to exclude any legitimate doubt in this regard** (ECHR, *Le Compte, van Leuven, de Meyere v. Belgium*, judgment of 23 June 1981; *Procola v. Luxembourg*; judgment of 28 September 1995; *Piersack v. Belgium*, judgment of 1 October 1982; *Theorgeirson v. Iceland*; *Hauschildt v. Denmark*;

[24] https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:32007X1214(01)&from=RO

judgment of 24 May 1989, para. 46; *Kleyn v. the Netherlands*; Lindon, *Otchakovsky-Laurens and July v. France*, judgment of 22 October 2007; *Micallef v. Malta*, judgment of 15 October 2009).
From a subjective point of view, in a concrete case, judges are obliged to abstain from expressing a preconceived opinion and forming a personal prejudice. Through the subjective test, it will have to be demonstrated, starting from the facts of the case, what a certain judge was thinking in a certain circumstance, whether or not he/she acted in a biased manner (ECHR, *De Cubber v. Belgium*, judgment of 26 October 1984, para. 24, *Padovani v. Italy*, judgment of 26 February 1993). In this case, impartiality is presumed, and the biased attitude of the judge in a certain case must be proven (ECHR, *Le Compte, Van Leuven and De Meyere, cited above*).
From an objective point of view, the judge must offer sufficient guarantees to exclude any doubt that he/she could act biased in a litigation brought to trial. Thus, independent of the judge's personal behaviour, certain verifiable factual elements may create suspicions regarding his/her impartiality. From this perspective, what is relevant is the trust that, in a democratic society, the courts must inspire in litigants, with reference, mainly, to the parties in the trial, so that even appearances are relevant, entering into the judge's obligation to abstain whenever there is a legitimate reason justifying the fear that it could be impartial (ECHR, *Fey v. Austria*, judgment of 24 February 1993, para. 30; ECHR, *Ferrantelli and Santangelo v. Italy*, judgment of 7 August 1996; ECHR, *Hauschildt v. Denmark*, cited above, para. 48; *Gautrin and others v. France*, judgment of 20 May 1998).
If there is a justified doubt, the judge suspected of a biased attitude must withdraw from judging the case. The State has the obligation to verify accusations of bias brought to a juror (ECHR, *Remli v. France*, judgment of April 23, 1996).
Article 19 TEU, which concretises the value of the rule of law stated in Article 2 TEU, entrusts the national courts and the Court with the task of guaranteeing the full application of Union law in all Member States, as well as the jurisdictional protection of the rights conferred on litigants by the said right [Judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies of the Judiciary*), C-216/18 PPU, EU:C:2018:586, paragraph 50, Judgment of 24 June 2019, *Commission vs Poland (Independence of the Supreme Court*), C-619/18 , EU:C:2019:531, paragraph 47, as well as Judgment of 5 November 2019, *Commission vs Poland* (*Independence of common law courts*), C-192/18, EU:C:2019:924, paragraph 98].
In order to guarantee that the courts which may be called upon to rule on matters related to the application or interpretation of Union law are in a position to ensure the effective jurisdictional protection imposed by this provision, the preservation of their independence is paramount, as confirmed in Article 47 of the second paragraph of the charter, which mentions access to an "independent" court among the requirements related to the fundamental right to an effective remedy [see in this regard the Judgment of 2 March 2021, *A. B. and others (Appointment of judges to the Supreme Court - Appeals)*, C-824/18, EU:C:2021:153, paragraph 115, as well as the case law cited].
This requirement of independence of the courts, which is inherent in the judicial activity, is related to the essential content of the right to effective judicial protection and the fundamental right to a fair trial, which is of essential importance as a guarantor of the protection of all the rights conferred on litigants by law of the Union and the preservation of the common values of the Member States provided for in Article 2 TEU, in particular the value of the rule of law. According to the principle of the separation of powers characterising the functioning of a State governed by

the rule of law, the independence of the courts from the legislative and executive powers must be guaranteed in particular [see in this regard the Judgment of 2 March 2021, *A. B. and others (Appointment of judges to the Supreme Court - Appeals)*, C-824/18, EU:C:2021:153, paragraphs 116 and 118, as well as the cited case law].
The requirement of independence of the courts, which derives from the second subparagraph of Article 19(1) TEU, comprises two aspects. The first aspect, of an external order, requires that said authority exercise its functions in full autonomy, without being subject to any hierarchical link or subordination to anyone and without receiving dispositions or instructions, regardless of their origin, thus being protected from interventions or external pressures likely to affect the independence of judgment of its members and influence their decisions. The second aspect, of an internal order, is related to the notion of impartiality and aims to be equidistant from the litigating parties and the interests of each of them from the perspective of its object. This last aspect requires respect for objectivity and the absence of any interest in the settlement of the dispute apart from the strict application of the rule of law [see in this regard the Judgment of 24 June 2019, *Commission/Poland (Independence of the Supreme Court*), C-619/18, EU:C:2019:531, paragraphs 72 and 73, and Judgment of 21 December 2021, *Euro Box Promotion and others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/ 19, EU:C:2021:1034, para. 224, as well as the Judgment of the CJEU of 22 February 2022, case C-430/21, *RS*].
According to a consistent case law, the guarantees of independence and impartiality imposed under Union law postulate the existence of rules that allow the removal, in the perception of litigants, of any legitimate doubt regarding the impenetrability of the court in question with respect to external elements and its neutrality in relation with the competing interests [see in this regard Judgment of 19 September 2006, *Wilson*, C-506/04, EU:C:2006:587, paragraph 53 and the case law cited, Judgment of 2 March 2021, *A. B. and others (Appointment judges at the Supreme Court – Appeals*), C-824/18, EU:C:2021:153, para. 117, as well as the Judgment of 20 April 2021, Repubblika, C-896/19, EU:C:2021:311, para. 53].
In this sense, judges must be protected from outside interventions or pressures that may endanger their independence. The rules applicable to the status of judges and the exercise of their judicial function must in particular allow the exclusion not only of any direct influence, in the form of instructions, but also of forms of indirect influence likely to guide the decisions of the judges in question and thus remove a lack of appearance of their independence or impartiality that could affect the confidence that justice must inspire in litigants in a democratic society and in a state of law [see, in this regard, Judgment of 18 May 2021, related cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, *Association of the Forum of Judges from Romania and others*, para. 193, Judgment of 2 March 2021, *A. B. and others (Appointment of judges to the Supreme Court - Appeals*), C-824/18, EU:C:2021:153, paragraphs 119 and 139, as well as the case law cited].
Regarding the rules governing the disciplinary regime, the requirement of independence requires, according to a constant jurisprudence, that this regime present the necessary guarantees to avoid any risk of using such a regime as a system of political control of the content of judicial decisions. In this regard, the adoption of rules that define, among other things, both the behaviours that constitute disciplinary violations and the concretely applicable sanctions, which provide for the intervention of an independent court in accordance with a procedure that fully guarantees the rights enshrined in articles 47 and 48 of the charter, in particular the right to defence, and which enshrines the possibility of contesting in court the

decisions of disciplinary bodies constitute a set of essential guarantees for preserving the independence of the judiciary [Judgment of 25 July 2018, *Ministry for Justice and Equality (Deficiencies of the judicial system*), C-216/18 PPU, EU:C:2018:586, point 67, Judgment of 24 June 2019, *Commission vs Poland (Independence of the Supreme Court*), C-619/18, EU:C:2019:531, point 77, as well as the Judgment of 5 November 2019, *Commission vs Poland (Independence of ordinary courts*), C-192/18, EU:C:2019:924, paragraph 114].

As such, it is necessary to reinstate the right of recusal, respectively the obligation to abstain for members of the SCM, and in the situation where, due to the recusals and abstentions admitted, the disciplinary panel cannot be constituted at the section level, then the disciplinary judgment should be carried out by the panel of 5 judges from the HCCJ level (randomly appointed).

20. Members of the Superior Council of Magistracy receive new privileges

The quality of elected member of the Superior Council of Magistracy becomes compatible with the quality of expert in drafts with external financing in the field of justice. The reason for this regulation is not explained.
Also, judges from the High Court of Cassation and Justice and prosecutors from the Prosecutor's Office attached to the High Court of Cassation and Justice, including from the specialised structures of the prosecutor's office, who have worked for at least 5 years at this court or, as the case may be, at these prosecutor's offices or specialised prosecutor's office structures, as well as the **elected members of the Superior Council of the Magistracy - judges and prosecutors, upon the expiration of their membership mandate, may opt to enter the legal profession or notary, without an exam or competition.**
The granting of such rewards is not explained, amounting to unjustified privileges. Moreover, in the drafts of 30 September 2020 and 22 June 2022, the Ministry of Justice had proceeded to eliminate some transitional provisions included in the law in force, such as the one that allowed judges of the High Court of Cassation and Justice whose mandate for which they were appointed or, as the case may be, are released for unattributable reasons to hold a position as a judge at the High Court of Cassation and Justice and to return to the previously held position of magistrate or to another position of judge or prosecutor or to opt for entering law firms or notary offices, without exam. In this sense, the reasoning included in the Decision of the Constitutional Court No. 241/2020 which explains the reason for this text and its transitory character at the time of the adoption of Law No. 303/2004 regarding the status of judges and prosecutors (para. 21 of the decision).
Also, the status of dignitary is preserved for the members of the current SCM, the provision according to which, "*In consideration of their status as a magistrate, judges and prosecutors, including those who are elected members of the Superior Council of the Magistracy, are not dignitaries, not being able to serve simultaneously from the judicial authority, the executive or legislative power*", being applicable only for the members of the SCM after the entry into force of the law.

21. Disciplinary liability. The reintroduction of the disciplinary sanction of demotion. The sanction of disciplinary transfer for an effective period of one to three years to another court or to another prosecutor's office, even of an

immediately lower level, constitutes a violation of the principle of immovability and independence of the judge/prosecutor. Other aspects

Demotion to professional rank, a measure erroneously "copied" from the system of military ranks and periodic advancements, through the passage of time (to which there can be no comparison or equivalent to the professional rank of magistrates) is unlimited in time (for example, 6 months or 1 year), not being proportional, and disregards the theory of earned rights, including the right to professional reputation. This type of sanction cannot be taken *tale quale* in the matter of disciplinary sanctioning of the magistrate because, in his/her case, certain fundamental guarantees must be respected (immovability and independence).
Transfer to another court/prosecutor's office for a period of between 1 and 3 years constitutes a sanction that endangers the independence and immovability of the judge/prosecutor because it can lead to his/her removal from certain files that he solves/instruments. It is inadmissible in a democratic state to have such a way, which can be used as a way to remove a magistrate from a case or certain cases. Also, the duration for which the measure can be taken is exaggerated, potentially disrupting the activity of the court/prosecutor's office where the magistrate works. At the same time, the possibility of being transferred to an immediately lower court/prosecutor's office does nothing but legitimise the demotion, practically implying a double sanction, the first being the removal of the magistrate from the court/prosecutor's office where he/she chose to act, and the second being his referral at a court/prosecutor's office of a lower level, also for an excessive period of time.
This type of sanction (disciplinary transfer, demotion) is also specific to labour law, but it cannot be taken *tale quale* in the matter of disciplinary sanctioning of the magistrate because, in his/her case, certain fundamental guarantees must be respected (immovability and independence).
Therefore, we appreciate that the complete removal of this sanction from Art. 274 para. 1 letter c of the Law on the status of magistrates.

Regarding the establishment of the measure of suspension from office, between the date of the pronouncement of the decision of the appropriate section for the application of the disciplinary sanction of exclusion from the judiciary and the date of release from office (art. 198 paragraph 1 letter g of the Law on the Status of Magistrates), it is noted that this it is neither time-limited nor subject to appeal. In other words, to the sanction of exclusion, another sanction of suspension is added, without limiting its application in time (which would mean that, if the decision of the Section for the application of the disciplinary sanction is motivated in 6 months or more, and the appeal is resolved in another 6 months or more, the magistrate risks being suspended for 1 year or more) and without regulating an appeal to challenge the taking of the measure.
We believe that this possibility of suspending the judge/prosecutor sanctioned with exclusion is not justified, as in the presentation of reasons it is not indicated what objective realities or causes led to the conclusion that such a measure is necessary. On the contrary, this provision has a potential danger for the independence of the magistrate because, in the situation where it is desired to remove a judge/prosecutor from the resolution of a case/cases, then the sanction of exclusion is applied in order to be able to implement the measure of suspension. Also, the control court could be determined not to re-individualise the sanction precisely to

avoid the blame on the Section that took the measure of suspension and reinstatement to the situation prior to the suspension.
In conclusion, it is necessary to remove the provision from art. 198 para. 1 letter g of the Law on the Status of Magistrates, being a sanction in itself, which endangers the independence of the judge/prosecutor.
With reference to the disciplinary act of manifesting political beliefs during service (art. 272 letter c of the Law on the Status), we appreciate that this is not sufficiently clear and predictable, as it is not possible to establish what political beliefs mean, nor the phrase "on the job".

22. Changing the composition of court panels without the judge's consent

The law on judicial organisation establishes in the matter of the trial panels of the High Court and other courts that the change of their composition is done exceptionally, based on objective criteria that will be regulated in the Organisational Regulation of the HCCJ/of the courts (art. 34 para. 3, art. 57). However, these criteria must be indicated in the law, and not in the lower normative act that cannot create rules/norms, but only apply those provided by the organic law. Moreover, in the case of panels of 5 judges, the same law stipulates what are the objective criteria (situations) in which the replacement of members can be ordered, respectively incompatibility or absence (art. 36 para. 4). These criteria must also be provided in the case of the other panels at the High Court level, but also of the other courts in the system, the solution having to be unitary.
The institution of **changing the panel** must be very clearly regulated, and the situations in which it is possible to change the members of a panel must be restrictive because the measure of replacing a judge not only represents an impairment of his/her independence but can also lead to the disruption of the legal order (the resumption of proceedings in criminal matters, the reinstatement of civil cases - which hinders speed).
Also, the Law on judicial organisation provides for the possibility that, when at the level of a section within the appeal courts, tribunals or courts, a panel cannot be constituted, the board may order the participation of judges from other sections (art. 45 para. 3), and the president or one of the vice-presidents will take this measure within the High Court (art. 35 para. 6), the designation being made by drawing lots.
First of all, there is no justification why a different solution was adopted compared to the rest of the courts at the HCCJ level, the duty of appointment falling to the leadership, and not to the board.
Secondly, this measure represents a serious damage to the career of a judge because it involves changing the section/panel and implicitly the matter in which he/she judges. However, this can only be taken with the consent of the person. As such, under the conditions in which the measure is able to affect the independence of the judge, it is necessary that the appointment to another panel/section be made with his/her consent. Only in the situation where no judge would give his/her consent could the drawing of lots be carried out, with the notification of those involved.

23. The need for additional guarantees to ensure the correct random distribution in the computerised system

The random distribution of cases in the computerised system is a fundamental aspect to respect the guarantees of a fair trial.
In the report no. 1696/IJ/1128/DIJ/2013 prepared by the Judicial Inspection - section III.c.(http://old.csm1909.ro/csm/linkuri/29_01_2014__65045_ro.pdf), the following were noted:
- in the ECRIS IV system, the interface for managing the court documents is located in the user part and not in the administration part of the application, so that all operations related to documents can be performed by the user of the application;
- the act of referral to the court can be deleted or modified after the random distribution, which makes it possible to change a summons request with another document and, therefore, direct a file to a certain panel;
- the main object of the file can be changed after the random distribution. In this way, a file assigned to an agreed panel can have its object changed, becoming a directed file;
- the randomly allocated term can be deleted and a new allocation is carried out, so that there is the possibility of operating several deletions until the file is distributed to the agreed panel;
Considering that over time it has been proven that the method of distribution of files with the help of ECRIS can be altered (https://e-juridic.manager.ro/articole/furtuna-la-tribunalul-bucuresti-frauda-la-repartizarea-dosarelor-10751.html) or suspicions may arise in relation to the way in which a file ends up being resolved by a panel (https://www.g4media.ro/exclusiv-cum-a-fost-directionat-dosarul-premierului-nicolae-ciuca-prin-metoda-coperta-catre-judecatorul-marius-iosif-care-s-a-pensionat-imediat-dupa-ce-a-anulat-sesizarile-de-plagia.html), thus having vulnerabilities in the ECRIS system, **it is required that the entire distribution operation be recorded on video**. Thus, a guarantee would be ensured that would make it extremely difficult to defraud the random distribution computer system. This could be doubled by establishing any action/inaction that has the effect of altering the random distribution as a **crime** in the law on judicial organisation or on the status of magistrates.
Such measures are essential to remove any suspicion of how the random assignment of cases is carried out and to restore public confidence in the impeccable functioning of the judicial system.

24. Maintaining the approval of the Minister of National Defence and the requirement to fulfil the specific legal conditions for acquiring the quality of an active officer within this ministry

In the draft law on the status of judges and prosecutors, unlike the version presented to the European Commission, possibly due to the pressure of the Ministry of National Defence, the status of military magistrates is seriously affected, maintaining or even strengthening the possibility of M.Ap.N. to influence the access of judges and prosecutors within the prosecutor's offices and military courts, thus indirectly being able to influence the course of criminal investigations or even the trial. Also, the mention of the subsidiary character of the obligations arising from the military capacity is removed, and the mention of the non-application of the military command structure is replaced by a wording that allows the indirect impact of judicial activity by using the obligations of a military nature.

The approval of the Minister of Defence for military magistrates directly affects their functional independence. Moreover, there is no approval from the Minister of Justice for the transfer of a civil judge from one civil court to another.
The Minister of National Defence should not have any duty or prerogative regarding the functional activity of military courts and prosecutors' offices or the recruitment of military judges and prosecutors, and the granting of military rank and promotion to the next military rank should be done according to the legal provisions in the matter, after completing the minimum internship in the degree.
The approval of the Minister of National Defence for the transfer to the position of military prosecutor must be a consultative one, and the acquisition of the quality of active officer must operate by law as a result of the disposition of the transfer or appointment, the Ministry of National Defence only fulfilling the formalities for granting the military rank corresponding to the legal provisions. Similarly, the provisions regarding the maximum age for activation or any other conditions for activation specific to M.Ap.N. need not apply to military magistrates.
The arguments for removing any possibility of influencing the justice act by the Minister of Defence are the following:
The Constitution of Romania, in Chapter VI entitled "Judicial Authority", clearly establishes the components of this authority: the courts, the Public Ministry and the Superior Council of the Magistracy. Also, in Chapter VI, the fundamental duties of the components of the Judicial Authority are stated.
Thus, article 125 with the marginal name "Status of Judges" provides in paragraph 2 that "appointment proposals, as well as the promotion, transfer and sanctioning of judges are the competence of the Superior Council of Magistracy, under the conditions of its organic law." The provisions are extremely clear, the competence of the Superior Council of Magistracy in the matter of the transfer of judges is absolute and, consequently, any interference from any other authority/institution/entity, even from within the Judicial Authority in the process of the transfer of judges, is excluded. Moreover, any interference by an entity outside the Judicial Authority, such as the Minister of National Defence, is excluded. The Constitution makes no distinction between civilian and military judges. In conclusion, a compliant opinion of the Minister of National Defence is incompatible with the constitutional text, as it is inconceivable to limit the competence established at the constitutional level in favour of the Superior Council of Magistracy by establishing a decision-making dependence on this opinion.
As regards prosecutors, including military ones, the Constitution not making any distinction between civilians and military ones, although there is no constitutional provision similar to that in Article 125 which concerns judges, from the corroboration of the relevant constitutional texts, it is clear that any interference from any entity outside the Judiciary, such as the Minister of National Defence, is excluded. Article 131 with the marginal title "Role of the Public Ministry" in paragraph 2 provides that "The Public Ministry exercises its powers through prosecutors established in the prosecutor's offices, under the law". The text makes no difference between military and civilian prosecutors or between military or civilian prosecutors, all civilian or military prosecutors are constituted in prosecutors within the Public Ministry. Article 132 with the marginal name "Status of prosecutors", paragraph 1, provides that "prosecutors carry out their activity according to the principle of legality, impartiality and hierarchical control, under the authority of the Minister of Justice." Article 133 with the marginal name "Role and structure", in paragraph 1, provides that "The Superior Council of the Magistracy is the guarantor of the independence

of the judiciary". From the corroborated interpretation of the above-mentioned constitutional texts, it follows that a compliant opinion of the Minister of National Defence is incompatible with the principle of impartiality and that of exercising the activity under the authority of the Minister of Justice, as well as with fulfilling the role of the Superior Council of Magistracy as guarantor of the independence of justice. Article 131 with the marginal name "Role of the Public Ministry", in paragraph 1, provides that "in the judicial activity, the Public Ministry represents the general interests of society and defends the legal order, as well as the rights and freedoms of citizens". To the extent that an entity outside the Judiciary can control the selection of military prosecutors and thereby indirectly influence the administration of justice, the Public Ministry is prevented from fulfilling its constitutional role.
The right to a fair trial excludes the possibility for the persons investigated or tried or for the other parties and participants to choose the judges to judge them or the prosecutors to carry out the criminal investigation. However, if the minister of national defence were allowed to control, through the approval, the transfer and appointment of prosecutors and military judges, this would be equivalent to the selection by this minister of judges and prosecutors to judge or investigate cases in which the minister or the ministry would be a party or have an interest. Article 124 with the marginal name "Administration of justice" provides in paragraph 2 that "Justice is unique, impartial and equal for all", which completely excludes any possibility of one of the parties/participants to choose their own judges to judge them or prosecutors to carry out the criminal investigation.
As for the "selection" criteria for military magistrates, they must be the same as for civilian magistrates. The professional performance criteria of military magistrates must be those specific to the profession of judge or prosecutor, and not those specific to military personnel. Article 124 paragraph 2 of the Romanian Constitution provides that "Justice is unique, impartial and equal for all" which implies the right of all litigants, regardless of their civilian or military status, to be investigated by prosecutors and tried by judges who, regardless of whether they are civilian or military, to meet the same professional requirements. For the same reasons, conditions regarding age, health or sports physical performance do not apply in the "selection" of military judges and prosecutors. The physical fitness and maximum age should be the same as for Civil Magistrates.
Also, the guarantees necessary to ensure the independence and impartiality of military judges and prosecutors must be expressly provided, so that the obligations arising from the capacity of military personnel have a subsidiary character and cannot interfere, directly or indirectly, with the fulfilment of the obligations arising from the capacity of prosecutors, and the military command structure within the military prosecutions should not apply to military magistrates.
Following the SCM's consultation of the body of prosecutors, more than 80% of them assessed that the opinion of the Minister of National Defence must be advisory, and not compliant.

25. Other problematic aspects

Art. 212 of the Law on the status of judges and prosecutors does not provide that seniority as a judicial police officer or clerk with higher education constitutes assimilated seniority, provided that, upon entry into the profession, they are taken into account, which creates a discrimination that cannot be justified.

Discrimination is all the more obvious if the provisions of art. 64 of the same normative act, according to which: *"(1) Former judges and prosecutors who ceased their activity for unattributable reasons, legal specialist staff assimilated to judges and prosecutors, lawyers, notaries public, legal assistants, legal advisors, bailiffs with higher legal education, probation staff with education higher legal degrees, judicial police officers with higher legal education, clerks with higher legal education, people who have performed specialized legal functions in the apparatus of the Parliament, the Presidential Administration, the Government, ministries, the Constitutional Court, the People's Advocate, the Court of Accounts or the Legislative Council , in the Legal Research Institute of the Romanian Academy and the Romanian Institute for Human Rights, teaching staff from accredited higher legal education, as well as assistant magistrates, with at least 5 years of experience in the specialty can be appointed to the judiciary, based on competition, if they meet the conditions provided for in art. 5 para. (3)."*

It is noted that, although initially all magistrates are in a situation of equality, for admission to the profession, 5 years of experience in various legal professions (including judicial police officer) being required, during the course of the profession, the law establishes a presumption of professional impropriety of magistrates former judicial police officers against those who were lawyers, clerks, legal advisors, etc. who are presumed by law to be superior from a professional point of view, since their seniority in the legal professions is considered to be a period of activation in the judiciary.

The criticised provisions of the law ignore the fact that the acquisition of the quality of magistrate was achieved following the promotion of the competition for admission to the magistracy, with the fulfilment of the conditions required by the law, including those regarding the minimum length of service required in legal positions, including the position of law enforcement officer judicial police. The principles enunciated by the Constitutional Court in Decision no. 176 of 26.03.2014 regarding the exception of unconstitutionality of the provisions of art. 50 paragraph 2 of Law No. 303/2004 regarding the status of judges and prosecutors are enunciated in this respect, noting that nothing justifies the emergence of a differentiation after the moment of admission to the judiciary; since they were declared admitted to the competition for admission to the judiciary, it can only be assumed that all magistrates, regardless of the position in the legal field that they had previously, evolved and perfected themselves within similar professional benchmarks (...); there can only be possible discrepancies generated by the individual level of training, not at all by particular circumstances, prior to admission to the judiciary. At the same time, the differentiation cannot be justified even on the grounds that the activity carried out by lawyers is closer to that carried out by judges and prosecutors. The same can be said about other categories of legal experts.

In contradiction with the principle of equal rights of citizens, for persons in the same situation, judges and prosecutors who have passed the competition for admission to the judiciary, with the fulfilment of the conditions required by law, a different legal treatment is applied regarding the recognition of seniority in the profession legal entity from which the magistrate comes. Taking into account the fact that, at the time of registration for the magistracy admission competition, all candidates were considered equal in terms of profession and seniority required according to art. 33 para. (1) from Law No. 303/2004, it is unfair to offer such privileged treatment, at a later time, to a certain category of magistrates.

Also, it is not justified in any way why the provisions of the law regarding the calculation of seniority without taking into account the period during which the judge or the prosecutor had the capacity of auditor of justice, in the case of examinations, competitions or selection procedures provided for by the law, enter into in force on 1 January 2026. Until this date, the period during which the judge or prosecutor had the capacity of auditor of justice is taken into account in the calculation of seniority provided by this law.

The Law on the SCM no longer establishes the obligation to communicate to the professional associations of invited judges and prosecutors or those who have expressed, by written request, their intention to participate in the meeting, of the preparatory materials of the Plenary or section meetings. In such conditions, their participation becomes purely decorative, ineffective.