

THE “ROMANIAN JUDGES’ FORUM” ASSOCIATION

TO:

Olt County Court  
Case no. 2122/104/2018  
Hearing: 18.12.2018

To the presiding judge of the court,

THE “ROMANIAN JUDGES’ FORUM” ASSOCIATION, the professional association of judges with legal entity, establishes by hearing report no. 671/June 8<sup>th</sup>, 2007 ruled by Slatina Court of Law, (...), related to the exception of the lack of evidence regarding the capacity of representative of the signatory of the counterstatement, judge Lucian Netejoru respectfully submits this

Request for preliminary ruling,  
under Article 267 TFUE,

asking the referral to the Court of Justice of the European Union of four questions regarding the following:

Preliminary, we show that the European Commission Report under the Cooperation and Verification Mechanism published on November 13<sup>th</sup>, 2018, imposed 8 new recommendations to Romania, among which:

*Justice laws*

Suspend immediately the implementation of the Justice laws and subsequent Emergency Ordinances.

Revise the Justice laws taking fully into account the recommendations under the Cooperation and Verification Mechanism and issued by the Venice Commission and the Council of Europe’s Group of States against Corruption GRECO

*Appointments/dismissals within the judiciary*

Suspend immediately all ongoing appointments and dismissal procedures for senior prosecutors.

Relaunch a process to appoint a Chief prosecutor of the National Anticorruption Directorate with proven experience in the prosecution of corruption crimes and with a clear mandate for the National Anticorruption Directorate to continue to conduct professional, independent and non-partisan investigations of corruption.

**The Superior Council of Magistracy to appoint immediately an interim team for the management of the Judicial Inspection and within three months to appoint through a competition a new management team in the Inspection**

Regarding the Judicial Inspection, the following were held:

”Also, for the appointment of a new management team of the Judicial Inspection, the Superior Council of Magistracy did not organize a competition,

although the mandate of the team management expired at the end of August 2018. The Government Decision to solve the situation by adopting an emergency ordinance regarding the appointment of the current *ad interim* team – instead of leaving this task to the Superior Council of Magistracy – only continued to increase the concerns.”

”The Superior Council of Magistracy did not organize a competition for the new management of the Judicial Inspection, although the mandate of the team management expired at the end of August 2018. This led the Government to adopt an emergency ordinance for the appointment of the current *ad interim* team. The argument invoked in this regard was that the law regulating the organization of the competition was challenged in court (by the Judicial Inspection in 2016) and as a result there is a legal blankness. The Superior Council of Magistracy has failed to take steps to ensure that a suitable solution is found for organizing the competition on time. The fact that the Minister of Justice decided to intervene, extending the mandates of the current management, could be seen as interfering with the competences of the Superior Council of Magistracy.” (See the Technical Report accompanying the document REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on the progress made by Romania under the cooperation and verification mechanism).

**As a result of the Romanian State’s failure to comply with these provisions, the initiation of preliminary ruling by the Court of Justice of the European Union becomes the main legal instrument of coercion for non-compliance with EU obligations.** According to the well-established case-law of the Court of Justice of the European Union, a Member State is not exempted from liability if an infringement of its obligations regarding the European Union can be attributed, in whole or in part, to an error of interpretation or application of the relevant European Union rules, including by its national courts. See Reference 1/2009, Judgment of 12 November 2009, *Commission/Spain* (C-154/08),<sup>1</sup> Judgment of 6 October 2011, *Commission/Italy*, C-302/09, Judgment of 22 December 2010, *Commission/Italy*, C-304/09, Judgment of 29 March 2012, *Commission/Italy*, C-243/10.

**First question:**

**Can the Cooperation and Verification Mechanism (CVM) established according to the Commission Decision 2006/928/EC of 13 December 2006, be considered an act adopted by an European Union institution in the sense of Article 267 TFUE, that can be subject to the interpretation by the Court of Justice of the European Union?**

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<sup>1</sup> By its Judgment, the Court of Justice established the infringement by a Member State (namely, Spain) of the Union’s law as a consequence of the practice contrary to the latter by the Supreme Court of Law of that State (*Tribunal Supremo*). The judgment is the first explicit acknowledgment in the case-law of the Court of Justice of the state’s liability for the action of courts, a reality which could be noticed from the Court’s settled case-law. For details, see *M. Șandru, M. Banu, D. Călin, Are there any sanctions for infringement of the obligation of the national court to make a preliminary reference to the Court of Justice?*, in *Curierul Judiciar* no. 12/2014.

**Motivation:**

**The Cooperation and Verification Mechanism (CVM)** was set up according to the Commission Decision 2006/928/EC of 13 December 2006, at the accession of Romania to the European Union, to address the shortcomings of the judicial reform and to fight against corruption. Since then, CVM Reports have sought to help focus the efforts of the Romanian authorities through specific recommendations and have chartered the progress made. As underlined by the Council<sup>2</sup>, **the CVM will end when all of the four benchmarks applying to Romania are satisfactorily met.** The benchmarks were defined at the time of accession and cover all the essential issues for the functioning of a Member State – the independence and efficiency of the judiciary, the integrity and the fight against corruption.

**The establishment of CVM can be considered a positive sign in observing the Copenhagen Criteria, as the EU eligibility criteria defined by the Council in Copenhagen in June 1993 are known. These criteria are the following: stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; a functioning market economy and the ability to cope with competitive pressure and market forces within the EU; ability to take on and effectively implement the obligations of membership, including the aims of political, economic and monetary union.**<sup>3</sup>

According to **the Report from the Commission to the European Parliament and The Council on progress in Romania under the Cooperation and Verification Mechanism of 25 January 2017**,<sup>4</sup> "in order to meet the benchmarks, a combination of legislative and institutional measures is needed. In addition, these measures can be fully assessed only by verifying if their effects are felt in practice and whether they can be considered to be embedded in the legal and institutional framework in Romania and are irreversible. Under these circumstances, the citizens can trust that decisions and practices in Romania fully observe the rule of law and the basis on which the mutual trust required for the effective implementation of EU law is built. The judicial reform and the fight against corruption have been key issues for the Romanian society in the last ten years. CVM has an important role in Romania as a determinant factor of the reform and as an assessment tool of progress. The conclusions of the Commission and the methodology used under the CVM have been constantly supported by the Council and have benefited from the cooperation and contributions of many Member States. Cooperation has also been strengthened by the specific support for Romania through EU funds. Legislative and institutional measures have yielded results due to the commitment shown by numerous judges and prosecutors, due to the implementation activity carried by the justice ministers and due to the good cooperation between the Romanian authorities and the Commission. The strong involvement of the civil society

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<sup>2</sup> See also web page <http://data.consilium.europa.eu/doc/document/ST-7118-2016-INIT/ro/pdf> [last visited on 9 December 2018].

<sup>3</sup> It can also represent a pattern for future Member States of the European Union.

<sup>4</sup> For details, web page [https://ec.europa.eu/info/sites/info/files/com-2017-44\\_ro\\_1.pdf](https://ec.europa.eu/info/sites/info/files/com-2017-44_ro_1.pdf) [last visited on 9 December 2018].

has also been essential to encourage judicial reform and concrete measures to fight corruption at all levels. At the same time, CVM reports have continued to underline that there are still areas where the continuation of the reform is proving difficult – and sometimes resisted. Fundamental issues, such as questioning the independence of the judiciary and the authority of judgments, and sometimes the specific attempts to return to the pre-reform situation, have inevitably slowed down the pace of progress in meeting the CVM benchmarks.”

The establishment of the Cooperation and Verification Mechanism (CVM) was based on Articles 37 and 38 of the Treaty concerning the accession of the Republic of Bulgaria and Romania to the European Union, signed by Romania on 25 April 2005 in Luxembourg.

*Under Article 37 of the Treaty, “If Bulgaria or Romania has failed to implement commitments undertaken in the context of the accession negotiations, causing a serious breach of the functioning of the internal market, including any commitments in all sectoral policies which concern economic activities with cross-border effect, or an imminent risk of such breach the Commission may, until the end of a period of up to three years after accession, upon motivated request of a Member State or on its own initiative, take appropriate measures. Measures shall be proportional, and priority shall be given to measures which least disturb the functioning of the internal market and, where appropriate, to the application of the existing sectoral safeguard mechanisms. Such safeguard measures shall not be invoked as a means of arbitrary discrimination or a disguised restriction on trade between Member States. The safeguard clause may be invoked even before accession on the basis of the monitoring findings and the measures adopted shall enter into force as of the first day of accession unless they provide for a later date. The measures shall be maintained no longer than strictly necessary and, in any case, shall be lifted when the relevant commitment is implemented. They may however be applied beyond the period specified in the first paragraph as long as the relevant commitments have not been fulfilled. In response to progress made by the new Member State concerned in fulfilling its commitments, the Commission may adapt the measures as appropriate. The Commission shall inform the Council in good time before revoking the safeguard measures, and it shall take duly into account any observations of the Council in this respect.”*

*Also, according to Article 38 of the Treaty, “If there are serious shortcomings or any imminent risks of such shortcomings in Bulgaria or Romania in the transposition, state of implementation, or the application of the framework decisions or any other relevant commitments, instruments of cooperation and decisions relating to mutual recognition in the area of criminal law under Title VI of the EU Treaty and Directives and Regulations relating to mutual recognition in civil matters under Title IV of the EC Treaty and European framework laws adopted under Sections 3 and 4 of Chapter IV of Title III of Part III of the Constitution, the Commission may, until the end of a period of up to three years after accession, upon the motivated request of a Member State or on its own initiative and after consulting the Member States, take appropriate measures and specify the conditions and modalities under which these measures are put into effect. These measures may take the form of temporary suspension of the application of relevant provisions and decisions in the relations between Bulgaria or Romania and any*

*other Member State or Member States, without prejudice to the continuation of close judicial cooperation. The safeguard clause may be invoked even before accession on the basis of the monitoring findings and the measures adopted shall enter into force as of the first day of accession unless they provide for a later date. The measures shall be maintained no longer than strictly necessary and, in any case, shall be lifted when the shortcomings are remedied. They may however be applied beyond the period specified in the first paragraph as long as these shortcomings persist. In response to progress made by the new Member State concerned in rectifying the identified shortcomings, the Commission may adapt the measures as appropriate after consulting the Member States. The Commission shall inform the Council in good time before revoking the safeguard measures, and it shall take duly into account any observations of the Council in this respect”.*

**In case C-258/14, *Florescu and Others*, by judgment of 13 June 2017, EU:C:2017:448, the Court of Justice of the European Union interpreted the Memorandum of Understanding concluded between the European Union and Romania in Bucharest and Brussels on 23 June 2009, establishing that it must be considered an act adopted by an European Union Institution, in the sense of Article 267 TFUE, that may be subject to the interpretation of the Court of Justice of the European Union. Therefore, it would not be for the first time when the CJEU would interpret an act concluded between an European Union Institution and a Member State.**

**Second question:**

**Are the contents, nature and temporal extent of the Cooperation and Verification Mechanism (CVM) established according to the Commission Decision 2006/928/EC of 13 December 2006, circumscribed to the Treaty concerning the accession of the Republic of Bulgaria and Romania to the European Union, signed by Romania on 25 April 2005 in Luxembourg? Are the requirements in the Cooperation and Verification Mechanism Reports binding for the Romanian State?**

**Motivation:**

Until the recent solution represented by Judgment No. 104 of 6 March, 2018, in its case-law, the Constitutional Court of Romania had only referred twice to the Cooperation and Verification Mechanism, respectively under Judgment no. 2 of 11 January 2012 and Judgment no. 1519 of 15 November 2011.

**Decision no. 1.519 of 15 November 2011** regarding the unconstitutionality exception of the provisions of Article 21 paragraph (1) of Law no. 51/1995 for the organization and practice of the lawyer’s profession<sup>5</sup> established lapidary the following aspects:

*”In the same sense, the Court assess also that the provisions of the Codes of Civil Procedure and Criminal Procedure regarding abstention and recusation are also likely to meet the requirements of the Commission Decision 2006/928/EC of 13*

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<sup>5</sup> Published in the Official Gazette of Romania, Part I, no. 67 of 27 January 2012.

December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, published in the Official Journal of the European Union L 354 of 14 December 2006, on the existence in all Member States of an impartial, independent and efficient judiciary and administrative system, endowed with sufficient means, inter alia, to fight against corruption. Thus, the benchmark regarding the establishment of an integrity agency with responsibilities for verifying assets, incompatibilities and potential conflicts of interest, and for issuing mandatory decisions on the basis of which dissuasive sanctions can be taken does not imply the existence in the national normative system of legal provisions such as that criticized in this case. Similarly, the benchmark regarding of a more transparent and effective judicial process does not necessarily imply a prohibition of the kind covered by this unconstitutionality exception.”

Also, **Decision no. 2 of 11 January 2012** regarding the unconstitutionality objection of the Law amending and supplementing Law no. 303/2004 on the statute of judges and prosecutors and Law no. 317/2004 on the Superior Council of Magistracy<sup>6</sup> established the following:

”Regarding these commitments, the Court ascertained that by Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, published in the Official Journal of the European Union L 354 of 14 December 2006, was held that the Commission had identified “unsolved matters, especially regarding the accountability and efficiency of judiciary” in Romania. The Report from the Commission to the European Parliament and The Council on progress in Romania under the Cooperation and Verification Mechanism of 20 July 2017, mentions that “Romania has not yet engaged in a thorough reform of disciplinary system”. Or, **as a Member State of the European Union, the Romanian State has the obligation to apply this mechanism and follow the recommendations established in this framework, in accordance with provisions of Article 148 paragraph (4) of the Constitution, according to which “The Parliament, the President of Romania, the Government, and the judicial authority shall guarantee that the obligations resulting from the accession act and the provisions of paragraph (2) are implemented”**. According to the Recitals, the criticized law expresses this obligation by regulating the deviations for which judges and prosecutors are subject to disciplinary measures and by including in this category the facts that violate the duties of the office or that prejudice the prestige of the position held. Also, the normative act follows the recommendations for strengthening the capacity and organization of the Judicial Inspection, as well as for the continuation of its reform process.”

**Decision no. 104 of 6 March 2018** departs from the case-law cited. The Constitutional Court of Romania made the following reasoning:

”80. Regarding the claiming of provisions of Article 148 paragraph (4) of the Constitution, with reference to the Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania

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<sup>6</sup> Published in the Official Gazette of Romania, Part I, no.131 of 23 February 2012.

to address specific benchmarks in the areas of judicial reform and the fight against corruption, published in the Official Journal of the European Union L 354 of 14 December 2006, the Court notices that, according to Article 2 of the Act concerning the conditions of accession of the Republic of Bulgaria and Romania and the adjustments to the Treaties on which the European Union is founded, part of the Accession Treaty, ratified by Law no. 157/2005 published in the Official Gazette of Romania, Part 1, no. 465 of 1 June 2005, “from the date of accession, the provisions of the original Treaties and the acts adopted by the institutions and the European Central Bank before accession shall be binding on Bulgaria and Romania and shall apply in those States under the conditions laid down in those Treaties and in this Act”.

81. Thus, in acceding to the legal order of the European Union, Romania has accepted that, **in the fields where the exclusive competence belongs to the European Union**, regardless of the international Treaties concluded, implementation of the obligations arising from them be subject to the European Union Rules. Otherwise, an undesirable situation would result, that of the Member State seriously undermining the Union’s competence and virtually replacing it in the above-mentioned fields by means of bilateral or multilateral international obligations. Thus, in applying Article 148 paragraph 2 of the Constitution, Romania applies in good faith the obligations arising from the accession act, not interfering with the exclusive competence of the European Union and, as established by its case-law, by virtue of the compliance clause contained in the text of article 148 of the Constitution, Romania cannot adopt a normative act contrary to the obligations undertaken as a Member State (see Decision No. 877 of 15 December 2015, published in the Official Gazette of Romania, Part I, no. 191 of 15 March 2016, paragraph 75). All the above-mentioned ones certainly have a constitutional limit expressed in what the Court has described as “national constitutional identity” (see Decision No. 683 of 27 June 2012, published in the Official Gazette of Romania, Part I, no. 479 of 12 July 2012, or Decision no. 64 of 24 February 2015, published in the Official Gazette of Romania, Part I, No. 286 of 28 April 2015).

82. Also, the use of European Rule of Law within the constitutionality control as a rule interposed to the reference one implies, under Article 148 paragraphs (2) and (4) of the Constitution of Romania, a cumulative conditionality: firstly, that rule must be sufficiently clear, precise and unequivocal by itself or its meaning has been clearly, precisely and unequivocally established by the Court of Justice of the European Union and, secondly, the rule must be circumscribed to a certain level of constitutional relevance, so that its normative content supports the possible violation by the domestic law of the Constitution – the only direct reference rule within the constitutional control. In such a case, the Constitutional Court’s approach is distinct from the simple application and interpretation of the law, a competence of the administrative courts and authorities or from the issues related to the legislative policy promoted by the Parliament or the Government, as the case may be.

83. Under the cumulative conditionality mentioned, it remains at the discretion of the Constitutional Court to apply within the constitutionality control the judgments of the Court of Justice of the European Union or to issue itself preliminary questions in order to establish the contents of the European Rule. Such an attitude relates to the cooperation and judicial dialogue between the national constitutional court and the European court,

*without calling into question the establishment of hierarchies between these courts (see Decision no. 668 of 18 May 2011, published in the Official Gazette of Romania, Part I, no.487 of 8 July 2011.*

*84. In this context, the Court notices that, as the preamble of Decision 2006/928/EC indicates, a decision claimed as the ground in the constitutionality control, considering Article 148 paragraph (2) of the Constitution, by virtue of the provisions of Articles 37 and 38 of the Accession Treaty, ratified by Law no. 157/2005, published in the Official Gazette of Romania, Part I, no. 465 of 1 June 2005, was adopted before the Accession of Romania to the European Union, the Decision 2006/928/EC, that stipulates in Article 1 that Romania shall, by 31 March of each year, and for the first time by 31 March 2007, report to the Commission on the progress made in addressing each of the benchmarks provided for in the Annex, which are four, namely: 1. Ensure a more transparent and efficient judicial process notably by enhancing the capacity and accountability of the Superior Council of Magistracy. Report and monitor the impact of the new civil and administrative procedures codes; 2. Establish, as foreseen, an integrity agency with responsibilities for verifying assets, incompatibilities and potential conflicts of interest, and for issuing mandatory decisions on the basis of which dissuasive sanctions can be taken; 3. Building on progress already made, continue to conduct professional, nonpartisan investigations into allegations of high-level corruption; 4. Take further measures to prevent and fight against corruption, in particular within the local government.*

*85. Thus, the Court notices that Decision 2006/928/EC stipulates the **establishment of an integrity agency and not the obligation of the legislator to establish incompatibilities**, aspects determined before accession, although the provisions of Protocol of 31 March 2006 concerning the conditions and arrangements for admission of the Republic of Bulgaria and Romania to the European Union state the adoption of these measures after the accession to the extent necessary. More than that, the contents of this decision states that it enters into force “subject only to and on the date of entry into force of the Treaty of Accession” [Article 3 of Decision 2006/928/EC].*

*86. Thus, according to Articles 37 and 38 of the Act concerning the conditions of accession of the Republic of Bulgaria and Romania to the European Union – Annex of the Treaty of Accession (Annex: Protocol of 31 March 2005 concerning the conditions and arrangements for admission of the Republic of Bulgaria and Romania to the European Union), the grounds claimed in adopting Decision 2006/928/EC, If Bulgaria or Romania has failed to implement commitments undertaken in the context of the accession negotiations, causing a serious breach of the functioning of the internal market, including any commitments in all sectoral policies which concern economic activities with cross-border effect, or an imminent risk of such breach the Commission may, until the end of a period of up to three years after accession, upon motivated request of a Member State or on its own initiative, take appropriate measures. Measures shall be proportional, and priority shall be given to measures which least disturb the functioning of the internal market and, where appropriate, to the application of the existing sectoral safeguard mechanisms. (...) If there are serious shortcomings or any imminent risks of such shortcomings in Bulgaria or Romania in the transposition, state of implementation, or the application of the framework decisions or any other*



*relevant commitments, instruments of cooperation and decisions relating to mutual recognition in the area of criminal law under Title VI of the EU Treaty and Directives and Regulations relating to mutual recognition in civil matters under Title IV of the EC Treaty, the Commission may, until the end of a period of up to three years after accession, upon the motivated request of a Member State or on its own initiative and after consulting the Member States, take appropriate measures and specify the conditions and modalities under which these measures are put into effect. These measures may take the form of temporary suspension of the application of relevant provisions and decisions in the relations between Bulgaria or Romania and any other Member State or Member States, without prejudice to the continuation of close judicial cooperation. The safeguard clause may be invoked even before accession on the basis of the monitoring findings and the measures adopted shall enter into force as of the first day of accession unless they provide for a later date. The measures shall be maintained no longer than strictly necessary and, in any case, shall be lifted when the shortcomings are remedied.*

87. Also, according to Article 39 paragraph (1) of the Act concerning the conditions of accession of the Republic of Bulgaria and Romania to the European Union – Annex to the Treaty of Accession, if, on the basis of the Commission's continuous monitoring of commitments undertaken by Bulgaria and Romania in the context of the accession negotiations and in particular the Commission's monitoring reports, there is clear evidence that the state of preparations for adoption and implementation of the *acquis* in Bulgaria or Romania is such that there is a serious risk of either of those States being manifestly unprepared to meet the requirements of membership by the date of accession of 1 January 2007 in a number of important areas, the Council may, acting unanimously on the basis of a Commission recommendation, decide that the date of accession of that State is postponed by one year **to 1 January 2008**.

88. In relation to the settled case-law of the Constitutional Court in the field, the meaning of the Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, **act adopted before the accession of Romania to the European Union, has not been elucidated by the Court of Justice of the European Union regarding the contents, nature and temporal extent and if they are circumscribed to those provided in the Treaty of Accession, implicitly by Law no. 157/2005, which is part of the national normative order, so that Decision 2006/928/EC can not constitute a reference rule under the constitutional control in the light of Article 148 of the Constitution.**

89. **More than that, if Decision 2006/928/EC were accepted as an indicator regarding the assessment of the rule's constitutionality, it would not be relevant, as it only recommends the establishment of an integrity agency with administrative capacity to manage an investigation in the field of incompatibilities and potential conflicts of interest, and with the capacity to adopt mandatory decisions that would lead to application of sanctions.**

90. Besides, it is within the exclusive competence of the Member State to establish incompatibilities other than those stipulated by the Basic Law of that State, since, as the Court held by Decision No. 80 of 16 February 2014, published in the

Official Gazette of Romania, Part I, no. 246 of 7 April 2014, paragraph 456, the Basic Law of the State – **The Constitution is the expression of the people’s will, which means that it cannot lose its binding force only by the inconsistency between its provisions and the European ones.** Also, **accession to the European Union cannot affect the supremacy of the Constitution over the whole legal order** (see also the Decision of 11 May 2005, K 18/04, ruled by the Constitutional Courthouse of the Republic of Poland).

91. The Constitution stipulated in that the provisions of the EU constituent treaties, as well as the other binding Community regulations, shall take precedence over the contrary provisions of the domestic laws, in compliance with the provisions of the accession act. However, in connection with the notion of “domestic laws”, by Decision no.148 of 16 April 2003 on the constitutionality of the legislative proposal for the revision of the Constitution of Romania, the Court has distinguished between the Constitution and the other laws (see Decision no. 80 of 16 February 2014, published in the Official Gazette of Romania, Part I, no. 246 of 7 April 2014, paragraph 452). Also, the same distinction is made at the level of the Basic Law by the final sentence of Article 20 paragraph (2), which stipulates the priority application of the international regulations, unless the Constitution or the domestic laws contain more favorable provisions, and Article 11 paragraph (3) states that if a treaty to which Romania is to become a party contains provisions contrary to the Constitution, its ratification can only take place after the Constitution has been revised.

92. Regarding the claiming of provisions of Law no. 365/2004 ratifying the Civil Law Convention on Corruption, adopted at New York on 31st of October 2003, in the light of Article 11 paragraph (1), the Court notices that Article 65: Implementation of convention stipulates that each State Party shall take the necessary measures, including legislative and administrative measures, in accordance with fundamental principles of its domestic law, to ensure the implementation of its obligations under this Convention; each State Party may adopt more strict or severe measures than those provided for by this Convention for preventing and combating corruption. Or, considering the case-law of the Constitutional Court in the field of incompatibility and the fact that the establishment of integrity standards is a matter of opportunity that falls within a margin of discretion of the legislator, the alleged infringement of Article 11 of the Constitution in the light of a possible infringement of the international rules can not be taken into account. Besides, the author of the unconstitutionality objection does not mention the exact imperative rules that would deprive the legislator of having a margin of discretion in establishing additional incompatibilities with the constitutional text or, on the contrary, by giving up some of them already established infra-institutional, depending on the social values protected, the evolution of a society where individuals can organize their conduct, aware of themselves, the supremacy of the social values to be protected in order to compete for the rule of law, and there is no need for further coercion by legislation extending the incompatibilities already established by the Basic Law.

93. In view of the above, considering the case-law of the Constitutional Court in the field of incompatibility and the fact the that the establishment of integrity standards is a matter of opportunity that falls within a margin of discretion of the legislator, and in

*the light of Article 148 of the Constitution, in this context, the legislator is one of the subjects that guarantees the fulfilment of the obligations resulting from the accession act, as already stated by the Constitutional Contentious Court by Decision No. 2 of 11 January 2012, published in the Official Gazette of Romania, Part I, no. 131 of 23 February 2012, the Court finds that the legislation on this matter falls within this margin of discretion, of course within the constitutional limits of the constitutional identity, corroborated with the national sovereignty and the constitutional obligations under Article 11 and Article 148.*

*94. For the reasons presented above, the court cannot hold the alleged infringement of Article 147 paragraph (4) of the Constitution, since the considerations held by the Constitutional Court in its case-law mentioned by the author of the exception of unconstitutionality cannot be converted de plano into reasons that would lead to the suppression of the constitutional right of the legislative power to adopt normative acts, especially if the field under regulation is related to opportunity issues that fall within the margin of discretion of the legislator.”*

**Third and fourth question:**

**Does Article 19 paragraph (1) second section of the Treaty on European Union need to be interpreted in that Member States have the obligation to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law, respectively guarantees of an independent disciplinary procedure for judges in Romania, removing any risk related to political influence on the conduct of disciplinary proceedings, such as the direct appointment by the Government of the management of the Judicial Inspection, even on a provisional basis?**

**Does Article 2 of the Treaty on European Union need to be interpreted in that Member States have the obligation to observe the rule of law criteria imposed also under the Cooperation and Verification Mechanism (CVM), established according to the Commission Decision 2006/928/EC of 13 December 2006, in the case of procedures for the direct appointment by the Government of the management of the Judicial Inspection, even on a provisional basis?**

**Motivation:**

Article 19 paragraph (1), part of Title III of the EU Treaty, entitled “Provisions on the institutions”, stipulates: “The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.”

Title V of the EU Treaty, entitled “General provisions on the Union’s external action and specific provisions on the common foreign and security policy”, Article 21 paragraph (1) first section of Chapter 1, entitled “General provisions on the Union’s external action”, stipulates: “The Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity,

the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.”

**The jurisdictional control for the observance of the Union’s legal order is provided, according to Article 19 paragraph (1) TEU, by the Court and the courts of the Member States. In addition, the Union is a union of law in which the acts of its institutions are subject to compliance control, in particular with treaties, general principles of law and fundamental rights.**

**Under Article 2 of the Treaty on European Union, “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”**

**By Decision of 27 February 2019, ruled in case C-64/16, *Associação Sindical dos Juizes Portugueses*, ECLI:EU:C:2018:117, CJUE established the following:**

”42. The guarantee of independence, which is inherent in the task of adjudication (see, to that effect, Judgment of 19 September 2006, *Wilson*, C 506/04, EU:C:2006:587, paragraph 49; Judgment of 14 June 2017, *Online Games and Others*, C-685/15, EU:C:2017:452, paragraph 60; and Judgment of 13 December 2017, *El Hassani*, C-403/16, EU:C:2017:960, paragraph 40), is required not only at the Union’s level as regards to the Union judges and the Advocates General of the Court, as referred to in Article 19 paragraph (2) third section of TEU, but also at the level of the Member States as regards to the national courts.

43. The independence of the national courts is essential especially for the proper functioning of the judicial cooperation system established by the preliminary ruling mechanism stipulated by Article 267 TFEU, as this mechanism can only be activated by a body which has the task of applying Union law and fulfils inter alia this criterion of independence.

**44. The concept of independence implies, in particular, that the body in question exercises its judicial functions in a completely autonomous manner, without being subjected to any hierarchical or subordinate connection and without receiving provisions or instructions, irrespective of their origin, and thus protected from interventions or external pressures liable to affect the judicial independence of its members and influence their decisions (see, to that effect, Judgment of 19 September 2006, *Wilson*, C-506/04, EU:C:2006:587, paragraph 51; and judgment of 16 February 2017, *Margarit Panicello*, C 503/15, EU:C:2017:126, paragraph 37 and the case-law cited).”**

During 2017-2018, three law amendments were adopted generically called “justice”, namely Law no. 303/2004 republished on the statute of judges and prosecutors, Law no. 304/2004 republished on the organization of the judiciary and Law no. 317/2004 on the Superior Council of Magistracy, all republished, then amended and supplemented.

A significant part of these amendments, harshly criticized by the European Commission for Democracy through Law of the Council of Europe (the Venice

Commission) or GRECO, are extremely harmful to the magistracy, being necessary to postpone or suspend the application of provisions in question until the date of their total revision or, as the case may be, the repeal of those provisions in force. In principle, the legislative power and the executive power in Romania must take into account immediately the Opinion issued by the Venice Commission on 13 July 2018 in order to avoid the destruction of the magistracy. It contains explanations to respect the standards of the rule of law in Romania in many aspects related to the amendments to the justice laws and cannot be endlessly overlooked, the recent public developments endangering the independence of the judiciary and the course of the Romanian State within the European Union and the Council of Europe, as previously noted by the European Commission and GRECO.

**Reorganization of Judicial Inspection strengthens the competences of the chief inspector** which has the task to appoint between the judicial inspectors, those who will take management positions (following a simple evaluation of the management projects specific to each management position), practically controlling the selection of the judicial inspectors, conducting the inspection activity and the disciplinary research, being the main authorizing officer and the sole holder of the disciplinary action. The establishment by law of a provision which, on the one hand, promotes the chief inspector's subjectivity in appointing the management of the Judicial Inspection and, on the other hand, establishes a total dependence of all senior management mandates within the Inspection on the chief inspector's mandate constitutes an infringement of the principle of ensuring the security of legal relations in the exercise of managerial mandates by the respective judicial inspectors.

**The preamble shows that the Government Emergency Ordinance in question, no. 77/2018, was adopted with *intuitu personae* effects – “Taking into account the need to provide interim protection by persons who have demonstrated their professional and managerial competence, already exercising the respective functions, having a thorough knowledge of the activity of the Judicial Inspection and participating at a competition both at the time of the initial appointment and at the time of inauguration for a new mandate, under the law”. [See Article II of GEO no. 77/2018: Provisions of Article 67 paragraph (7) of Law no. 317/2004 applies also for situations when the position of chief inspector or, as appropriate, deputy chief inspector of the Judicial Inspection is unoccupied at the time of entry into force of this emergency ordinance”].**

According to Article 133 paragraph (1) of the Constitution, the duties of the Superior Council of Magistracy, as guarantor of the independence of justice, under Law no. 317/2004, regard the defence of judges and prosecutors against any act that might affect their independence or impartiality or would create suspicions about them (Article 30), the career of judges and prosecutors (Article 35), admission examination for entry into the magistracy, evaluation, training and examinations of judges and prosecutors (Article 36), organization and functioning of courts and prosecutor's offices (Article 37). As a consequence, the bills involving a Council opinion are those normative acts on **the status of judges and prosecutors** (which include provisions on the rights and obligations of judges and prosecutors, incompatibilities and interdictions, appointment, promotion, suspension and termination of office of judges and prosecutors, delegation,

secondment and transfer of judges and prosecutors, their liability, etc.), currently regulated by Law no. 303/2004, **judicial organization** (courts – organization/competences/management, Public Ministry – organization/competences/management, the organization and functioning of the National Institute of Magistracy, the specialized auxiliary departments within the courts and prosecutor's offices, the budgets of the courts and prosecutor's offices, etc.), currently regulated by the Law no. 304/2004, or **the organization and functioning of the Superior Council of Magistracy** with Law no. 317/2004 as applicable law (see the *Decision no. 63 of 8 February 2017 ruled by the Constitutional Court*), **which also regulates the organization and functioning of the Judicial Inspection.**

Under Article 67 of Law no.317/2004, the chief inspector and the deputy chief inspector are appointed by the Plenum of the Superior Council of Magistracy between judicial inspectors in office, based on a competition consisting in a project concerning the exercise of the tasks specific to that management position and a written test on management, communication, human resources, the ability of the candidate to make decisions and take responsibility, stress tolerance and a psychological test. The competition is organized by the Superior Council of Magistracy in accordance with the Regulation approved by Decision of the Plenum of the Superior Council of Magistracy, published in the Official Gazette of Romania, Part I.

**Such legal provision expressly contained in GEO no.77/3028** (“(7) In case a position of chief inspector or, as appropriate, deputy chief inspector of the Judicial Inspection is vacant as a result of the expiry of the mandate, an interim inspector shall be appointed by the chief inspector or, where applicable, the deputy chief inspector whose mandates have expired, until the date these positions are no longer vacant, under the law”) **does not exist for other management positions in the judiciary** (presidents of court, presidents of division, chief prosecutors, etc.), which did not prevent the application of the legal remedy existing in the common law, respectively in Law no. 303/2004 on the statute of judges and prosecutors, which regulates the legal institution of the delegation to a management position by the Superior Council of Magistracy.<sup>7</sup>

Decision of the Plenum of the Superior Council of Magistracy no. 158 of 9 March 2012 approving the Regulation on the organization and conduct of the competition for the appointment of the Chief Inspector and Deputy Chief Inspector of Judicial Inspection was suspended by Court Order ruled by Bucharest Court of Appeal, so that **the automatic extension, as provisional, of the mandates of the current management of Judicial Inspection takes place *sine die*, under GEO no. 77/2018, for indefinite time, without the possibility of exercising by the Superior Council of Magistracy**

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<sup>7</sup> See also the minutes of Commission no.1 – Legislation and inter-institutional cooperation within the Superior Council of Magistracy dated July 9th, 2018 and September 3rd, 2018, available on web pages <https://www.csm1909.ro/ViewFile.ashx?guid=d6dce35b-eb5e-4c8f-ba47-aefe25c62b3d|InfoCSM> respectively <https://www.csm1909.ro/ViewFile.ashx?guid=798406b2-192d-4725-b47a-c7be7b51d867|InfoCSM> [last visited on 6 September 2018].

**of the power provided by the law to order the delegation to management positions by evaluating the projects of the judicial inspectors who choose to be interim.**

According to provisions of Article 133 paragraph 1 of the Constitution of Romania, **“The Superior Council of Magistracy shall guarantee the independence of justice”**, which implies exercising the power to appreciate not only with regard to the appointment of the Chief Inspector and the Deputy Chief Inspector of the Judicial Inspection under the conditions of Article 67 of Law no. 317/2004, but also with regard to the delegation to such a management position vacant by the expiry of the mandate, under the conditions of Article 57 of the Law no. 303/2004 on the status of judges and prosecutors.

**A legislative intervention under Government Emergency Ordinance has not the effect of covering an alleged “legislative gap”, as stated in the preamble to the Ordinance, but the amputation of an attribution of the Superior Council of Magistracy, by virtue of its constitutional role as a guarantor of the independence of the justice, introducing in the legal circuit the possibility to exercise a management position for an indefinite period by the automatic extension as an undifferentiated effect of the law of an expired mandate without any possibility for the Superior Council of Magistracy to exercise the margin of appreciation which is the essence of its constitutional role.**

**”The requirement of independence also means that the disciplinary regime governing those who have the task of adjudicating in a dispute must provide the necessary guarantees in order to prevent any risk of its being used as a system of political control of the content of judicial decisions. Rules which define, in particular, both conduct amounting to disciplinary offences and the penalties actually applicable, which provide for the involvement of an independent body in accordance with a procedure which fully safeguards the rights enshrined in Articles 47 and 48 of the Charter, in particular the rights of the defence, and which lay down the possibility of bringing legal proceedings challenging the disciplinary bodies’ decisions constitute a set of guarantees that are essential for safeguarding the independence of the judiciary”(see CJUE, Judgment of 25 July 2018, Ministry of Justice and Equality – deficiencies in the judiciary, C-216/18 PPU, EU:C:2018: 586, section 67)**

**Also, “the requirement of judicial independence forms part of the essence of the fundamental right to a fair trial, a right which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded” (see CJUE, Judgment of 25 July 2018, Ministry of Justice and Equality – deficiencies in the judiciary, C-216/18 PPU, EU:C:2018: 586, section 48).**

**In accordance with the relevant provisions, the extension by the Government of the current management mandates of Judicial Inspection violates the powers of the Superior Council of Magistracy in relation to the competences of the chief judicial inspectors and the judicial independence, a prerequisite for**

ensuring effective judicial protection. The guarantee of independence inherent to the task of adjudication, is required not only at the Union's level as regards to the Union judges and the Advocates General of the Court, as referred to in Article 19 paragraph (2) third section of TEU, but also at the level of the Member States as regards to the national courts.

Therefore, we believe that, under the law, the power of representation of the Judicial Inspection has not been proven. To the extent that infringement of Romania's obligations regarding the European Union is determined (Cooperation and Verification Mechanism, established according to the Commission Decision 2006/928/EC of 13 December 2006, Article 19 paragraph (1) second section of the Treaty on European Union, Article 2 of the Treaty on European Union), it would prove the absence of the respondent's right of legal representation, irrespective of the existence or non-existence of a decision of the Plenum of the Superior Council of Magistracy requested as evidence of legal representation, with the consequence of the annulment of the procedural document represented by the counterstatement submitted on file presenting evidence, invoking an exception and formulating defence, the case being settled without taking them into consideration.

We appreciate that the referring court must ask CJEU to use the urgent preliminary ruling procedure.

According to Article 105 of the Rules of Procedure of the Court of Justice of the European Union, at the request of the referring court or, exceptionally, of his own motion, the President of the Court may, where the nature of the case requires that it be dealt with within a short time, after hearing the Judge-Rapporteur and the Advocate General, decide that a reference for a preliminary ruling is to be determined pursuant to an expedited procedure derogating from the provisions of these Rule.

In this case, the urgency is justified by the nature of the case requiring an immediate decision, the exigencies of the rule of law not being able to be conditioned by long terms during which irreparable damage can occur.

Sincerely,

9 December 2018

**THE "ROMANIAN JUDGES' FORUM" ASSOCIATION**

Judge Dragoş Călin, Bucharest Court of Appeal, co-  
President

Judge Anca Codreanu, Braşov Courthouse,  
co- President

*Illegible signatures / Round STAMP of the "Romanian  
Judges' Forum" Association*



*The undersigned **POPESCU MIRELA**, certified interpreter and translator for ENGLISH language, according to the authorization no. 26586 from 2009, issued by the Ministry of Justice from Romania, I hereby certify the accuracy of this translation made from Romanian language into English language, that the text presented was translated entirely, without gaps and that, through translation, the content and the meaning of the document weren't distorted.*

Sworn translator,  
**POPESCU MIRELA**