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in the Matter of Disciplinary Liability
of Judges and Prosecutors

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LIST OF ABBREVIATIONS

Civ.Proc.C	– Law #134/2010 on the Civil Procedure Code
Civ.Proc.C 1865	– Civil Procedure Code of 1865
ECHR	– European Court of Human Rights
CJEU	– European Court of Justice
Code of Ethics for Judges and Prosecutors	– The Code of Ethics for Judges and Prosecutors as approved by Decision of the Plenum of the Higher Council of Magistrates #328/2005
HCM	– Higher Council of Magistrates
NAD	– National Anticorruption Department
Law #47/1992	– Law #47/1992 on the Organization and Operation of the Constitutional Court
Law #303/2004	– Law #303/2004 on the Status of Judges and Prosecutors
Law #304/2004	– Law #304/2004 on Judicial Organization
Law #317/2004	– Law #3172004 on the Higher Council of Magistrates
Rules of Operation for Courts of Law	– In-House Rules for Courts of Law as approved by Decision of the Plenum of the Higher Council of Magistrates #1375/2015
Rules of Operation for Prosecutor's Offices	- In-House Rules for Prosecutor's Offices as approved by Order of the Minister of Justice #2.632/C/2014 - In-House Rules for Prosecutor's Offices as approved by Decision of the Plenum of the Higher Council of Magistrates #947/2019
In-House Rules of the NAD	– In-House Rules for the National Anticorruption Department, as approved by Order of the Minister of Justice #1643/2015
Rules for Inspection Work	– Regulation on the rules for the Judicial Inspection's performing its activities, as approved by Decision of the Plenum of the Higher Council of Magistrates #1027/2012

Note: The judgments included in this Collection are public and can be perused on the website of the High Court of Review and Justice, the tab that reads Jurisprudence of the 5-Justice Panel.

CONTENTS

I. DISCIPLINARY VIOLATIONS 8

Art. 99 letter a) Law #303/2004: "conduct that tarnishes professional honor or integrity or the prestige of the judiciary, committed in the exercise or outside the exercise of work-related responsibilities"........... 8

1. Quality of the law. Clear and predictable stipulations. 8
2. Circumstantial elements in the assessment of the disciplinary violation 9
3. Judge. Disparaging statements and remarks and use of licentious and offensive language online. 9
4. Judge. Article published online concerning a Judgment by the Constitutional Court containing inappropriate language in regards to the moral profile and integrity of the Constitutional Court judges. 10
5. Prosecutor. Improper behavior. 12

Art. 99 letter b) Law #303/2004: "violation of the legal stipulations concerning incompatibilities and prohibitions for judges and prosecutors." 12

1. Prosecutor. Participation, as representative of the Prosecutor's Office, in a case of administrative litigation. 12
2. Prosecutor. Legal advice. 14

Art. 99 letter c) Law #303/2004: "unseemly attitudes, during exercise of work responsibilities, towards colleagues, other personnel of their court or prosecutor's office, judicial inspectors, solicitors, experts, witnesses, case parties or representatives of other entities." 14

1. Judge. Aggressive behavior, impolite language involving ethnic origin and physical aspect, statements about unprincipled actions engaged in by colleagues. 14
2. Judge. Unseemly attitudes of a judge in relation to the court personnel. 15

Art. 99 letter g) Law #303/2004: "failure by a prosecutor to comply with the orders of their hierarchically superior prosecutor, as issued in writing in compliance with the law." 16

1. A comparative analysis between the disciplinary violations described by Art. 99 letter g) and Art. 99 letter m) in Law #303/2004. The notions of "order," "hierarchically superior prosecutor" and "manager of the prosecutor's office." 16
2. Comparative analysis between the disciplinary violations stipulated by Art. 99 letter g) and Art. 99 letter m) in Law #303/2004. Distinction between the act that has a regulatory character (law or regulation) and the act that has an individual character (order in writing issued by the hierarchically superior prosecutor). 16
3. Prosecutor. Non-compliance with a regulatory act applicable to the Public Ministry 17
4. Prosecutor. Failure to comply with stipulations in a Law that were taken over in a Regulation. 18

Law #303/2004, ...18

5. Prosecutor. Listing cases in the ECRIS system as finalized, which are in fact not finalized. 19

Art. 99 letter h) Law #303/2004: "repeated non-compliance for reasons attributable to the defendant with the legal stipulations concerning speedy disposition of cases, or repeated delays in performing work for reasons attributable to the defendant." 19

1. Time frame for the exercise of disciplinary action 19
2. Judge. Repeated failure to comply with the deadline for writing the full text of their Judgment for reasons attributable to the defendant. 20
3. Judge. Repeated failure to comply with the deadline for writing the full text of their Judgment for reasons attributable to the defendant. 21
4. Judge. Repeated failure to comply with the deadline for writing the full text of their Judgment for reasons attributable to the defendant. 22
5. Judge. Repeated failure to comply with the deadline for writing the full text of their Judgment for reasons attributable to the defendant. 22
5. Judge. Failure to comply with the reasonable duration of the preliminary chamber procedure 23
6. Prosecutor. Failure to comply with the legal deadline or reasonable duration for resolution of cases 25
7. Prosecutor. Failure to comply with the legal deadline or reasonable duration for resolution of cases. 25
8. Prosecutor. Failure to dispose of cases within the legal deadline. Objective factors, reasons not attributable to the magistrate. 26

Art. 99 letter j) Law #303/2004: "failure to comply with the secrecy of deliberation or the confidentiality of work that has such character, as well as of other information of the same nature they have become aware of in the exercise of their position, except for public-interest information as under the law."...... 26

1. Prosecutor. Communicating information about the charges to retained defenders of the suspects/defendants. Right to defense and right to being informed of the contents of the charges brought against defendants. 26

Art. 99 letter l) Law #303/2004: "interference with the work of another judge or prosecutor" 28

1. Judge. Approaching the judge in a case to inform them of the stakes the litigation holds for one of the parties in the case 28

2. Prosecutor. Approaching the case prosecutor about issuing certain orders in that case. 29

Art. 99 letter m) Law #303/2004: "unjustified noncompliance with administrative orders or decisions issued under the law by the manager of the court or prosecutor's office, or with other obligations with an administrative character stipulated in laws or regulations." 30

1. A comparative analysis of the disciplinary violations described by Art. 99 letter m) and Art. 99 letter g) in Law #303/2004. The notions of "order," "hierarchically superior prosecutor" and "manager of the prosecutor's office." 30

2. Comparative analysis between the disciplinary violations stipulated by Art. 99 letter m) and Art. 99 letter g) in Law #303/2004. Distinction between the act that has a regulatory character (law or regulation) and the act that has an individual character (order in writing issued by the hierarchically superior prosecutor). 30

3. Judge. Calling a case approximately one hour later than the scheduled time on the session list. 31

4. Prosecutor. Delegating a prosecutor to represent the prosecutor's office in an administrative litigation case whose object is an order to remove a prosecutor from office. 32

5. Prosecutor. Exercise of supervision of the work of subordinate prosecutors by a judge holding the position of advisor to the chief prosecutor. 34

6. Prosecutor. Failure to comply with an Order by the Prosecutor General of the Prosecutor's Office Attached to the Court of Appeals concerning reporting via hierarchical channels of the status of cases older than 6 months. 34

7. Prosecutor. Failure to comply with the stipulations of Art. 62 para. (1) in the Rules for Inspection Work. 35

8. Prosecutor. Delay in assigning cases by the chief prosecutor. 37

9. Prosecutor. Destruction of data obtained from electronic surveillance 37

Art. 99 letter ș) Law #303/2004: "disregard for decisions returned by the Constitutional Court or by the High Court of Review and Justice in disposing of appeals in the interest of the law." 38

1. Judge. Disregard for the obligatory effect of the considerations in the Decision by the Constitutional Court and the Judgment returned by the High Court of Review and Justice in disposing of an appeal in the interest of the law. 38

2. Prosecutor. Constitutional Court Decision that instates an obligation for the magistrate. 40

Art. 99 letter t) Law #303/2004: "exercise of position in ill-faith or with grave negligence." 41

1. Judge. Refusal to sign the resolution for postponement of verdict. 41

2. Prosecutor. Destruction of evidence obtained from electronic surveillance warrant. 42

3. Prosecutor. Obligation to notify about electronic surveillance warrants. Prosecutor who is under the obligation regulated by Art. 145 C.proc.pen. 43

II. STAGES OF THE DISCIPLINARY PROCEDURE 44

1. The stages of the disciplinary procedure: administrative stage, administrative-jurisdictional stage, court stage 44

III. DISCIPLINARY INVESTIGATION 44

1. Notifying the Judicial Inspection of aspects that have made the object of preliminary checks. 44

2. Suspension of a magistrate from office until final resolution in disciplinary action 45

3. Preliminary checks. Deadline for dismissal. 45

IV. ADMINISTRATIVE-JURISDICTIONAL PROCEDURE 45

1. Resolution to exercise disciplinary action. Legal nature. Act developed on a non-working day. Penalty of nullification. 45

2. Civil Procedure Code. Compatibility between stipulations of the Civil Procedure Code and the procedure for trying disciplinary actions brought before the HCM. 46

2.1. Inapplicability of Art. 211 Civ.Proc.C in the administrative-jurisdictional procedure brought before the HCM. Quorum needed for the procedures before HCM as a disciplinary court. 46

2.2. Applicability of Art. 413 para. (1) item 1 Civ.Proc.C to administrative-jurisdictional procedures before the HCM. 47

2.3. Inapplicability of Art. 509-513 Civ.Proc.C to the administrative-jurisdictional procedure before the HCM. 48
3. Procedure before the HCM as a disciplinary court. Legal nature. Decision by the disciplinary court – administrative-jurisdictional act. 49
4. HCM. Extra-judicial court, carrying out an administrative-jurisdictional activity. 49
V. JUDICIAL PROCEDURE........ 50
1. CJEU. Request for preliminary ruling concerning interpretation of stipulations in domestic law........ 50
2. Decision by the HCM Chamber for Judges to suspend examination of the motion to release from office by way of retirement for the judge pending final verdict in disciplinary action. Material jurisdiction........ 51
3. Appeal on annulment filed against decision returned in review procedure. Inadmissibility. 51
4. Appeal on annulment. Failure by the court for appeal on law to examine any of the grounds for reversal........ 52
5. Suspension from office of the magistrate pending final Decision in disciplinary action. Challenge filed on grounds provided by Art. 52 para. (1^1) in Law #317/2004........ 54
5.1. HCM. Absence of passive legal standing. 54
5.2. The object and the party entitled to file the challenge stipulated by Art. 52 para. (1^1) in Law #317/2004. Inadmissibility of the challenge filed by the Judicial Inspection against the Decision returned by the HCM which denies suspension from office of a magistrate pending the final verdict in a disciplinary action. 54
6. Decision by the HCM Chamber for Prosecutors ordering suspension from office of magistrate prosecuted on criminal charges. Avenue of appeal. Jurisdictional court. 55
7. Motion of unconstitutionality of Art. 51 para. (3) in Law #317/2004 raised as part of appeal on law before the 5-Justice Panel. Inadmissibility........ 56
8. Judgment. Justification. ECHR Jurisprudence. 56
9. Independence and impartiality of the court. ECHR, Decision of 9 January 2013, case Oleksandr Volkov v. Ukraine. 57
10. Appeal on law as regulated by Art. 51 para. (3) in Law #317/2004. Devolutive avenue of appeal. Constitutional Court Decision #381/2018........ 58
11. Revision. Decision returned by HCM as a disciplinary court. Inadmissibility of revision as regulated by Art. 509-513 Civ.Proc.C. 58
12. Revision. Condition of mentioning the merits. Judgment that denied an appeal on law filed against a decision returned in an appeal on annulment........ 59
13. Revision. Condition of mentioning the merits. Judgment on an appeal on annulment........ 59
14. Revision. Condition of mentioning the merits. Judgment on a motion on revision. 60
15. Revision. Criticism brought around the grounds for appeal on annulment. 60
16. Revision. Documentary evidence. Constitutional Court Decision........ 61
17. Revision. Art. 509 para. (1) item 11 Civ.Proc.C. Constitutional Court Decision #381/2018. The appeal on law regulated by Art. 51 para. (3) in Law #317/2004. Devolutive avenue of appeal. 61
18. Revision. Art. 509 para. (1) item 11 Civ.Proc.C. Constitutional Court Decision #685/2018. 62
19. Revision. Art. 509 para. (1) item 11 Civ.Proc.C. Constitutional Court Decision returned prior to the date the judgment became final whose revision is now requested........ 63
20. Revision. Art. 509 para. (1) item 11 Civ.Proc.C. Motion of unconstitutionality raised in a different case........ 64

21. Revision. Art. 509 para. (1) item 11 din C. proc. civ. Exception of absolute nullity of a decision challenged on revision for failure to comply with public-order rules concerning the setting up of the court. Grounds for appeal on annulment. Inadmissibility of revision. 64

I. DISCIPLINARY VIOLATIONS

Art. 99 letter a) Law #303/2004: "conduct that tarnishes professional honor or integrity or the prestige of the judiciary, committed in the exercise or outside the exercise of work-related responsibilities"

1. Quality of the law. Clear and predictable stipulations.

Law #303/2004, Art. 99 letter a)

The stipulations of Art. 99 letter a) in Law #303/2004 do not have an equivocal character and are not devoid of clarity and predictability.

By establishing that it is a disciplinary violation for a magistrate to engage in conduct consisting of manifestations that can tarnish professional honor or integrity and thereby the prestige of the institution, the legal text in fact puts in place an obligation of restraint, in the meaning of a practical synthesis of professional ethics (independence, impartiality, integrity) which involves moderation and restraint in one's professional, social and private life.

The obligation of restraint should also be looked at in terms of the need that a magistrate adjust their behavior to match the principles of morals and ethics recognized as such by society and act in all circumstances in good faith, as it is practically impossible to list in a single text all actions that might be of a nature to violate the obligation of restraint. The phrase used by the Romanian lawmaker is in full agreement with that which is used in international documents that speak of a magistrate's integrity, namely: The Principles of Bangalore, Declaration of Judicial Ethics adopted in London in 2010.

In its Judgment of 24 May 2007, returned in the Case Dragotoniu and Militaru-Pidhorni v. Romania (complaints #77193/01 and #77196/01), in reference also to the Case Groppera Radio AG and others v. Switzerland of 28 March 1990, Case Tolstoy Miloslavsky v. The United Kingdom of Great Britain of 13 July 1995, Case Cantoni v. France, Judgment of 15 November 1996, the ECHR stated that the meaning of the notion of predictability depends to a great extent on the scope of a specific domain and on the number and capacity of its targets.

The ECHR found that, because of the principle of generality of laws, their contents cannot provide absolute precision, and one of the standard legal writing techniques consists of using general categories rather than exhaustive lists, and that numerous laws make use of formulations that are more or less vague in order to avoid an excessive rigidity and make it possible to adapt to changes of situation, so the interpretation and application of such texts depends on practice (Case Kokkinakis v. Greece, Judgment of 25 May 1993).

As the ECHR has explicitly stated the decision-making function granted to courts of law serves precisely to remove the doubts that might exist as to the interpretation of regulations, taking into account the evolutions of everyday practice, on condition the result is coherent with the substance of the violation and is evidently predictable (Case S.W. v. The United Kingdom of Great Britain, Judgment of 22 November 1995).

HCRJ, 5-Justice Panel, Judgment #128 of 27 May 2019

2. Circumstantial elements in the assessment of the disciplinary violation

Law #303/2004, Art. 90, Art. 99 letter a)
Code of Ethics for Judges and Prosecutors, Art. 17

In assessing the conditions conducive to disciplinary liability for violations stipulated at Art. 99 letter a) in Law #303/2004, the following circumstantial elements will be considered:

(i) *the professional status of judges and prosecutors mandates a responsibility to maintain the image and status of the magistrate and the obligation of restraint as professional duties;*

(ii) *the specific nature of a position as magistrate and the need to preserve its dignity require that the judge conduct themselves in such manner as to ensure that in the eyes of a reasonable observer their conduct is beyond reproach, not only while exercising their profession but also in society, so that the public will have confidence in the integrity of the judicial corps;*

(iii) *because they are constantly in the attention of the public, owing to the importance of their work, the magistrate must accept, freely and willingly, a series of personal restrictions that are not applicable to the regular citizen;*

(iv) *from interpreting the stipulations of Art. 90 in Law #303/2004 and Art. 17 in the Code of Ethics for Judges and Prosecutors it results that the magistrate's professional status involves, by enlarging the obligation of restraint, a duty to have a correct, dignified and reserved conduct, of a nature that maintains the prestige of the judiciary untarnished;*

(v) *the goal pursued by the procedure to find disciplinary liability in the hypothesis of failure to comply with the obligation of restraint is legitimate and consists of ensuring the impartiality of the act of justice, with the goal of "eliminating any appearance of partiality, thereby contributing to promoting the trust that courts of law in a democratic society should foster in the population" (Judgment by the Constitutional Court #711 of 27 October 2015, item 31);*

(vi) *the right of a magistrate to freedom of expression is not denied, as it is recognized they can voice their own opinion about events that are likely to influence the judicial system.*

HCRJ, 5-Justice Panel, Judgment #128 of 27 May 2019

3. Judge. Disparaging statements and remarks and use of licentious and offensive language online.

Law #303/2004, Art. 90, Art. 99 letter a), Art. 100 letter e)

By establishing the existence of a disciplinary violation as under Art. 99 letter a) in Law #303/2004, the legal text punishes failure to exercise the magistrate's obligation of restraint, in the meaning of a practical synthesis of professional ethics (independence, impartiality, integrity) which involves moderation and restraint in one's professional, social and private life.

*In the circumstances under examination the court held that the violation had been committed that is stipulated at Art. 99 letter a) in Law #303/2004, because the magistrate: **(i)** posted in the judges' forum with offensive remarks about the panel they were a member of, as well as comments inappropriate for their position; **(ii)** formulated disparaging accusations concerning the moral integrity of another judge, expressed in licentious and offensive language in both direct discussions with judges of the court and in postings on the judges' forum; **(iii)** posted on Facebook with statements inappropriate for their position as regards the judges of the court.*

With their conduct the magistrate violated the obligations required by Art. 90 in Law #303/2004, their actions showing an attitude that does not match the standards required of the position and carrying the potential of impacting the image of the court and harm professional honor and integrity, with the unequivocal purpose of bringing disparaging or potentially disparaging information before the public concerning the judges and activity of the court.

In the circumstances of the case, under Art. 100 letter e) in Law #303/2004 the disciplinary sanction was ordered consisting of "exclusion from the magistrates' profession", for the commission of the disciplinary violations described in Art. 99 letter a) and c) of the Law.

HCRJ, 5-Justice Panel, Judgment #26 of 4 February 2019

4. Judge. Article published online concerning a Judgment by the Constitutional Court containing inappropriate language in regards to the moral profile and integrity of the Constitutional Court judges.

Law #303/2004, Art. 90, Art. 99 letter a), Art. 100 letter a)
Code of Ethics for Judges and Prosecutors, Art. 17
Fundamental Principles of the Independence of the Judiciary, item 1.2
Universal Status of Judges, Art. 3
Recommendation R (94) 12 of the Council of Europe, Principle V item 2

In the circumstances of the case the court found the constitutive elements were met for the disciplinary violation described by Art. 99 letter a) in Law #303/2004.

In terms of the objective side it was held that the judge posted online, on a website of the legal profession, an article where they analyzed the contents of the Judgment returned by the Constitutional Court, and in the text wrote in an inappropriate manner, in a way that was likely to question the moral profile and integrity of the Constitutional Court judges; such conduct runs counter to the obligation of restraint required of magistrates in the exercise of their freedom of speech considering their status, an obligation put in place by Art. 90 in Law #303/2004, Art. 17 in the Code of Ethics for Judges and Prosecutors, item 1.2 in the Fundamental Principles of the Independence of the Judiciary, Art. 3 in the Universal Status of Judges, Principle V item 2 in Recommendation R (94) 12 of the Council of Europe.

Though expressing criticism in itself is allowed, in compliance with freedom of expression, with the presentation of concrete, material arguments, in the circumstances of

*the case such freedom was nevertheless exceeded because: **(i)** the content of the publicly-expressed opinion used expressions and linguistic constructs that had an unequivocal purpose of inducing the idea that the Constitutional Court judges were an instrument of certain group interests; **(ii)** the specific manner of expression used was of a nature that impacts the target persons' right to image, honor and reputation, in this case the Constitutional Court judges, with the suggestion that they are not observing the law and are subordinated to political interests; **(iii)** the way in which the judge chose to express their opinion was of a nature to induce, without bringing evidence, a perception of the existence of a conspiracy against the rule of law, made possible with the help of the Constitutional Court, accrediting the idea of legislative fraud; **(iv)** the expressions used in the posting, given the meaning attributed by the context in which they were made, supported the clear and unequivocal position expressed by the judge in regards to the events unfolding at that point in time; **(v)** the judge's statements are not value judgments but mere disparaging allegations devoid of pertinent arguments, which question the professional and moral integrity of the Constitutional Court judges; **(vi)** posting the article on a website of the legal profession meets the legal requirement of a "public character" because on the one hand that website is open to the public at large and on the other hand the posted article was uploaded there with the intention to make it known to the persons accessing the website, and was taken up by the mass-media as well; **(vii)** the judge did not stop at presenting aspects concerning the way the judicial system works, but engaged in purely subjective accusations that questioned the professional competence and integrity of the Constitutional Court judges.*

What is held against the judge is the way in which they chose to assert their personal opinions, in a manner of a nature to break the proper balance between an individual's fundamental right to their freedom of expression and the legitimate interest of a democratic state to see to it that its public function is exercised as under the goals listed at Art. 10 paragraph 2 in the European Convention for the Protection of Human Rights and Fundamental Freedoms.

In terms of the subjective side the form of guilt characterizing the disciplinary violation is that of direct intent. The judge's manifestation shows they accepted the possibility that their opinion would be accessible to other persons as well, with all the consequences arising therefrom, and even if the intention of their actions was not to impact the professional integrity of the Constitutional Court judges the person nevertheless accepted the likelihood that such result might come to pass. The linguistic constructs used and the virulence of the message exclude the likelihood that the judge did not accept, albeit lacking this specific intent, the impact on the professional integrity of the Constitutional Court judges.

The consequence of the commission of this disciplinary violation is a deterioration of the public trust in and respect for the magistrate's function, as well as tarnishing the image of the judiciary as a system and service that defends the rule of law.

For their violation the judge received the disciplinary sanction of "warning" on the basis of Art. 100 letter a) in Law #303/2004.

HCRJ, 5-Justice Panel, Judgment #128 of 27 May 2019

5. Prosecutor. Improper behavior.

Law #303/2004, Art. 4 para. (1), Art. 90, Art. 99 letter a), Art. 100 letter e)
Code of Ethics for Judges and Prosecutors, Art. 17
Law #161/2003, Art. 104

The obligation of a magistrate to maintain a dignified and reserved conduct, of a nature that maintains the prestige of the judiciary untarnished and observe the conduct standards specifically stipulated in the national and international legal and regulatory requirements, the study and observance of which is mandatory both during and outside the exercise of work responsibilities, is described in several regulatory texts: Art. 4 para. (1) and Art. 90 in Law #303/2004, Art. 17 in the Code of Ethics for Judges and Prosecutors and Art. 104 in Law #161/2003, London Declaration on Judicial Ethics (2010).

In the circumstances of the case the constitutive elements were found of the disciplinary violation stipulated by Art. 99 letter a) in Law #303/2004 in the circumstances of a prosecutor, in the exercise of their work responsibilities as part of a discussion with a certain person at the head office of their Prosecutor's Office, in the presence of a defense counsel and a journalist, engaged in an aggressive behavior and used a strong tone in asking that person for explanations concerning the allegations brought against them, namely launching rumors intended to protect a mayor who was under investigation on corruption charges and a number of Russian citizens allegedly involved in the commission of criminal activities. This inappropriate behavior is of a nature to tarnish the judiciary's honor, professional integrity and prestige.

Given the stipulations of Art. 100 in Law #303/2004 concerning distinct disciplinary violations committed by the prosecutor who had been under disciplinary investigation at various other previous times, a fact which shows the repetitive character of the violation of legal and regulation requirements that compel a magistrate to comply with obligations dictated by the position's status and dignity, the diversity of the violations plus their seriousness and consequences as well as the fact that while under investigation the magistrate had an insincere position, the disciplinary sanction was ordered consisting of "exclusion from the magistrates' profession" as under Art. 100 letter e) in Law #303/2004.

HCRJ, 5-Justice Panel, Judgment #90 din 8 April 2019

Art. 99 letter b) Law #303/2004: **"violation of the legal stipulations concerning incompatibilities and prohibitions for judges and prosecutors."**

1. Prosecutor. Participation, as representative of the Prosecutor's Office, in a case of administrative litigation.

Civ.Proc.C, Art. 92 para. (2)
Law #303/2004, Art. 10, Art. 99 letter b) and m)
Code of Ethics for Judges and Prosecutors, Art. 11 para. (3)

The disciplinary action was brought against the prosecutor on charges of violating Art. 10 para. (3) in Law #303/2004 and ale Art. 11 in the Code of Ethics for Judges and Prosecutors. In an administrative litigation case – whose object was a request to suspend termination of a prosecutor from their position – they went to court and stated they were not there as a prosecutor as defined at Art. 92 para. (2) Civ.Proc.C but as a representative and agent of the chief prosecutor who was a defendant in the case as the issuer of the aforementioned termination order.

Under Art. 10 para. (3) in Law #303/2004, "Judges and prosecutors are allowed to plead in court, in the conditions regulated by law, only in their personal cases or those involving their ascendants and descendants, spouses and persons under their guardianship. However, even in such situations judges and prosecutors cannot use their official capacity to influence the decision of the court or the prosecutor's office and shall avoid creating the appearance that they might in any way influence the decision."

Under Art. 11 para. (3) in the Code of Ethics for Judges and Prosecutors, "Judges and prosecutors are not allowed to intervene in the decision on various motions, solicit or accept a solution in the interest of their person or their family members or other persons otherwise than within the limits of the legal framework. Interference with the activity of other judges and prosecutors is forbidden."

In the circumstances of the case the prosecutor was not found in violation of the regime of incompatibilities and prohibitions established by law, because they did not act as an agent of the chief prosecutor but as a representative of the prosecutor's office as a public institution defending in an administrative litigations case, and had been appointed officially to do so.

By representing the prosecutor's office in two hearings in court the prosecutor did not exercise the position of legal advisor, which could have led to the existence of a situation of incompatibility in the simultaneous exercise of two distinct positions.

The circumstances of the case reflect a combination of factors that led to the appointment of the prosecutor as representative of the prosecutor's office in the administrative litigation case, but the main action consisting of the prosecutor's participation in the two hearings in that case was regarded from the perspective of the disciplinary violation stipulated at Art. 99 letter m) second thesis in Law #303/2004.

The actions held against the prosecutor in terms of the disciplinary violation stipulated at Art. 99 letter b) in Law #303/2004 are in fact only consequences of the inappropriate conduct described at Art. 99 letter m) second thesis in the Law and, as regards the defendant prosecutor, reflect uncertainty about the legal grounds based on which they represented the prosecutor's office, a lack of familiarity with the specificities of administrative litigations as well as an attempt to justify their participation and ensuring proper representation of the institution based on an appointment ordered by the deputy chief prosecutor of that Office.

The factual circumstances – justified absence of both the chief prosecutor and the legal advisor – ultimately show an intention to ensure that the prosecutor's office was represented in the administrative litigation case and elements were not identified that would outline a behavior that violates the regime of incompatibilities and prohibitions mandated by law.

HCRJ, 5-Justice Panel, Judgment #69 of 18 March 2019

2. Prosecutor. Legal advice.

Law #51/1995, Art. 3
Law #303/2004, Art. 10 para. (2), Art. 99 letter b)
Status of the Solicitor's Profession, Art. 89

In the circumstances of the case the court found the constitutive elements of the disciplinary violation stipulated at Art. 99 letter b) in Law #303/2004 were not met.

Given the stipulations of Art. 10 para. (2) in Law #303/2004, Art. 3 in Law #51/1995 on the Organization and Exercise of the Solicitor's Profession and Art. 89 in the Status of the Solicitor's Profession, adopted by U.N.B.R. (National Union of Bar Associations in Romania) Decision #64 of 3 December 2011, the mere statements by a magistrate concerning the legal avenues available to a defendant in a criminal case to challenge the Judgment returned in a court case, or concerning certain actions or the legal avenue to penalize a false witness – without a complex legal "analysis" of a certain "set of issues"– does not constitute an activity specific to the solicitors' profession in the form of "legal consultancy" in any of the descriptions provided at Art. 89 in the Status of the Solicitor's Profession.

In the situation where a magistrate is asked for their opinion on a matter of law, without said magistrate engaging in undertakings specific to the solicitors' profession, which would consist in providing legal advice, developing defense strategies, formulation of motions or engaging in negotiations with the parties, there is no violation of the ban stipulated at Art. 10 para. (2) in Law #303/2004.

HCRJ, 5-Justice Panel, Judgment #90 of 8 April 2019

Art. 99 letter c) Law #303/2004: "unseemly attitudes, during exercise of work responsibilities, towards colleagues, other personnel of their court or prosecutor's office, judicial inspectors, solicitors, experts, witnesses, case parties or representatives of other entities."

1. **Judge. Aggressive behavior, impolite language involving ethnic origin and physical aspect, statements about unprincipled actions engaged in by colleagues.**

Law #161/2003, Art. 104
Law #303/2004, Art. 4, Art. 99 letter a) and c), Art. 100 letter e)
Code of Ethics for Judges and Prosecutors, Art. 17

The court found the judge as having committed a disciplinary violation concerning the obligations mandated by Art. 104 in Law #161/2003, Art. 4 in Law #303/2004 and Art. 17 in the Code of Ethics for Judges and Prosecutors, in the context of their conduct demonstrated by the following elements: ***(i)*** *inappropriate and aggressive conduct as part of the judicial panel they were a member of, during court sessions, when in the absence of the panel chairperson they took the floor during the debates, a fact that caused the colleagues to*

*refuse being members of the same collegiate panel; **(ii)** use of inappropriate language towards another judge, whom they were calling names arising from their ethnic origin and physical aspect; **(iii)** inappropriate attitude towards two other judges, by making statements about "unprincipled" activities they were engaging in while in their office, statements that were detailed explicitly in two requests for abstention formulated; the content of the judge's request for abstention was the subject of a pamphlet-article published in the online version of a local publication.*

In the circumstances of the case, based on Art. 100 letter e) in Law #303/2004, the disciplinary sanction was ordered consisting of "exclusion from the magistrates' profession" as under Art. 99 letter a) an c) in the Law.

HCRJ, 5-Justice Panel, Judgment #26 of 4 February 2019

2. Judge. Unseemly attitudes of a judge in relation to the court personnel.

Law #303/2004, Art. 4, Art. 99 letter c) and letter t) first thesis,
Art. 99[1] para. (1), Art. 100 letter b)
Law #161/2003, Art. 104
Code of Ethics for Judges and Prosecutors, Art. 17

A literal, systematic and teleological interpretation of the stipulations of Art. 4 and Art. 99 letter c) in Law #303/2004, Art. 104 in Law #161/2003 and Art. 17 in the Code of Ethics for Judges and Prosecutors shows that defining the disciplinary status of magistrates, integrated with their professional status, involves compliance with the obligation to have a correct, dignified and restrained conduct with a view to maintaining untarnished the prestige of the judiciary, and that the responsibility to maintain the image of the judiciary and the status of magistrates is a professional duty.

In this case the court found the commission of the disciplinary violation stipulated under Art. 99 letter c) in Law #303/2004, consisting of unseemly attitudes of the judge towards their colleague judges and the court personnel, demonstrated by the following elements: aggressive attitude towards colleagues; shoving a judge who was on the same panel, openly for all colleagues to see; inappropriate statements made during court session about the panel colleague concerning their work in the case; filing frivolous criminal complaints against colleagues; calling out the President of the court about their performance of their managerial duties; refusal to cooperate; imperative attitude towards the economic staff of the court; aggressive attitude towards the court's psychologist.

Based Art. 100 letter b) in Law #303/2004, the disciplinary sanction was ordered for the judge consisting of "decrease the pre-tax monthly stipend for the position by 10% for a period of 3 months," for the commission of the disciplinary violations stipulated by Art. 99 letter c) and t) first hypothesis correlated with Art. 99[1] para. (1) in the same law.

HCRJ, 5-Justice Panel, Judgment #242 of 4 November 2019

Art. 99 letter g) Law #303/2004: "failure by a prosecutor to comply with the orders of their hierarchically superior prosecutor, as issued in writing in compliance with the law."

1. A comparative analysis between the disciplinary violations described by Art. 99 letter g) and Art. 99 letter m) in Law #303/2004. The notions of "order," "hierarchically superior prosecutor" and "manager of the prosecutor's office."

Law #303/2004, Art. 99 letter g) and letter m)

Under Art. 99 letter g) and m) in Law #303/2004:

"Art. 99. – The following shall constitute disciplinary violations:

g) failure by a prosecutor to comply with the orders of their hierarchically superior prosecutor, as issued in writing in compliance with the law;

m) unjustified failure to comply with orders or decisions with an administrative character issued in compliance with the law by the manager of the court or prosecutor's office, or of other administrative-type obligations stipulated by law or other regulations."

The distinction made by the lawmaker in the stipulations of Art. 99 letter g) and letter m) in Law #304/2004 consists of the fact that the notion of hierarchically superior prosecutor, which is used in the text of Art. 99 letter g), is wider than that of manager of the prosecutor's office as used by Art. 99 letter m) in Law #303/2004.

The systematic, grammatical interpretation of those stipulations results in the conclusion that the content of the notion of "order" as used in the text of Art. 99 letter g) includes administrative-type decisions given in writing and in compliance with the law by hierarchically superior prosecutors other than prosecutor's office managers, and the latter hypothesis is covered by a special stipulation in the content of letter m).

HCRJ, 5-Justice Panel, Judgment #1 of 14 January 2019

2. Comparative analysis between the disciplinary violations stipulated by Art. 99 letter g) and Art. 99 letter m) in Law #303/2004. Distinction between the act that has a regulatory character (law or regulation) and the act that has an individual character (order in writing issued by the hierarchically superior prosecutor).

Law #303/2004, Art. 99 letter g) and letter m)

Under Art. 99 letter g) and m) in Law #303/2004:

„Art. 99. – The following shall constitute disciplinary violations:

g) failure by a prosecutor to comply with the orders of their hierarchically superior prosecutor, as issued in writing in compliance with the law;

m) unjustified failure to comply with orders or decisions with an administrative character issued in compliance with the law by the manager of the court or prosecutor's office, or of other administrative-type obligations stipulated by law or other regulations."

The violation described at Art. 99 letter g) in Law #303/2004 involves the existence of an order in writing issued by the hierarchically superior prosecutor, by virtue of the

principle of hierarchical subordination, without a distinction being made whether the order concerns administrative or judicial matters, while the violation described at Art. 99 letter m) second thesis involves the existence of legal and regulatory stipulations that establish obligations of an administrative character for prosecutors.

In other words the difference between the two disciplinary violations also resides in the fact that the violation under letter g) involves the hypothesis of a refusal to comply with an order by the hierarchically superior prosecutor, given in writing and in compliance with the law, while the violation under letter m) second thesis involves the hypothesis of unjustified non-compliance with an administrative obligation, required under an act with a regulatory character such as a law or a regulation. Thus the distinction that needs to be made between the two violations is equivalent to the distinction between the act that has a regulatory character (law or regulation) and the act that has an individual character (order in writing issued by the hierarchically superior prosecutor). In the same sense the violation under letter g) involves the existence of a relationship of direct subordination between the prosecutor who issues the order in writing and the prosecutor who receives the order, while the violation under letter m) second thesis involves the existence of a relationship of compliance of the prosecutor's professional conduct with administrative obligations established by legal requirements of a general and impersonal character contained in a law or regulation.

HCRJ, 5-Justice Panel, Judgment #69 of 18 March 2019

3. Prosecutor. Non-compliance with a regulatory act applicable to the Public Ministry

Law #303/2004, Art. 99 letter g) and m)

The objective side of this disciplinary violation consists of the prosecutor's action or inaction that shows a refusal to comply with an order of their hierarchically superior prosecutor, as issued in writing in compliance with the law.

In the circumstances of the case the prosecutor is charged with failure to comply with the Order by the Prosecutor General of the Prosecutor's Office Attached to the High Court of Review and Justice #62/2016, both in terms of Art. 99 letter m) in the Law, second thesis, "unjustified failure to comply with (…) other administrative-type obligations stipulated by law or other regulations" and in terms of Art. 99 letter g) in the Law, "failure (…) to comply with the orders of their hierarchically superior prosecutor, as issued in writing in compliance with the law."

The violation described at Art. 99 letter g) in Law #303/2004 involves the existence of an order in writing issued by the hierarchically superior prosecutor, by virtue of the principle of hierarchical subordination, without a distinction being made whether the order concerns administrative or judicial matters, while the violation described at Art. 99 letter m) second thesis involves the existence of legal and regulatory stipulations that establish obligations of an administrative character for prosecutors.

In other words the difference between the two disciplinary violations also resides in the fact that the violation under letter g) involves the hypothesis of a refusal to comply with

an order by the hierarchically superior prosecutor, given in writing and in compliance with the law, while the violation under letter m) second thesis involves the hypothesis of unjustified non-compliance with an administrative obligation, required under an act with a regulatory character such as a law or a regulation. Thus, the distinction that needs to be made between the two violations is equivalent to the distinction between the act that has a regulatory character (law or regulation) and the act that has an individual character (order in writing issued by the hierarchically superior prosecutor). In the same sense the violation under letter g) involves the existence of a relationship of direct subordination between the prosecutor who issues the order in writing and the prosecutor who receives the order, while the violation under letter m) second thesis involves the existence of a relationship of compliance of the prosecutor's professional conduct with administrative obligations established by legal requirements of a general and impersonal character contained in a law or regulation.

In the circumstances of the case, where the prosecutor is charged with committing the disciplinary violation stipulated by de Art. 99 letter m) second thesis in Law #303/2004, for unjustified failure to comply with an act of regulatory character issued at the level of the Public Ministry, the court does not find applicability of the stipulations of Art. 99 letter g) in the law concerning failure to comply with a direct order issued by the hierarchically superior prosecutor.

HCRJ, 5-Justice Panel, Judgment #69 of 18 March 2019

4. Prosecutor. Failure to comply with stipulations in a Law that were taken over in a Regulation.

Law #303/2004, Art. 99 letter m)
Law #304/2004, Art. 65 para. (3)

The existence of the material element of the objective side of the disciplinary violation stipulated by Art. 99 letter m) in Law #303/2004 involves the existence of an order in writing issued by the hierarchically superior prosecutor, compliance with which is mandated by the principle of hierarchical subordination specific to this position in the judicial system. It is for instance noteworthy that unjustified failure to comply with administrative-type orders issued lawfully by the head of the court or prosecutor's office, or of other administrative-type obligations stipulated by law or other regulations, will be considered as a violation under Art. 99 letter m) in the Law as held in the recent jurisprudence of the High Court of Review and Justice (see above Judgment #69 of 18 March 2019).

In the context where in the case under trial the prosecutor is charged with failure to comply with legal stipulations (Art. 65 para. 3 in Law #304/2004) taken over at infra-legal level of a regulation (Art. 7 letter s) from the In-House Rules of the NAD and Art. 7 para. 3 in HCRJ Order #5/2016), we are looking at an administrative-type obligation stipulated in a law and which has been taken over in two administrative acts of a regulatory character, with lesser legal strength. Taking over stipulations from a regulatory act of higher legal strength, into a regulatory act of lesser legal strength issued on the basis and in the

application of the former, shows the existence or a parallelism of regulation, a procedure whose avoidance is recommended by Art. 16 para. (4) in Law #24/2000 on legal drafting rules for the development of regulatory acts, as republished with subsequent amendments and supplements.

In consideration of the above, the conduct is to be examined in terms of compliance with the stipulations of higher legal strength (Art. 65 para. 3 in Law #304/2004), as applicable to the violation described by Art. 99 letter m) second thesis in Law #303/2004, and not in terms of the violation described by letter g) of the same Article and which speaks of an order in writing, with an individual character, issued by the hierarchically superior prosecutor.

HCRJ, 5-Justice Panel, Judgment #75 of 25 March 2019

5. Prosecutor. Listing cases in the ECRIS system as finalized, which are in fact not finalized.

Law #303/2004, Art. 99 letter m)
Order by the Prosecutor General of the
Prosecutor's Office Attached to HCRJ #5 of 10 January 2007, Art. 2 and Art. 5

The constitutive elements are met of the disciplinary violation stipulated by Art. 99 letter g) in Law #303/2004, as the facts show the prosecutor asked a clerk to introduce in ECRIS a number of 40 criminal cases as finalized, though in reality they were not finalized and had not been removed from the Ledger of criminal prosecutions and investigations.

By engaging in this conduct the prosecutor violated Art. 2 and Art. 5 in the Order by the Prosecutor General of the Prosecutor's Office Attached to the High Court of Review and Justice #5 of 10 January 2007, and the immediate consequence of that action consists in a lack of veracity of the of the data introduced in the ECRIS system, which is a record of statistical information of the judicial system.

The chief prosecutor was subject to the disciplinary sanction consisting of a "warning" for committing the disciplinary violations stipulated by Art. 99 letter h), letter g) and letter m) in Law #303/2004.

HCRJ, 5-Justice Panel, Judgment #92 of 15 April 2019

Art. 99 letter h) Law #303/2004: "repeated non-compliance for reasons attributable to the defendant with the legal stipulations concerning speedy disposition of cases, or repeated delays in performing work for reasons attributable to the defendant."

1. Time frame for the exercise of disciplinary action

Law #303/2004, Art. 99 letter h)

Law #317/2004, Art. 46 para. (7)

Arising from an analysis of the disciplinary violation stipulated by Art. 99 letter h) in Law #303/2004, in terms of the material element of the objective side, the action of not observing the legal/reasonable deadline consists of continuous inaction in the period comprised between the time of the deadline set for complying with the obligation and the time when the obligation was actually complied with (assignment of the work, finalization of the work).

In other words, in the meaning of Art. 99 letter h) in Law #303/2004, the action of not observing the legal/reasonable deadline is committed for the entire duration of the inaction (the time frame within which the obligation required by law is not complied with) and is extinguished the moment the obligation is complied with, and this is the temporal landmark as of which the term starts being counted for the exercise of disciplinary action as under Art. 46 para. (7) in Law #317/2004.

HCRJ, 5-Justice Panel, Judgment #92 din 15 April 2019

2. Judge. Repeated failure to comply with the deadline for writing the full text of their Judgment for reasons attributable to the defendant.

Law #303/2004, Art. 99 letter h), Art. 100 letter a) and b)

*The court finds the constitutive elements are met of the disciplinary violation stipulated by Art. 99 letter h) in Law #303/2004, as the circumstances of the case show the following: **(i)** in terms of the objective side, on 4 June 2018, the judge had a number of 97 judgments without the full text written, the oldest one dating to 22 March 2017; **(ii)** the judge had been under scrutiny before, for the same delays in writing the full text of their judgments, but the scrutiny had been dropped; **(iii)** in terms of the subjective side, the delays in writing the full text of the judgments are attributable to the magistrate because they resulted from their time management, their planning of activities and their effective work time (they would normally come to work on Mondays, Wednesdays and Fridays after 12:30 – 13:00hrs).*

Under Art. 100 letter b) in Law #303/2004 the disciplinary court ordered the disciplinary action called "reduction of the monthly pre-tax position-related stipend by 10% for a period of 2 months."

The 5-Justice Panel considered that disciplinary action as non-compliant with the principle of proportionality and stated that given the personal and objective circumstances of the magistrate – they underwent surgery during the period under scrutiny, they had attended a competitive examination for promotion in rank, their Chamber had a high workload, they had a complex activity to perform at the Criminal Enforcement Office – it was justifiable to apply the disciplinary action stipulated by Art. 100 letter a) in Law #303/2004, consisting of a "warning."

HCRJ, 5-Justice Panel, Judgment #51 of 25 February 2019

3. Judge. Repeated failure to comply with the deadline for writing the full text of their Judgment for reasons attributable to the defendant.

Law #303/2004, Art. 99 letter h) second thesis

The court finds the constitutive elements are met of the disciplinary violation stipulated by Art. 99 letter h) second thesis in Law #303/2004, as the evidence in the case shows the following: ***(i)*** *according to the statistical data: a) on 31 December 2017 the judge had a number of 450 judgments without the full text written within the required deadline, the oldest one having been returned on 10 March 2016; b) on the date the resolution was developed to start the disciplinary investigation, 14 March 2018, the judge had a number of 463 judgments overdue, the oldest of which had been returned on 2 June 2016; c) on the date the disciplinary investigation was performed, 25 April 2018, the magistrate had a number of 469 judgments overdue, the oldest of which had been returned on 2 June 2016; d) on 7 June 2018 the number of overdue judgment texts was 462, the oldest of which had been returned on 22 September 2016; e) on 19 September 2018 the judge was recorded with 357 overdue judgment texts, the oldest of which had been returned on 12 January 2017;* ***(ii)*** *the judge consistently writes their judgment texts beyond the legal deadline of 30 days, and in the investigated period they had no other responsibilities to perform at the court except their judicial activity;* ***(iii)*** *the statistics show that the number of cases assigned to the magistrate and disposed of was approximately equal to that of their other colleagues within that Chamber;* ***(iv)*** *in the investigated period the high workload caused several other judges of that Chamber to have judgment texts not written within the legal deadline, but the defendant was one of the judges with the largest and oldest number of overdue judgment texts; thus the criterion of the workload as compared to that of other judges of the court does not constitute an element to justify the defendant's overdue work.*

As for the customization of the disciplinary penalty – "reduction of the monthly pre-tax position-related stipend by 15% for a period of 1 month" – the following elements were considered in tailoring the penalty: ***(i)*** *the magistrate had previously received a disciplinary "warning" for the same disciplinary violation;* ***(ii)*** *the fact that the situation continued to exist where the magistrate was long overdue in writing their judgment texts even after having received a disciplinary warning for the same violation demonstrates that the defendant failed to use a systematic approach to the work they had to complete and did not provide the texts in the order of their age and urgency, thus ignoring the very serious consequences such approach could cause;* ***(ii)*** *the principle of enforcing disciplinary in a gradual manner;* ***(iii)*** *in the investigated period the judge had, just like their other colleagues, a significant amount of work in their Chamber;* ***(iv)*** *personal circumstances in terms of having to devote time to raising their two children aged 8 and 4;* ***(v)*** *the statistics show that the judge made sustained efforts to write their judgment texts, thus creating the at least apparent assumption that they were aware of the problem and took steps to deal with the situation held against them, thus achieving the goal of the disciplinary procedure.*

HCRJ, 5-Justice Panel, Judgment #127 of 27 May 2019

4. Judge. Repeated failure to comply with the deadline for writing the full text of their Judgment for reasons attributable to the defendant.

Law #303/2004, Art. 99 letter h) second thesis, Art. 100 letter d)

In the meaning of Art. 99 letter h) second thesis in Law #303/2004, the circumstances of the case show "repeated tardiness in performing work for reasons attributable to the defendant" because evidence has been brought showing repeated violation by the magistrate of the legal requirements that regulate the obligation to write the full text of returned judgments within the legal deadline, namely Art. 426 para. (5) Civ.Proc.C.

Thus, according to the evidence in the case: ***(i)*** *on 29 June 2018, the date when the complaint was filed, the judge had not written the text for a judgment returned on 9 September 2016, though a party in that case has filed three applications to speed up the writing, namely on 18 January 2017, 19 April 2017 and 19 June 2017;* ***(ii)*** *on 3 August 2018 the judge had a number of 224 judgments pending the writing of the full text (15 returned in 2015, 86 returned in 2016, and the rest in 2017 and 2018);* ***(iii)*** *on 12 November 2018 , the judge had a number of 171 judgments not written within the legal deadline (14 from 2015, 86 from 2016, 17 from 2017 and 54 from 2018).*

In terms of the reasons attributable to the defendant the following elements were considered: ***(i)*** *the judge consistently writes their judgment texts beyond the legal deadline;* ***(ii)*** *the judge's workload was approximately equal to that of their other colleagues within that Chamber;* ***(iii)*** *the judge had previously received a disciplinary penalty consisting of a "reduction of the monthly pre-tax position-related stipend by 10% for a period of 1 month" for the same disciplinary violation;* ***(iv)*** *the lines of defense bringing up the complexity of the work, duration of time needed for completion of activities specific to the position, the work conditions and the inter-human relations cannot be given the proposed relevance because all those aspects are common traits of the activity of that Chamber's judges, and the statistical data shown in the evidence in the case does not reveal the existence of distinctive elements for this particular judge that would attribute an excusable character to the investigated actions in terms of the disciplinary violation in discussion.*

In the circumstances of the case the penalty was adopted that is stipulated by Art. 100 letter d) in Law #303/2004, consisting of "suspension from office for a period of 2 months."

HCRJ, 5-Justice Panel, Judgment #239 of 4 November 2019

5. Judge. Repeated failure to comply with the deadline for writing the full text of their Judgment for reasons attributable to the defendant.

Law #303/2004, Art. 99 letter h) second thesis, Art. 100 letter b)
Rules of Operation for Courts of Law, Art. 5 para. (2)
Civ.Proc.C, Art. 426 para. (5)

In the circumstances of the case the court finds the constitutive elements are met of the disciplinary violation stipulated by Art. 99 letter h) second thesis in Law #303/2004.

In terms of the objective side it was found that: ***(i)*** *on the date the disciplinary investigation started (31 August 2018) the judge had a number of 607 judgments pending the writing of the full text within the legal deadline;* ***(ii)*** *on the date the disciplinary investigation was completed (09 October 2018) the judge had a number of 585 judgments pending the writing of the full text within the legal deadline;* ***(iii)*** *the judge consistently writes their judgment texts beyond the legal deadline of 30 days.*

The facts show the judges violated the stipulations of Art. 5 para. (2) in the Rules of Operation for Courts of Law and Art. 426 para. (5) Civ.Proc.C.

In terms of the subjective side the court found that in the circumstances of a workload equivalent to that of the other judges of that Chamber the judge did accumulate a very large number of delays in writing their judgment texts, for very long periods of time, for reasons attributable to themselves, resulting in the violation of the reasonable duration of judicial procedures and of the right of the parties to a fair trial as enshrined in Art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

In the process of customizing the disciplinary penalty the following aspects were considered: ***(i)*** *the judge had received previous penalties for the commission of the same disciplinary violation;* ***(ii)*** *after receiving the disciplinary penalty the judge made efforts to catch up with the outstanding writing of their judgments, so that on 27 March 2019 they had 176 outstanding judgment texts, a fact that demonstrates a positive trend towards repairing the examined deficiencies, thus creating the at least apparent assumption that the magistrate became aware of the problem and took steps to deal with the situation held against them;* ***(iii)*** *the disciplinary penalty ordered by the disciplinary court, namely transferring the judge to a different court, would have a negative impact on the Chamber's activity and judges and the goal of a disciplinary procedure is to penalize the defendant magistrate, not to inflate the negative consequences of the reprehensible conduct by inflicting them upon the court and judges working therein;* ***(iv)*** *in the given case the goal of the disciplinary procedure can be attained in a manner that does not bring an additional impact upon the court's activity, by using the disciplinary penalty stipulated by Art. 100 letter b) in Law #303/2004 and consisting of "reduction of the monthly pre-tax position-related stipend by 20% for a period of 6 months."*

HCRJ, 5-Justice Panel, Judgment #217 of 21 October 2019

5. Judge. Failure to comply with the reasonable duration of the preliminary chamber procedure

Law #303/2004, Art. 99 letter h) first thesis, Art. 100 letter a)
Rules of Operation for Courts of Law, Art. 5 para. (2) letter g)
Code of Ethics for Judges and Prosecutors, Art. 13
European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 6 para. (1)

The analysis of the conditions for disciplinary liability as a result of violation of Art. 99 letter h) first thesis in Law #303/2004 the conformity is examined of the judge's professional conduct with the legal regulations which establish an obligation to dispose of cases with celerity, in the sense of observing the reasonable deadline, this being a regulation specifically included in the laws and solidified by the jurisprudence for: Art. 5 para. (2) letter g) in ROI, Art. 13 in the Code of Ethics for Judges and Prosecutors, Art. 6 para. 1 in the European Convention for the Protection of Human Rights and Fundamental Freedoms correlated with the ECHR jurisprudence (Decision of 26 November 2013, Vlad and others v. Romania, par.131).

Art. 343 in the Criminal Procedure Code, which specifically states that "The duration of the preliminary chamber procedure shall be no more than 60 days of the date the case was registered with the court," regulates a recommended deadline.

In terms of the violation stipulated by Art. 99 letter h) first thesis in Law #303/2004, it is necessary to establish whether the facts indicate a repeated violation of the professional conduct expected of the magistrate, committed for reasons attributable to the defendant, in regards to the reasonable deadline for completing the preliminary chamber procedure depending on the "complexity of the case, behavior of the parties and object of the legal action."

In this case the court finds the constitutive elements are met of the disciplinary violation stipulated by Art. 99 letter h) first thesis in Law #303/2004, as the duration of the preliminary chamber procedure cannot be considered reasonable in the following circumstances material to the case: ***(i)*** *the judge failed to rule on motions and exceptions raised in the case and ordered no procedural measure for a period of almost one year;* ***(ii)*** *the judge ruled on motions and exceptions raised and which had been submitted to them 1 year and 4 months before;* ***(iii)*** *the judge's decision of 17 June 2016, under which they ruled on motions and exceptions raised, had not had its full text written either on the date when disciplinary action was enforced (21 July 2017), nor on the date the disciplinary court returned its decision (14 March 2018) and not even on the date when the High Court of Review and Justice finished hearing the case and set a date for its verdict (18 March 2019);* ***(iv)*** *the way in which the judge managed their work in the case shows a repeated failure to comply with the legal requirements concerning speedy disposition of a case and outlines a conduct devoid of firmness and diligence, defective management of judicial work, which led to a postponement of disposition of the case beyond the acceptable limits of the reasonable deadline even in the circumstances of that case's high complexity and volume;* ***(v)*** *the immediate consequence of the judge's inappropriate conduct was an excessive extension of the duration of the preliminary chamber procedure, it being impossible to regard as reasonable or acceptable the hypothesis where 14 after commission of the indicted actions, 6 years of criminal investigation and 4 years of preliminary chamber the case is still at the preliminary chamber stage, which is prior to the trial on the merits.*

In this case, based on Art. 100 letter a) in Law #303/2004, the judge received the disciplinary sanction consisting of "warning for the commission of the violation stipulated by Art. 99 letter h) first thesis in the same law."

HCRJ, 5-Justice Panel, Judgment #93 of 15 April 2019

6. Prosecutor. Failure to comply with the legal deadline or reasonable duration for resolution of cases

Law #303/2004, Art. 99 letter h)

In the circumstances of the case where the prosecutor is charged with failure to dispose of 74 cases within the legal deadline the court held the constitutive elements are not met for the disciplinary violation stipulated by Art. 99 letter h) in Law #303/2004, because the factual situation is not attributable to the prosecutor but was caused by other objective factors (the high volume of work pertaining to the execution as well as the managerial position), and by personal problems of the magistrate.

Thus in terms of the workload the court considered the fact that the prosecutor was performing work specific to the execution position, taking on criminal cases and returning a significant number of indictments which was higher than the average for their prosecutor's office, and at the same time was performing work specific to the managerial position (official letters for the registration of cases, dealing with complaints against prosecutorial decisions, inspecting the work of the judicial department, providing guidance to probationary prosecutors, receiving citizens in audience).

Consequently it was felt that the facts and attitude held against the prosecutor were not the result of an unjustifiable lack of interest because, on the contrary, the prosecutor did demonstrate interest and diligence in in dealing with the cases, and therefore in terms of the subjective side the actions of the magistrate can be ascribed to excusable guilt.

HCRJ, 5-Justice Panel, Judgment #1 of 14 January 2019

7. Prosecutor. Failure to comply with the legal deadline or reasonable duration for resolution of cases.

Law #303/2004, Art. 99 letter h)

The constitutive elements are met for the disciplinary violation stipulated by Art. 99 letter h) in Law #303/2004, as the facts show a repetitive conduct of failure to comply with the legal deadline or the reasonable deadline for disposition of the cases, a conduct that is attributable to the chief prosecutor who demonstrated lack of diligence and passiveness in the exercise of their work-related responsibilities, as follows: ***(i)*** *the material element of the objective side is outlined by the following aspects: failure to finalize 40 cases for more than 1 year; performing no work whatsoever in 10 cases for durations ranging between 9 months and 1 year 7 months; performing no work whatsoever in 8 cases for durations ranging between 1 year 3 months and 1 year 11 months and then reassigning them; disposition beyond the legal deadline of complaints under the responsibility of the chief prosecutor (64 cases from the year 2015 and 27 cases from the year 2016); disposition beyond the legal deadline of 4 motions for abstention/challenge;* ***(ii)*** *the facts demonstrate a violation of Art. 91 para. (1) in Law #303/2004, Art. 10 in Law #304/2004, Art. 69 para. (3), Art. 322 and Art. 338 in the Criminal Procedure Code and Art. 12 and Art. 13 in the*

Code of Ethics for Judges and Prosecutors; ***(iii)*** *the immediate consequence of the defendant's actions was that of delaying judicial procedures, in violation of the principle of speedy trial and in disregard for the legitimate rights and interests of the respective parties, a situation conducive to a deterioration of trust in and respect for the judicial system;* ***(iv)*** *in terms of the subjective side the magistrate's guilt – in the form of fault – is demonstrated implicitly by the inappropriate way – passive conduct devoid of interest and diligence – in which they understood the repetitive exercise of their work-related responsibilities, in violation of the legal requirements concerning disposition of cases within the legal deadline or with celerity.*

In the circumstances of the case the disciplinary sanction was ordered against the prosecutor consisting of "warning" for the commission of the disciplinary violations stipulated by Art. 99 letter h), letter g) and letter m) in Law #303/2004.

HCRJ, 5-Justice Panel, Judgment #92 of 15 April 2019

8. Prosecutor. Failure to dispose of cases within the legal deadline. Objective factors, reasons not attributable to the magistrate.

Law #303/2004, Art. 99 letter h)

The constitutive elements are not met for the disciplinary violation, as the circumstances of the case show that the prosecutor's late disposal of cases/work assigned to them was primarily the consequence of factors of an objective order, consisting of a high volume of complex activities, completely insufficient human and material resources available to the prosecutor's office, and not the consequence of factors attributable to the prosecutor as required under Art. 99 letter h) in Law #303/2004.

HCRJ, 5-Justice Panel, Judgment #20 of 28 January 2019

Art. 99 letter j) Law #303/2004: "failure to comply with the secrecy of deliberation or the confidentiality of work that has such character, as well as of other information of the same nature they have become aware of in the exercise of their position, except for public-interest information as under the law."

1. Prosecutor. Communicating information about the charges to retained defenders of the suspects/defendants. Right to defense and right to being informed of the contents of the charges brought against defendants.

European Convention on Human Rights, Art. 6 item 1 and 3 and Art. 10
Directive 2012/13/EU of 22 May 2012 of the European Parliament and Council, Art. 6 and Art. 7

Constitution of Romania, Art. 20, Art. 21 and Art. 24
Criminal Procedure Code, Art. 8, Art. 10 para. (3) and Art. 94
Law #182/2002, Art. 5, Art. 3, Art. 24 para. (5) and Art. 33
Law #303/2004, Art. 4 para. (1), Art. 99 letter j)
Government Decision #585/2002, Appendix, Art. 14, Art. 15, Art. 26, Art. 33, Art. 41, Art. 69 para. (2) şi (3), Art. 73 and Art. 294
Code of Ethics for Judges and Prosecutors, Art. 15 para. (1)
Regulation on Access of Justices, Prosecutors and Assistant Magistrates of the High Court of Review and Justice to Classified Information, State Secrets and Service Secrets
Regulation on access of Justices, Prosecutors and Assistant Magistrates of the High Court of Review and Justice to Classified Information, State Secrets and Service Secrets, Art. 3 para. (1) letter a) and Art. 11 para. (1), (3), (4), (5) and (9)

In the circumstances of the case, in terms of the disciplinary violation stipulated by Art. 99 letter j) in Law #303/2004, the prosecutor is charged with violation, with indirect intent, of the rules concerning protection of classified information as under Art. 5 in Law #182/2002, Art. 14, 15, 26, 33, 41, Art. 69 para. (2) and (3), Art. 73 and 294 in the Appendix to Government Decision #585/2002 and de Art. 3 para. (1) letter a) and Art. 11 para. (1), (3), (4), (5) and (9) in the Regulation on Access of Justices, Prosecutors and Assistant Magistrates of the High Court of Review and Justice to Classified Information, State Secrets and Service Secrets, approved by Decision #140/2014 of the Plenum of the Higher Council of Magistrates.

As regards the material aspect of the objective side of the disciplinary violation, it is held against the prosecutor that they developed 8 non-secret reports using fully or in part certain classified information, from regulatory acts and from classified documents by copying it on an optical support devoid of serial number and a marking indicating it was strictly secret, which he brought to the knowledge of the retained defenders of the defendants in a criminal case while those individuals did not have the appropriate clearance to access that level of secrecy and who manipulated the information outside the scope of the law.

The court found the material element of the objective side of the disciplinary violation held against the defendant did not exist, for the following reasons:

The action the magistrate is forbidden to engage in and is considered unlawful in terms of Art. 99 letter j) in Law #303/2004 is an application of Art. 4 para. (1) in Law #303/2004 and Art. 15 para. (1) in the Code of Ethics for Judges and Prosecutors and concerns the magistrate's obligation to refrain from revealing or using data or information they have acquired knowledge of during the exercise of their office, for purposes other than those strictly related to the exercise of their profession, by revealing such to individuals not entitled to acquire such knowledge.

Given the Decision of the Constitutional Court #21/2018, the ECHR jurisprudence and the stipulations of Directive 2012/13/EU, in case there is a restriction of the right to be informed the decision to deny access to classified information existing in the case file shall always belong to a judge or should at least make the object of judicial control.

In this case the object of the criminal violations under investigation was precisely the development of certain classified documents concerning a reimbursement of expenditures,

which showed the use of allocated operational funds contrarily to their legal destination, and the prosecutor's actions to reveal the classified information to the retained defenders of the defendants, as the object of the investigated violations, without said defenders having the necessary access clearance, were caused by compliance with the defendants' right to be informed of the charges brought against them, therefore this is part of the right to have a defense as a guarantee of the right to a fair trial.

Thus the prosecutor's actions are not unlawful but obligatory, and were performed on the basis of the legal requirements that govern the criminal trial, exclusively as part of the procedural requirement of presenting the charges and only to the persons entitled to learn of them, and who in this capacity acquire the obligation to protect confidentiality.

In the exercise of their responsibilities, working the criminal case the prosecutor applied the legal requirements concerning the right to be informed of the charges, namely Art. 20, 21 and 24 in the Constitution, Art. 8, Art. 10 para. (3) and Art. 94 in the Criminal Procedure Code, Art. 3, Art. 24 para. (5) and Art. 33 in Law #182/2002, in agreement with the stipulations of European law concerning the right to a fair trial, to defense and to be informed of the charges, namely Art. 6 item 1 and 3 and Art. 10 in the European Convention on Human Rights and Art. 6 and Art. 7 in Directive 2012/13/EU of 22 May 2012 of the European Parliament and Council concerning the right to information as part of criminal proceedings, according to which the right to have a defense and to receive information about the criminal charges are fundamental rights.

HCRJ, 5-Justice Panel, Judgment #49 of 25 February 2019

Art. 99 letter l) Law #303/2004: "interference with the work of another judge or prosecutor"

1. Judge. Approaching the judge in a case to inform them of the stakes the litigation holds for one of the parties in the case

Law #303/2004, Art. 99 letter l), Art. 100 letter d)

In interpreting and applying the stipulations of Art. 99 letter l) in Law #303/2004 the jurisprudence of the High Court holds that: ***(i)*** *the notion of "interference" includes any breach of the principle that judges are independent in their work and are subject only to the law;* ***(ii)*** *the legal rule does not condition the existence of the objective side of the regulated violation on the production of the intended result or the exercise or perception of the existence or a form of pressure or psychological coercion;* ***(iii)*** *the violation described by the law has the character of a form of jeopardy, not a form of result, whose immediate consequence, namely a state of jeopardy for the independence of the judge, results "ex re" (The High Court of Review and Justice – 5-Justice Panel: Judgment #25 of 25 February 2014; Judgment #153 of 12 October 2015; Judgment #269 of 23 October 2017, item 26 şi 30; Judgment #173/2018, item 115-116).*

As this is not a violation judged in terms of its result, in examining the constitutive elements it is not relevant at all whether the goal of the interference was attained or

whether the interference itself was perceived as such, or was perceived in a different manner or its significance was only understood later by the persons who, directly or indirectly, took part in the unfolding of the events under examination in terms of the act of interference.

The disciplinary violation described by Art. 99 letter l) in Law #303/2004 is a particularly egregious violation which objectively justifies a harsher penalty.

In the circumstances of the case the court found that the judge's actions of finding the judges entrusted with trying a case and approaching them to inform them what the stakes were in that case for one of the parties, a conduct that reflects intent to sensitize those judges to the benefit of that particular party, meets the constitutive elements of the disciplinary violation.

Based on Art. 100 letter d) in Law #303/2004, the judge received the disciplinary sanction consisting of "suspension from office for a period of 3 months.

HCRJ, 5-Justice Panel, Judgment #37 of 18 February 2019

2. **Prosecutor. Approaching the case prosecutor about issuing certain orders in that case.**

Code of Ethics for Judges and Prosecutors, Art. 11 para. (3), Art. 17
Law #303/2004, Art. 4, Art. 99 letter l), Art. 100 letter e)

The material element of the violation described by Art. 99 letter l) in Law #303/2004 resides in the action of "interference" – tampering, intervention in the work of another magistrate, where the essential part is that the interference should be of a nature to harm the principle of the independence of the judiciary and the magistrate, irrespective of whether the act of interfering does or does not intend to further an interest. The mere interference of a magistrate with the work of another magistrate is sufficient to meet the constitutive elements of the disciplinary violation in discussion.

In the circumstances of the case the material element of the disciplinary violation consists of the prosecutor's interference with the work of another prosecutor, who is in charge of a criminal case, in the sense of asking them to refrain from introducing a certain person in that case as a victim and to investigate the police officer. With that conduct the prosecutor violated Art. 11 para. (3) and Art. 17 in the Code of Ethics for Judges and Prosecutors and Art. 4 in Law #303/2004.

The form of guilt the violation was committed with is indirect intent to interfere with the work of another prosecutor, with acceptance of the immediate consequence of said conduct, namely harming the principle of the prosecutor's independence in performing criminal investigation work in the case entrusted to them for completion.

Based on Art. 100 in Law #303/2004, and considering the large number of distinct disciplinary violations committed by that prosecutor who had already been under disciplinary investigations at various other times, a fact that demonstrates the repetitive character of actions in violation of the legal and regulatory rules that dictate a magistrate's obligations arising from their status and the dignity of their office, considering the diversity of their other disciplinary violations, their seriousness and consequences, as well as the fact

that during the disciplinary investigation the magistrate was insincere the disciplinary sanction was ordered consisting exclusion from the magistrate's profession as under Art. 100 letter e) in Law #303/2004.

HCRJ, 5-Justice Panel, Judgment #90 of 8 April 2019

Art. 99 letter m) Law #303/2004: "unjustified noncompliance with administrative orders or decisions issued under the law by the manager of the court or prosecutor's office, or with other obligations with an administrative character stipulated in laws or regulations."

1. A comparative analysis of the disciplinary violations described by Art. 99 letter m) and Art. 99 letter g) in Law #303/2004. The notions of "order," "hierarchically superior prosecutor" and "manager of the prosecutor's office."

Law #303/2004, Art. 99 letter g) and letter m)

Art. 99 letter g) and m) in Law #303/2004:

"Art. 99. – The following shall constitute disciplinary violations:

g) noncompliance by a prosecutor with the orders of the hierarchically superior prosecutor, issued in writing and in observance of the law;

m) unjustified noncompliance with administrative orders or decisions issued under the law by the manager of the court or prosecutor's office, or with other obligations with an administrative character stipulated in laws or regulations".

The distinction the lawmaker made in the stipulations of Art. 99 letter g) and letter m) in Law #304/2004 consists of the fact that the notion of hierarchically superior prosecutor, with which the lawmaker operates in Art. 99 letter g), is wider than that of the chief of the prosecutor's office as used in the text of Art. 99 letter m) din Law #303/2004.

The systematic, grammatical interpretation of those stipulations results in the conclusion that the content of the notion of "order" as used in the text of Art. 99 letter g) includes administrative-type decisions given in writing and in compliance with the law by hierarchically superior prosecutors other than prosecutor's office managers, and the latter hypothesis is covered by a special stipulation in the content of letter m).

HCRJ, 5-Justice Panel, Judgment #1 of 14 January 2019

2. Comparative analysis between the disciplinary violations stipulated by Art. 99 letter m) and Art. 99 letter g) in Law #303/2004. Distinction between the act that has a regulatory character (law or regulation) and the act that has an individual character (order in writing issued by the hierarchically superior prosecutor).

Law #303/2004, Art. 99 letter g) and letter m)

Art. 99 letter g) and m) in Law #303/2004:

"Art. 99. – The following shall constitute disciplinary violations:

g) noncompliance by a prosecutor with the orders of the hierarchically superior prosecutor, issued in writing and in observance of the law;

m) unjustified noncompliance with administrative orders or decisions issued under the law by the manager of the court or prosecutor's office, or with other obligations with an administrative character stipulated in laws or regulations."

The violation described at Art. 99 letter g) in Law #303/2004 involves the existence of an order in writing issued by the hierarchically superior prosecutor, by virtue of the principle of hierarchical subordination, without a distinction being made whether the order concerns administrative or judicial matters, while the violation described at Art. 99 letter m) second thesis involves the existence of legal and regulatory stipulations that establish obligations of an administrative character for prosecutors.

In other words the difference between the two disciplinary violations also resides in the fact that the violation under letter g) involves the hypothesis of a refusal to comply with an order by the hierarchically superior prosecutor, given in writing and in compliance with the law, while the violation under letter m) second thesis involves the hypothesis of unjustified non-compliance with an administrative obligation, required under an act with a regulatory character such as a law or a regulation. Thus the distinction that needs to be made between the two violations is equivalent to the distinction between the act that has a regulatory character (law or regulation) and the act that has an individual character (order in writing issued by the hierarchically superior prosecutor). In the same sense the violation under letter g) involves the existence of a relationship of direct subordination between the prosecutor who issues the order in writing and the prosecutor who receives the order, while the violation under letter m) second thesis involves the existence of a relationship of compliance of the prosecutor's professional conduct with administrative obligations established by legal requirements of a general and impersonal character contained in a law or regulation.

HCRJ, 5-Justice Panel, Judgment #69 of 18 March 2019

3. Judge. Calling a case approximately one hour later than the scheduled time on the session list.

Law #303/2004, Art. 99 letter m)
Rules of Operation for Courts of Law, Art. 89-90

In the circumstances of the case, in terms of the material element of the objective side of the disciplinary violation stipulated by Art. 99 letter m) in Law #303/2004, it was held against the judge that they called a case approximately one hour later than the scheduled time on the session list (at 16:00hrs instead of 15:00hrs).

The court found the constitutive elements were not met for the disciplinary violation, because while the action did violate the stipulations of Art. 89 and 90 in the Rules of Operation for Courts of Law, it did not have the seriousness required by law for causing disciplinary liability to apply, given the relatively small duration of the delay, the fact that the parties were not harmed because the case was continued for lack of complete

procedural elements, as well as the fact that it was singular, as no other similar situations were identified so this was an isolated situation in the judge's professional activity.

HCRJ, 5-Justice Panel, Judgment #242 din 4 November 2019

4. Prosecutor. Delegating a prosecutor to represent the prosecutor's office in an administrative litigation case whose object is an order to remove a prosecutor from office.

Constitution of Romania, Art. 131 para. (1)
Civ.Proc.C, Art. 92 para. (2)
Law #303/2004, Art. 99 letter g) and letter m) second thesis
Law #304/2004, Art. 10 para. (3), Art. 62 para. (2)
Order by the Prosecutor General of the Prosecutor's Office Attached to the High Court of Review and Justice #62/2016, Appendix #3, Art. 5 para. (1) and (2), Art. 6 para. (1) and (2), Art. 7 para. (1) and (2), letter C item 10

A. *The disciplinary violation stipulated by Art. 99 letter m) second thesis in Law #303/2004 involves: (i) the existence of an obligation with an administrative character mandated by law or regulations for the magistrate; (ii) the magistrate's noncompliance with that obligation; (iii) the noncompliance must be unjustified.*

The objective side of this disciplinary violation consists of either action or inaction that run counter to the obligation mandated by law or regulations, as long as the noncompliant conduct does not constitute the objective side of another, special disciplinary violation regulated by Art. 99 in the Law. This point needs to be made because, for instance, violating the legal stipulations concerning incompatibilities and prohibitions also constitutes a form on noncompliance with an obligation mandated by law, but such action will be examined in terms of the violation described by Art. 99 letter b) in the Law and not in terms of the violation described by Art. 99 letter m) second thesis in the Law.

On the subjective side the specificity of this violation is given by the fact that noncompliance with an obligation with an administrative character mandated by law or regulations is unjustified. The existence of an unjustified character of the noncompliant conduct is examined in terms of the concrete circumstances of the factual situation.

In this case and as part of the disciplinary violation the court examined the actions of the hierarchically superior prosecutor consisting of delegating a prosecutor to represent the prosecutor's office in a civil litigation – which was about suspending enforcement of the order to remove a prosecutor from office – and the actions of the prosecutor who was delegated to represent the prosecutor's office in such a case in court.

The actions under examination constitute noncompliance with the stipulations in the law and regulations that establish how a prosecutor's office is to be represented in civil litigations, and the responsibilities of the prosecutor and of the legal advisor because that litigation is not part of the category of civil cases that should be attended by a prosecutor as under Art. 5 para. (1) and (2), Art. 6 para. (1) and (2), Art. 7 para. (1) and (2) and letter C

item 10 in Appendix #3 to the Order by the Prosecutor General of the Prosecutor's Office Attached to the High Court of Review and Justice #62/2016.

According to Art. 131 para. (1) in the Constitution of Romania, Art. 92 para. (2) Civ.Proc.C, Art. 10 para. (3) in Law #303/2004 and Art. 62 para. (2) in Law #304/2004, in definitions of the role of the Public Ministry, the prosecutor shall take part in civil cases as a representative of the State in order to protect the lawful order and/or the rights and interests of the citizenry, in a position preeminent in relation to that of the other parties in the case, which is justified by the preeminence of the public interests protected – the lawful order and/or the rights and interests of the citizenry – over the private, individual interests pursued by the parties in the civil dispute. However, an administrative litigation – whose object is suspending enforcement of the order to remove a prosecutor from office – does not involve elements that have to do with the lawful order and/or the rights and interests of the citizenry that would justify the presence of a prosecutor as a representative of the Public Ministry, alongside the parties in the dispute. In such cases representation of the prosecutor's office is provided by the legal advisor in the exercise of their responsibilities as under the In-House Rules of the NAD.

***B.** The disciplinary violation stipulated by Art. 99 letter g) in Law #303/2004 requires the existence of an order in writing issued by the hierarchically superior prosecutor, by virtue of the principle of hierarchical subordination, without a distinction being made whether the order concerns administrative or judicial matters, while the violation described at Art. 99 letter m) second thesis involves the existence of legal and regulatory stipulations that establish obligations of an administrative character for prosecutors.*

However, the difference between the two disciplinary violations also resides in the fact that the violation under letter g) involves the hypothesis of a refusal to comply with an order by the hierarchically superior prosecutor, given in writing and in compliance with the law, while the violation under letter m) second thesis involves the hypothesis of unjustified non-compliance with an administrative obligation, required under an act with a regulatory character such as a law or a regulation. Thus the distinction that needs to be made between the two violations is equivalent to the distinction between the act that has a regulatory character (law or regulation) and the act that has an individual character (order in writing issued by the hierarchically superior prosecutor). In the same sense the violation under letter g) involves the existence of a relationship of direct subordination between the prosecutor who issues the order in writing and the prosecutor who receives the order, while the violation under letter m) second thesis involves the existence of a relationship of compliance of the prosecutor's professional conduct with administrative obligations established by legal requirements of a general and impersonal character contained in a law or regulation.

Consequently, in the case brought against the prosecutor for having committed the disciplinary violation stipulated by Art. 99 letter m) second thesis in Law #303/2004, unjustified noncompliance with an obligation of a regulatory character applicable at the level of the Public Ministry, the regulatory thesis in Art. 99 letter g) in the law is not applicable in terms of noncompliance with a direct order issued by the hierarchically superior prosecutor.

HCRJ, 5-Justice Panel, Judgment #69 of 18 March 2019

5. Prosecutor. Exercise of supervision of the work of subordinate prosecutors by a judge holding the position of advisor to the chief prosecutor.

Law #303/2004, Art. 99 letter m) second thesis
Law #304/2004, Art. 65 para. (3)
In-House Rules of the NAD, Art. 7 letter s)

In terms of the disciplinary violation stipulated by Art. 99 letter m) second thesis in Law #303/2004, the chief prosecutor of the NAD was held responsible for violating the stipulations of Art. 65 para. (3) in Law #304/2004 and Art. 7 letter s) in the In-House Rules of the NAD. According to those stipulations they are under an obligation of an administrative character to exercise supervision over the work of subordinated prosecutors, either directly or through the agency of specially appointed prosecutors. Failure to comply with those stipulations was described in the disciplinary action as having ordered supervision over the work of prosecutors working in various territorial offices to be exercised by a judge, not a prosecutor, a judge who held the position of advisor to the chief prosecutor of the NAD.

For the existence of a disciplinary violation it must be established not only that unlawful actions or inactions were undertaken but also that consequences were caused.

Though the circumstances of the case do show failure to comply with those stipulations, as the material element of the objective side of the disciplinary violation, the requirement is not met concerning the immediate consequences of the unlawful conduct, since the activity performed by the appointed judge in the exercise of their position as advisor to the chief prosecutor of the NAD does not constitute part of the activity of supervising prosecutors subordinated to the chief prosecutor.

HCRJ, 5-Justice Panel, Judgment #75 of 25 March 2019

6. Prosecutor. Failure to comply with an Order by the Prosecutor General of the Prosecutor's Office Attached to the Court of Appeals concerning reporting via hierarchical channels of the status of cases older than 6 months.

Constitution of Romania, Art. 132 para. (1)
Law #303/2004, Art. 99 letter m), Art. 100 letter a)
Law #304/2004, Art. 64 para. (1), Art. 65 para. (1) şi (2), Art. 92 para. (3)
Rules of Operation for Prosecutor's Offices[1], Art. 77 para. (1) letter a)

[1] The In-House Rules of the prosecutors' offices as approved under Order by the Minister of Justice #2.632/C/2014, published in the Official Journal of Romania, Part I, issue #623bis of 26 August 2014, was replaced by the In-House Rules of the prosecutors' offices as approved under Decision by the Chamber of Prosecutors of the HCM #947/2019, published in the Official Journal of Romania, Part I, issue #1004bis of 13 December 2019.

The prosecutor was held responsible for violating the disciplinary violation stipulated by Art. 99 letter m) in Law #303/2004 consisting of failure to comply with an Order by the Prosecutor General of the Prosecutor's Office Attached to the Court of Appeals, because they failed to report via hierarchical channels on the status of cases older than 6 months of the date the prosecutorial reports were filed for dismissal, dropping charges or commencing investigation and prosecution.

Given the stipulations of Art. 132 para. (1) in the Constitution of Romania and Art. 65 para. (1) and (2) in Law #304/2004, the essence of the principle of hierarchical supervision consists on the one hand of the exercise by prosecutors holding managerial positions of a supervision of the acts, steps and solutions adopted by subordinated prosecutors and, on the other hand, of the exercise of a supervision of an administrative type.

Under Art. 92 para. (3) in Law #304/2004 and Art. 77 para. (1) letter a) in the Rules of Operation for Prosecutor's Offices, the chief prosecutors of prosecutor's offices attached to Courts of Appeals and the prosecutors-general of the prosecutor's offices attached to Tribunals have general supervision authority over the prosecutor's offices in their jurisdiction in terms of "administration."

The pyramid structure of the Public Ministry, established under Art. 65 in Law #304/2004 translates, in the scope of administrative-type decisions, in an obligation to comply with orders issued by hierarchical superiors as follows: ***(i)*** *internal orders issued by the Prosecutor General of the Prosecutor's Office Attached to the High Court of Review and Justice, in the exercise of their managerial, supervision and oversight responsibilities as the head of the Public Ministry, are mandatory for all prosecutor's offices irrespective of the hierarchical level they are situated on;* ***(ii)*** *orders issued by the prosecutors-general and chief prosecutors of the prosecutor's offices attached to Tribunals in the exercise of their managerial, supervision and oversight responsibilities are mandatory for prosecutor's offices in their area of jurisdiction;* ***(iii)*** *orders in writing issued by the manager of the prosecutor's office in observance of the law are mandatory for prosecutors under their authority;* ***(iv)*** *orders issued in writing and in observance of the law by the manager of the hierarchically superior prosecutor's office are mandatory for the head of the hierarchically inferior prosecutor's office.*

Given the imperative stipulations of Art. 64 para. (1), Art. 65 para. (1) and (2) and Art. 92 para. (3) in Law #304/2004, compliance with orders issued by the prosecutor general in the exercise of their managerial, supervision and oversight responsibilities, issued in writing and in observance of the law, are mandatory for prosecutor's offices in their area of jurisdiction and constitute an official work obligation.

Based on Art. 100 letter a) in Law #303/2004, the disciplinary sanction was ordered consisting of a "warning."

HCRJ, 5-Justice Panel, Judgment #1 of 14 January 2019

7. Prosecutor. Failure to comply with the stipulations of Art. 62 para. (1) in the Rules for Inspection Work.

Art. 99 letter m) second thesis in Law #303/2004

In the case brought before it the court found the constitutive elements of the disciplinary violation stipulated by Art. 99 letter m) second thesis in Law #303/2004 were not satisfied.

The prosecutor, who at the time was a Judicial Inspector with the Judicial Inspection, is charged with violations of Art. 62 para. (1) in the Rules for Inspection Work, having committed the following actions: (i) they sent an official letter to the prosecutor's office that was going to be inspected, without consulting with the members of the inspection team and without the letter having been sanctioned by the head of the Department of Judicial Inspection for prosecutors; (ii) traveled on their own initiative to the prosecutor's office that was going to be inspected, following a telephone conversation with the head of that prosecutor's office and using the official vehicle made available by the head of that prosecutor's office, without consulting with the members of the inspection team and without announcing this to the management of the Judicial Inspection.

Under Art. 62 para. (1) in the Rules for Inspection Work, "In order to perform an inspection, the designated team of judicial inspectors shall require that the court/prosecutor's office about to be inspected communicate data and information needed for the object of that inspection, via an official letter sanctioned by the head of that respective Judicial Inspection Department."

In the circumstances of the case the court found that the actions committed are part of the material element of the objective side of a disciplinary violation.

In terms of the subjective side, though, the evidence that was brought does not reflect the fact that the prosecutor held the unjustified and deliberate intent to violate the legal requirements that regulate the obligations incumbent upon them in the exercise of their work responsibilities, because of the following aspects: ***(i)*** *the order of the Chief Inspector of the Judicial Inspection, which established the goals of the inspection, the membership of the inspection team, the time frame for the inspection, the period of time the inspection was going to target, the structure of the inspection report, etc., was countersigned by the Director of the Department of Judicial Inspection for prosecutors, who therefore had knowledge of the contents of that document;* ***(ii)*** *the official letter sent by the prosecutor as head of the inspection team, without it being sanctioned by the head of the respective Department of Judicial Inspection, to the prosecutor's office that was going to be inspected, contains the request that appropriate steps be taken to make available to the judicial inspectors the records/documents that had been indicated in the goals of the inspection, as per the order of the Chief Inspector of the Judicial Inspection;* ***(iii)*** *as long as the aspects to be inspected as described in the official letter corresponds to the goals of the inspection in the aforementioned order, which was known to the Director of the Department of Judicial Inspection for prosecutors, the court cannot find ill-faith and intent of the prosecutor to disobey the aforementioned orders;* ***(iv)*** *the conduct of the prosecutor is justified by the fact that the period between the issuance of the order (3 July 2017) and the date the inspection was to commence (17 July 2017) was very short, especially as July is the month allocated for the judicial vacation and part of the personnel was on official vacation, so they decided to get organized quickly in terms of securing the documentation needed for the inspection;* ***(v)*** *when they traveled in person to the prosecutor's office, on*

the day of issuance of the order (3 July 2017), the prosecutor handed the head of that prosecutor's office an original copy of the order, then a second copy of the order taken under signature and attached to the Judicial Inspection report, and had discussions about the object of the inspection; ***(vi)*** *quickly transmitting information of the existence of the inspection order is of a nature to streamline the inspection work by having the documentation required by the team already available.*

HCRJ, 5-Justice Panel, Judgment #91 of 15 April 2019

8. Prosecutor. Delay in assigning cases by the chief prosecutor.

Law #303/2004, Art. 99 letter m)
Rules of Operation for Prosecutor's Offices[2], Art. 127 para. (4) and (5), Art. 173

In the circumstances of the case the court found the constitutive elements of the disciplinary violation stipulated by Art. 99 letter m) in Law #303/2004 were satisfied, because: ***(i)*** *the chief prosecutor established a working pattern for themselves that runs counter to the stipulations of Art. 127 para. (4) and (5) in the Rules of Operation for Prosecutor's Offices, and as such repeatedly assigned cases for work after a very long time since their registration;* ***(ii)*** *in violation of Art. 173 in the Rules of Operation for Prosecutor's Offices, the chief prosecutor did not fill in the Record Ledger of the prosecutors' cases and works.*

The chief prosecutor received the disciplinary sanction "warning" for the commission of the disciplinary violations stipulated by Art. 99 letter h), letter g) and letter m) in Law #303/2004.

HCRJ, 5-Justice Panel, Judgment #92 of 15 April 2019

9. Prosecutor. Destruction of data obtained from electronic surveillance

Law #303/2004, Art. 4 para. (1), Art. 99 letter m) second thesis
In-House Rules of the NAD, Art. 81 para. (2) letter a)

For the disciplinary violation stipulated by Art. 99 letter m) second thesis in Law #303/2004, to exist in terms of its objective side the prosecutor must have been under an obligation of administrative character stipulated by law or in the in-house Rules of operation and must have failed to comply with said obligation, an in terms of the subjective side it is necessary for the failure to comply to have been unjustified.

[2] The In-House Rules of the prosecutors' offices as approved under Order by the Minister of Justice #2.632/C/2014, published in the Official Journal of Romania, Part I, issue #623bis of 26 August 2014, was replaced by the In-House Rules of the prosecutors' offices as approved under Decision by the Chamber of Prosecutors of the HCM #947/2019, published in the Official Journal of Romania, Part I, issue #1004bis of 13 December 2019.

Art. 4 para. (1) of Title I “General Stipulations” – Chapter I – “Notions and Principles” in Law #303/2004 is about the precedence of the law, of the rights and liberties of individuals and their being equal before the law, ensuring non-discriminating legal treatment for all participants in legal proceedings irrespective of their capacity, and Title IX “Responsibilities of the Personnel of the National Anticorruption Department” – Chapter I “Responsibilities of the prosecutors and military prosecutors” – Art. 81 para. (2) letter a) in the In-House Rules of the NAD states that among the responsibilities of the prosecutors and military prosecutors at the NAD is also to ensure, through their activities, observance of the law and the independence of the judicial authority.

These legal stipulations do not contain requirements concerning the administrative procedure to follow in case of enforcement of a judicial decision that orders destruction of data obtained from electronic surveillance but, as results for the very name associated with the chapters, instead contains principles of a general character concerning the way the magistrates should do their work.

So the aforementioned texts do not make it mandatory for a prosecutor to perform certain administrative actions, non-compliance with which could entail applicability of the disciplinary violation stipulated by Art. 99 letter m) second thesis in Law #303/2004.

The destruction order issued in the decision of 17 October 2017 returned by the High Court of Review and Justice – Criminal Chamber is not the equivalent of an administrative obligation as defined by Art. 99 letter m) second thesis in Law #303/2004, especially as the enforcement was performed as a result of the prosecutor’s own work, by having sent the request for its communication on 14 March 2018. Between the moment it was received and the date the operation was completed there was a delay of 13 days, which is reasonable given the complexity of the steps needed to carry out the orders in the Judgment, which means that the magistrate’s liability cannot be sustained on subjective side either.

In the absence of a legal text that would stipulate the procedure to follow so as to achieve destruction of evidence recorded on optical media and, implicitly, of a deadline for completion of such procedure – so much the more so as the High Court of Review and Justice held that “the lawmaker must also regulate a procedure for the preservation and/or destruction of data obtained from electronic surveillance when the challenged measure is enforced” – the prosecutor cannot be held responsible. In analyzing such fault the court also considered the stipulations in the Constitutional Court’s Decision #244/2017, which also noted the absence of a procedure for the destruction of evidence.

HCRJ, 5-Justice Panel, Judgment #110 of 13 May 2019

Art. 99 letter ș) Law #303/2004: **“disregard for decisions returned by the Constitutional Court or by the High Court of Review and Justice in disposing of appeals in the interest of the law.”**

1. Judge. Disregard for the obligatory effect of the considerations in the Decision by the Constitutional Court and the Judgment returned by the High Court of Review and Justice in disposing of an appeal in the interest of the law.

Law #303/2004, Art. 99 letter ș)
Constitutional Court Decisions #732/2014 and #735/2016
Judgment # 6/2016, HCRJ – Panel for Appeals in the Interest of the Law
Decision #24/2015, HCRJ – Panel for the Clarification of Certain Points of Law

The disciplinary action charges brought against the judge for the disciplinary violation stipulated by Art. 99 letter ș) in Law #303/2004, namely disregarding the obligatory effect of the considerations in the Constitutional Court Decision #732/2014[3] *and Judgment #6/2016*[4] *of the High Court of Review and Justice – Panel for Appeals in the Interest of the Law.*

Constitutional Court Decision #732/2014 found that the phrase "at the time of collection of the biological samples" in the contents of Art. 336 para. (1) in the Criminal Code was unconstitutional. As results from the orders in the Decision and the considerations at items 24, 25 and 27, the Constitutional Court found the phrase "at the time of collection of the biological samples" in the contents of Art. 336 para. (1) in the Criminal Code was unconstitutional because the avenue of bringing charges by attaching criminal relevance to blood alcohol concentration present at the time the biological samples are collected does not allow the targets of the criminalization text to have a clear representation of the objective and subjective constitutive elements of the criminal violation and thus be able to foresee the consequences arising from violation of the rule and to adjust their behavior accordingly.

For it to have been a disciplinary violation in the form described by Art. 99 letter ş) in Law #303/2004, the actions should have consisted of returning a judgment on the charges brought under Art. 336 para. (1) in the Criminal Code that would have run counter to Constitutional Court Decision #732/2014 and considered the blood alcohol concentration present at the time the biological samples were collected.

In this case however the court does not see evidence of disregard for Judgment #24/2015 by the High Court of Review and Justice – Panel for Appeals in the Interest of the Law[5] *or for Constitutional Court Decision #735/2016*[6]*, because both judgments denied the*

[3] Constitutional Court Decision #732/2014, which reads: I. By a majority of votes the Court sustains the unconstitutionality motion raised ex officio by the Court of Appeals of Oradea – Chamber for Criminal Matters and Juvenile Cases in its Case #984/255/P/2012 and finds the phrase "at the time of collection of the biological samples" in the contents of Art. 336 para. (1) in the Criminal Code is unconstitutional. II. By unanimous vote denies as inadmissible the unconstitutionality motion concerning the stipulations of Art. 336 para. (3) in the Criminal Code, a motion filed ex officio by the same court on the same case.

[4] Judgment #6/2016 by The High Court of Review and Justice – Panel for Appeals in the Interest of the Law denied as inadmissible the appeal in the interest of the law filed by the Collegiate Management of the Military Court of Appeals concerning "establishing the extent of the effects of Constitutional Court Decision #732 of 16 December 2014, after its publication in the Official Journal of Romania, in regards to the violation of driving a vehicle on public roads while under the influence of alcohol or other substances as described by Art. 336 para. (1) in the Criminal Code."

[5] Judgment #24/2015 returned by the High Court of Review and Justice – Panel for the Clarification of Certain Points of Law denied as inadmissible the request filed by the Court of Appeals of Ploiești – Chamber for Criminal Matters and Juvenile and Family Cases in its Resolution of 24 June 2015 in Case #156/315/2015, concerning a preliminary ruling in regards to "the constitutive content of the criminal violation under Art. 336 para. (1) Criminal Code."

complaints filed as inadmissible, as the two courts found that the interpretation and application of those legal stipulations was the exclusive prerogative of the sitting magistrate.

This being the situation, the fact that the magistrates under disciplinary charges returned judgments to find that the criminal violation stipulated by Art. 336 para. (1) in the Criminal Code was not decriminalized by the effect of publication of the Constitutional Court Decision #732/2014, and then went on to return other judgments where they found the opposite, does not constitute the disciplinary violation under Art. 99 letter ş) in Law #303/2004 but is the result of their own legal reasoning arising from examining the evidence and the applicable law, an activity which represents the normal exercise of a judge's position and results in a judgment in the case, which is subsequently subject to challenge only in the way stipulated by law, in the form of the avenues of appeal; otherwise there would be harm brought to the principle of judicial independence as established in Art. 124 para. (3) in the Constitution of Romania.

Nor does looking at Judgment # 6/2016 of the High Court of Review and Justice – Panel for Appeals in the Interest of the Law show the commission of the disciplinary violation at Art. 99 letter ş) in Law #303/2004 because that Judgment in fact denied as inadmissible the appeal in the interest of the law concerning the extent of the effects of Constitutional Court Decision #732/2014 and stated that the Decision had not provided a clarification solution to a point of law under analysis that could become mandatory for courts of law as under Art. 474 para. (4) in the Criminal Procedure Code.

HCRJ, 5-Justice Panel, Judgment #76 of 25 March 2019

2. Prosecutor. Constitutional Court Decision that instates an obligation for the magistrate.

Law #303/2004, Art. 99 letter ș)
Constitutional Court Decision #611/2017

In its Decision # 611/2017 the Constitutional Court stated the following:

"1. The Court finds the existence of a legal conflict of a constitutional nature between the Parliament of Romania, on the one hand, and the Public Ministry – Prosecutor's Office Attached to the High Court of Review and Justice, on the other hand, generated by the refusal of the chief prosecutor of the NAD to report before the Special Investigation Committee of the Senate and Chamber of Deputies to clarify aspects related to the organization of the 2009 elections and the result of the Presidential elections.

2. Finds that Mrs. A. was under an obligation to report before the Special Investigation Committee of the Senate and Chamber of Deputies to clarify aspects related to the organization of the 2009 elections and the result of the Presidential elections, and

[6] Constitutional Court Decision #735/2015 which denied as inadmissible the motion of unconstitutionality raised in Case #3.287/211/2016 of the Cluj-Napoca District Court – Criminal Chamber and found that the stipulations of Art. 336 para. (1) in the Criminal Code and Art. 15 para. (2) in Law #187/2012 on the Implementation of Law #286/2009 on the Criminal Code were constitutional in regards to the criticism in the motion.

provide the required information or make available the other documents or items of evidence in her possession and needed for the Committee's work.

3. Finds there is no legal conflict of a constitutional nature between the Parliament of Romania, on the one hand, and the Public Ministry – Prosecutor's Office Attached to the High Court of Review and Justice, on the other hand, generated by the refusal of the Prosecutor General of the Prosecutor's Office Attached to the High Court of Review and Justice to exercise disciplinary action against the chief prosecutor of the NAD for failure to report before the Special Investigation Committee of the Senate and Chamber of Deputies to clarify aspects related to the organization of the 2009 elections and the result of the Presidential elections and the refusal of the Prosecutor's Office Attached to the High Court of Review and Justice to send the Special Investigation Committee a copy of the criminal case which was under work at that prosecutor's office."

By considering the operative part of the Constitutional Court Decision as well as its considerations – including paragraph 138 which is in fact only an anticipation of the operative part – the magistrate subject to said operative part fulfilled the obligation given them and replied in writing to the request sent by the parliamentary investigation committee, letting them know that she "does not possess information and/or documents needed for a clarification of the circumstances and causes for the events under investigation by the parliamentary committee."

For an existence of the disciplinary violation stipulated by Art. 99 letter ş) in Law #303/2004 it is necessary that the magistrate ignore, deliberately fail to comply with the decision returned by the court for constitutional litigations.

In terms of the subjective side the magistrate did not try to ignore the Constitutional Court Decision. On the contrary, both the operative part and the considerations of that Decision formed the magistrate's belief that the obligation established in their regard was an alternative one, and the choice of complying with it in the form of a written reply was perfectly legitimate, and for this reason there is no form of fault, and no intent either.

Even if the Constitutional Court Decision were to be interpreted in the meaning that the obligation ordered to the magistrate was unequivocal and demanded that she report before the parliamentary committee, in terms of the subjective side the disciplinary violation stipulated by Art. 99 letter ş) in Law #303/2004 speaks of failure to comply with Decisions (returned by the Constitutional Court or the High Court of Review and Justice in ruling on appeals in the interest of the law) that concern the judicial activity performed by judges and prosecutors.

HCRJ, 5-Justice Panel, Judgment #78 of 25 March 2019

Art. 99 letter t) Law #303/2004: "exercise of position in ill-faith or with grave negligence."

1. Judge. Refusal to sign the resolution for postponement of verdict.

Law #303/2004, Art. 99 letter t) first thesis, Art. 100 letter b)

The action of a judge who knowingly refuses to sign a resolution for postponement of verdict even though they were part of the deliberations on the appeal on law and deliberations together with the other members of the panel, thus violating Art. 147, Art. 256 para. 1, Art. 258 and Art. 261 para. 1 item 8 Civ.Proc.C 1865, satisfies the constitutive elements of the disciplinary violation stipulated by Art. 99 letter t) first thesis in Law #303/2004

Based on Art. 100 letter b) in Law #303/2004, the judge received the disciplinary sanction consisting of "decrease the pre-tax monthly stipend for the position by 10% for a period of 3 months" for the disciplinary violations stipulated by Art. 99 letter c) and t) first thesis corroborated with Art. 99[1] in the same Law.

HCRJ, 5-Justice Panel, Judgment #242 of 4 November 2019

2. Prosecutor. Destruction of evidence obtained from electronic surveillance warrant.

Law #303/2004, Art. 99 letter t) first thesis, Art. 99[1] para. (1)

*The facts brought in the disciplinary action analysis contains the following elements: **(i)** the High Court of Review and Justice – Criminal Chamber returned the Resolution of 17 October 2017 under which, in applying Constitutional Court Decision #244 of 6 April 2017, it also ordered "destruction of evidence obtained as part of a warrant to perform electronic surveillance" in the case of two plaintiffs without establishing a deadline for compliance with said order; **(ii)** the prosecutor, having learned of the Resolution from the ECRIS application, requested the High Court of Review and Justice on 14 March 2018 for a copy of that Resolution and a copy was sent to that prosecutor's office on 19 March 2018; within 4 days of receiving it the prosecutor issued an order to enforce the Resolution and the activity was completed on 27 March 2018.*

Looking at the evidence in the case the court cannot identify elements of a nature that would lead to the conclusion that the prosecutor took steps that were outside any procedural regulations, that they made a mistake for which a reasonable observer could not find a justification or that they engaged in a deliberate distortion of the law in order to cause harm, thus demonstrating lack of honesty in the exercise of their profession.

Consequently, the court found the constitutive elements were not satisfied for the disciplinary violation stipulated by Art. 99 letter t) first thesis corroborated with Art. 99[1] para. (1) in Law #303/2004, because the prosecutor did comply with Art. 2 and 102 para. 2, 139 para. 4, 141 para. 6, 550 para. 1 and 552 para. 2 in the Criminal Procedure Code.

HCRJ, 5-Justice Panel, Judgment #110 of 13 May 2019

3. Prosecutor. Obligation to notify about electronic surveillance warrants. Prosecutor who is under the obligation regulated by Art. 145, Criminal Procedure Code

Law #303/2004, Art. 99 letter t) second thesis
Criminal Procedure Code, Art. 145 para. (1), (4) şi (5)

Art. 145 para. (1), (4) and (5) in the Criminal Procedure Code state that after cessation of an electronic surveillance warrant the prosecutor shall notify every target of an electronic surveillance warrant that such steps were taken in their regard, in writing, within no more than 10 days. [...] If providing sufficient justification the prosecutor can delay sending the notification or submitting the storage media with the recordings of electronic surveillance warrant activities, or the chain of custody records if such are of a nature that might lead to an alteration or endangering of the proper performance of the criminal investigation in the case (letter a), endangering the safety of the victim, witnesses or family members thereof (letter b), show difficulties in performing electronic surveillance of other persons involved in the case (letter c). The longest possible delay is until the end of the criminal investigation or the dropping of charges.

In the circumstances of the case the court found the constitutive elements were not satisfied for the disciplinary violation stipulated by Art. 99 letter t) second thesis in Law #303/2004, because:

***(i)** given the procedural measures quoted above in regards to steps in the electronic surveillance warrant, the prosecutor under disciplinary investigation responded to an applicant that he had ordered no such measures, though in reality they had been ordered in one criminal investigation and used in a different one;*

***(ii)** the disciplinary action charged violation of Art. 145 para. (4) and (5) in the Criminal Procedure Code, Art. 30 para. (1) letter o) in the In-House Rules of the NAD and items 56, 58, 59, 63, 67-68, 70-72 in the considerations of Constitutional Court Decision #244/2017;*

***(iii)** the case prosecutor who was under the obligations stated by Art. 145 para. (4) and (5) in the Criminal Procedure Code was no longer working with the prosecutor's office at the date the applications for information were filed;*

***(iv)** the applications were assigned for resolution to another prosecutor – who is the subject of the disciplinary procedure in the case brought before the court – who in turn assigned them to a police officer who had worked on the prosecutor's criminal investigation team. Thus, finding the documentation for a response to the applicant's requests became the task of the police officer who, having performed said task inadequately, also was subject to disciplinary action;*

***(v)** a transfer (from the case prosecutor to a different prosecutor) of the responsibility to notify as under Art. 145 in the Criminal Procedure Code could only have applied if it had been specifically regulated by law; therefore tasking a prosecutor different from the case prosecutor to deal with applications requesting information is not equivalent with the new prosecutor being subject to the same obligation to notify, so as to entail applicability of the relevant legal requirements;*

***(vi)** considering the above circumstances, the court found that the prosecutor relied on the good faith and competence of the criminal investigations police officer at the time of*

signing the responses to the applications and then subsequently rectified the error that had occurred from the inadequate performance of the task and issued a new response to the applicant.

HCRJ, 5-Justice Panel, Judgment #111 of 13 May 2019

II. STAGES OF THE DISCIPLINARY PROCEDURE

1. The stages of the disciplinary procedure: administrative stage, administrative-jurisdictional stage, court stage

Law #317/2004, Art. 45, 46, 49, Art. 51

According to Law #317/2004 and the Rules for Inspection Work, the procedure for disciplinary action concerning judges and prosecutors contains three stages:

(i) the administrative stage, performed by the Judicial Inspection and which contains two steps: the preliminary checks (Art. 45 in Law #317/2004, regulated in Section 1 of Chapter II in the Rules for Inspection Work) and the disciplinary investigation (Art. 46 in Law #317/2004 regulated in Section 2 of Chapter II in the Rules for Inspection Work);

(ii) the administrative-jurisdictional stage, which consists of the HCM Chambers ruling on the disciplinary action brought by the Judicial Inspection (Art. 49 in Law #317/2004);

(iii) the court stage, which consists of the 5-Justice Panel of the High Court of Review and Justice ruling in the avenues of appeal brought to challenge decisions returned by the HCM Chambers in disciplinary action against judges and prosecutors (Art. 51 in Law #317/2004).

HCRJ, 5-Justice Panel, Judgment #126 of 27 May 2019

III. DISCIPLINARY INVESTIGATION

1. Notifying the Judicial Inspection of aspects that have made the object of preliminary checks.

Rules for Inspection Work, Art. 17

By registering a notification ex officio and under a new number, in the circumstances where the same aspects had already made the object of a previous check that ended in a disciplinary action, Art. 17 in the Rules for Inspection Work was violated and thus the preliminary check procedure was nullified.

Failure by the Judicial Inspection, in the performance of its activities, to comply with those rules entails nullification of the work because of an infringement of applicable regulation and legal requirements, thus voiding the legal act thus completed of its intended

effects. The legal institution of nullification is not specific to the Civil Procedure Code alone, but exists for any civil legal act irrespective of its nature, including administrative acts.

HCRJ, 5-Justice Panel, Judgment #50 of 25 February 2019

2. Suspension of a magistrate from office until final resolution in disciplinary action

Law #317/2004, Art. 52 para. (1)

Ordering a magistrate to be suspended from office until the final resolution in a disciplinary action, under the procedure regulated by Art. 52 para. (1) in Law #317/2004, is possible throughout the length of the disciplinary investigation or action and not only after completion of the disciplinary action.

HCRJ, 5-Justice Panel, Judgment #62 din 4 March 2019

3. Preliminary checks. Deadline for dismissal.

Law #317/2004, Art. 45 para. (3)
Civ.Proc.C, Art. 185 para. (1)

The deadline stipulated by Art. 45 para. (3) in Law #317/2004 within which the preliminary checks must be completed is a legally imperative deadline, and failure to observe it entails dismissal of the work because the procedural act completed after the deadline becomes null as under Art. 185 para. (1) Civ.Proc.C.

Failure by the Judicial Inspection, in the performance of its activities, to comply with those rules entails nullification of the work because of an infringement of applicable regulation and legal requirements, thus voiding the legal act thus completed of its intended effects. The legal institution of nullification is not specific to the Civil Procedure Code alone, but exists for any civil legal act irrespective of its nature, including administrative acts.

HCRJ, 5-Justice Panel, Judgment #50 of 25 February 2019

IV. ADMINISTRATIVE-JURISDICTIONAL PROCEDURE

1. Resolution to exercise disciplinary action. Legal nature. Act developed on a non-working day. Penalty of nullification.

The resolution to start a disciplinary investigation is an administrative act, and has a double legal nature: on the one hand it is the act that finalizes the administrative disciplinary procedure, on the other it is the act that triggers application of disciplinary jurisdiction.

The resolution can be subject to nullification, and validation of the disciplinary action depends on the validity of this procedural act.

An administrative act developed on a non-working day legally declared as such is the equivalent of a non-existent act, so can only be found absolutely null.

Writing the resolution to start a disciplinary investigation on a non-working day reverses the presumption of lawfulness of such administrative act, is a violation of a legal requirement concerning an extrinsic condition required of such act, so the applicable penalty is absolute nullity of the resolution mentioned above.

The resolution to start a disciplinary investigation is the act whereby the action is brought before the disciplinary court, and its effects on the career of the judge in that case can only be removed by finding absolute nullity said resolution because it violates an imperative requirement that concerns a general interest, that of the operation of a public entity.

HCRJ, 5-Justice Panel, Judgment #154 of 3 June 2019

2. Civil Procedure Code. Compatibility between stipulations of the Civil Procedure Code and the procedure for trying disciplinary actions brought before the HCM.

2.1. Inapplicability of Art. 211 Civ.Proc.C in the administrative-jurisdictional procedure brought before the HCM. Quorum needed for the procedures before HCM as a disciplinary court.

Law #317/2004, Art. 27 para. (2), Art. 44-53, Art. 49 para. (7)
Civ.Proc.C, Art. 211

Art. 49 para. (7) in Law #317/2004 stipulates that the regulations put in place by law in the matter of trying disciplinary actions shall operate with the addition of regulations in the Civil Procedure Code, but the presence of reference to the Code does not automatically mean the stipulations of the Civil Procedure Code are always applicable.

Thus, the stipulations of Art. 211 Civ.Proc.C on the setting up of a court of law are not applicable to the disciplinary procedure taking place before the HCM as a disciplinary court.

According to the jurisprudence of the 5-Justice Panel, the proceedings of the HCM Chamber for Judges in disciplinary matters take place in compliance with Art. 27 para. (2) second thesis in Law #317/2004, "in the presence of majority of its members" (e.g. Judgments by the High Court of Review and Justice – 5-Justice Panel: #14/2017; #266/2017, item 64-66; #5/2018, item 41).

The arguments that support this interpretation are: (i) the stipulations of Art. 44-53 in Law #317/2004, which regulates the HCM's responsibilities in the matter of magistrates' disciplinary liability, do not contain any derogation from the rules in Art. 27 para. (2) in the Law; (ii) Art. 49 para. (7) in Law #317/2004 stipulates that the legal rules concerning the procedure in trying a disciplinary action shall operate with the addition of regulations in the Civil Procedure Code, but the presence of reference to the Code does not automatically

mean the stipulations of Art. 211 Civ.Proc.C, become applicable in the matter of the setting up of a court of law; (iii) the HCM Chambers, when operating as disciplinary courts for judges and prosecutors, are not courts of law as defined by Art. 126 para. (2) in the Constitution of Romania and Law #304/2004, but operate as extra-judicial courts that perform an administrative-jurisdictional activity and consequently constitute an administrative-jurisdictional body, as also held in the jurisprudence of the Constitutional Court (Decisions #148 din 16 April 2003 and #391 din 17 April 2007).

HCRJ, 5-Justice Panel, Judgment #62 of 4 March 2019, Judgment #71 of 18 March 2019

2.2. Applicability of Art. 413 para. (1) item 1 Civ.Proc.C to administrative-jurisdictional procedures before the HCM.

Civ.Proc.C, Art. 413 para. (1) item 1
Law #317/2004, Art. 46 para. (3), Art. 49 para. (5) and (7)

In the matter of disciplinary action trials, Art. 49 para. (7) in Law #317/2004 reads that "The stipulations in this Law that regulate the procedure for trying disciplinary action cases shall operate with the addition of regulations in Law #134/2010, as republished with subsequent amendments, insofar as the latter's stipulations are not incompatible with the former."

In the administrative-jurisdictional procedure before the disciplinary Chambers of the HCM, compatibility and consequently applicability of the stipulations in the Civil Procedure Code are examined based on the specific circumstances of each case, and the lawfulness and reliability of the interpretation provided by the disciplinary court can be challenged before a court of law, specifically the 5-Justice Panel of the HCRJ.

The stipulations of Art. 413 para. (1) item 1 Civ.Proc.C, according to which "The court can suspend the trial when clarification of the legal matters at hand depends, entirely or in part, on the existence or nonexistence of a right that makes the object of a different trial" are compatible with the administrative-jurisdictional procedure before the HCM as a disciplinary court.

The applicability of Art. 413 para. (1) item 1 Civ.Proc.C to the administrative-jurisdictional procedure before the HCM is not removed by the existence of the special stipulations of Art. 46 para. (3) and Art. 49 para. (5) in Law #317/2004, which read:

"Art. 46. – [...] (3) The disciplinary investigation shall be suspended when a criminal action is filed against the investigated judge or prosecutor on the same charges.

Art. 49. – [...] (5) The stipulations of Art. 46 para. (3) and (4) shall apply accordingly. Suspension shall be ordered by Resolution by the appropriate Chamber of the Higher Council of Magistrates."

It is noteworthy that the suspension situation regulated by the special law – Art. 46 para. (3) in Law #317/2004 – concerns the start of a criminal action on the same charges, which in the case brought before this Court does not exclude compatibility with the disciplinary procedure and applicability of Art. 413 para. (1) item 1 Civ.Proc.C, which

concerns a different legal hypothesis which in this case is about the influence the ruling to be returned in an administrative litigation will have on the verdict in the disciplinary action.

In support of the arguments brought in the case before this Court it is proper to also consider the fact that the absence of special stipulations Law #317/2004 concerning other situations where suspension is possible – other than that at Art. 46 para. (3) in the Law – allows the court the case has been brought before, by virtue of the referral rule under Art. 49 para. (7) in Law #317/2004, to examine and, as the case may be, find the existence of compatibility and apply other suspension hypotheses in the Civil Procedure Code.

In the circumstances of the case the HCM Chamber for Prosecutors in disciplinary matters ordered, based on Art. 413 para. (1) item 1 Civ.Proc.C, suspension of the trial on the disciplinary action until a final judgment was returned in the administrative litigation case brought to obtain cancellation of applicability of Art. 7 para. (3) in the Rules for Inspection Work, whose influence on the disciplinary dispute arises from the fact that one of the lines of defense used by the investigated magistrate relied on the unlawfulness of those stipulations.

HCRJ, 5-Justice Panel, Judgment #237 of 4 November 2019

2.3. Inapplicability of Art. 509-513 Civ.Proc.C to the administrative-jurisdictional procedure before the HCM.

Civ.Proc.C, Art. 509-513
Law #317/2004, Art. 51 para. (3)

Art. 509-513 Civ.Proc.C, which regulate the avenue of appeal of having judgments reviewed, are not applicable to Decisions returned by the HCM Disciplinary Chambers.

The motion for review is thus inadmissible as filed against the Decision returned by the HCM Chambers in the trial procedure for the disciplinary action.

The order to deny the motion for review as inadmissible, returned by the relevant HCM Chamber, is the result of the disciplinary court's verification of their own jurisdiction as under the Constitutional [Art. 126, Art. 133 para. (3) and Art. 134 para. (2)] and legal stipulations [Art. 510 para. (1) of the Civil Procedure Code, Art. 2 and 3 in Law #304/2004 and Art. 44 para. (1) and Art. 51 para. (3) in Law #317/2004] and do not constitute overstepping of their own power or a refusal to hold the trial, nor an overstepping of the powers of the judicial authority.

In order to challenge a Decision returned by the HCM in the exercise of its role as a disciplinary court the magistrate under disciplinary investigation has a guaranteed right of access to justice, using the avenues of appeal regulated by the domestic judicial system, specifically "appeal on law" as under Art. 51 para. (3) in Law #317/2004.

The right of access to justice does not involve the right of any individual to choose which court they wish to bring a case before, or the procedural avenue they wish to use so as to bring the legal action before a judge; the State is only under the obligation to make sure any person has the possibility to have their litigation brought before a judge, in the conditions stipulated by law.

HCRJ, 5-Justice Panel, Judgment #144 of 27 May 2019

3. Procedure before the HCM as a disciplinary court. Legal nature. Decision by the disciplinary court – administrative-jurisdictional act.

Constitution of Romania, Art. 126 para. (1)
Law #304/2004, Art. 2 para. (2)
Law #317/2004, Art. 44 para. (1)

The Decision returned by the HCM Chambers, when acting as a disciplinary court, and when acting as an extra-judicial court in an administrative-jurisdictional procedure, are administrative-jurisdictional acts and not court judgments in the sense regulated by the Civil Procedure Code, as resulting from the corroborated interpretation of Art. 126 para. (1) in the Constitution of Romania, Art. 2 para. (2) in Law #304/2004 and Art. 44 para. (1) in Law #317/2004 and as has been held in the jurisprudence of the Constitutional Court[7] and that of the High Court of Review and Justice[8].

The avenue of appeal of having a judgment reviewed as regulated by Art. 509-513 Civ.Proc.C can only be exercised to challenge a court judgment, and not an administrative-jurisdictional act.

HCRJ, 5-Justice Panel, Judgment #71 of 18 March 2019

4. HCM. Extra-judicial court, carrying out an administrative-jurisdictional activity.

Constitution of Romania, Art. 126 para. (1), Art. 134 para. (2)
Law #304/2004, Art. 2 para. (2)
Law #317/2004, Art. 44 para. (1)

When acting as a disciplinary court for judges and prosecutors, through the agency of its Chambers, the HCM is not a court of law in the meaning of Art. 2 in Law #304/2004.

In these terms the jurisprudence of both the Constitutional Court and the High Court of Review and Justice – 5-Justice Panel states that when acting as a disciplinary court for judges and prosecutors, the HCM is an extra-judicial court, and not a court of law in the meaning of Art. 126 para. (1) in the Constitution of Romania corroborated with Art. 2 para. (2) in Law #304/2004 on Judicial Reorganization as republished with subsequent amendments and supplements. (Constitutional Court Decisions #148/2003, #391/2007, #514/2007 and #788/2007; High Court of Review and Justice – 5-Justice Panel Judgments #266/2017, item 66; #271/2017, item 45; #293/2017, item 19; #5/2018, item 49 and #148/2018, item 19).

As results from the text of Art. 134 para. (2) in the Constitution of Romania, corroborated with Art. 44 para. (1) in Law #317/2004 as republished, in the matter of

[7] Decisions #148/2003, #391/2007, #514/2007, #788/2007

[8] Judgments returned by the 5-Justice Panel, #266/2017 (item 66), #271/2017 (item 45), #293/2017 (item 19) and #5/2018 (item 49).

disciplinary liability for magistrates, the HCM performs an activity with a jurisdictional character and acts as a disciplinary court situated outside the system of the judicial authority, the only one which in the current constitutional order can carry out justice in Romania.

The Constitutional Court has ruled in the same way, and in the abovementioned Decisions constantly defined the legal nature of the HCM without recognizing for it the status of a court of law as under Art. 126 para. (1) in the Constitution of Romania.

HCRJ, 5-Justice Panel, Judgment #25 of 4 February 2019

V. JUDICIAL PROCEDURE

1. CJEU. Request for preliminary ruling concerning interpretation of stipulations in domestic law.

Treaty on the Functioning of the European Union, Art. 267

Under Art. 267 in the Treaty on the Functioning of the European Union (formerly Art. 234 in the Treaty of the European Communities), the CJEU has jurisdiction to provide preliminary rulings on:

a) interpretation of the Treaties;

b) validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.

Paragraph 2 in the Article stipulates the possibility of a court in an EU Member State to request the CJEU to return a ruling if it considers that a decision on the question is necessary to enable it to give judgment, or if the question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal is under an obligation to bring the matter before the Court.

However, even in the case of courts against whose decisions there is no judicial remedy – such as in the situation here – they have authority to establish whether the questions are relevant for the ruling in their case, as well as the content of such questions. Therefore a simple request from the interested party to have a question sent to CJEU for a preliminary ruling does not automatically cause such question to be sent to the European Court, as the national court is free to assess the relevance of such request in the context of the case pending before it.

To request that the CJEU provides a preliminary ruling and an interpretation, the national court must justify its need for the interpretation of a stipulation in EU law. As such, that court needs to identify an issue with the interpretation of an EU law stipulation that requires intervention from the CJEU. Using the preliminary ruling procedure is only possible when the national court has doubts about the correct interpretation of EU law applicable in its case.

In the procedural avenue of the request for preliminary ruling, the CJEU establishes the meaning of the EU law stipulation, with the goal of having a uniform interpretation of EU law throughout the Union, while the actual application of that stipulation will belong exclusively to the national court. The question that a national court can send must concern matters strictly to do with interpretation, validity or application of EU law, and not aspects of national law or particular elements in the case pending before it.

When providing a ruling on the interpretation or validity of EU law, the CJEU tries to make it an answer that could be useful for the resolution of the main dispute, with the requesting court then having the task of establishing the concrete consequences of the CJEU's response and, if necessary, remove applicability of the domestic law in discussion.

In her motion for a preliminary ruling from the CJEU, the challenging party raises matters of domestic law, while the matters having to do with interpretation, validity or application of EU law are not relevant to the resolution of the dispute, situated in the extra-ordinary avenue of appeal called appeal on annulment and brought before this Court.

Therefore, since there is no issue in the interpretation of EU law applicable in this case that might warrant an intervention from the CJEU, the simple request from the appealing party to have questions sent to CJEU for a preliminary ruling cannot automatically lead to a suspension of the case and the sending of requests to the European court.

HCRJ, 5-Justice Panel, Judgment #73 of 18 March 2019

2. Decision by the HCM Chamber for Judges to suspend examination of the motion to release from office by way of retirement for the judge pending final verdict in disciplinary action. Material jurisdiction.

Law #304/2004, Art. 9
Law #554/2004, Art. 10 para. (3)

The Decision by the HCM Chamber for Judges to suspend examination of the motion to release from office by way of retirement for a judge, pending the final verdict in the disciplinary action, can be challenged before the Administrative Litigations Chamber of the jurisdictional Court of Appeals as under Art. 9 in Law #304/2004 corroborated with Art. 10 para. (3) in Law of Administrative Litigation #554/2004.

Such Decision is not part of the category of decisions in disciplinary cases by the HCM Chambers that can be challenged by appeal on law before the 5-Justice Panel of HCRJ, as under Art. 51 para. (3) in Law #317/204.

HCRJ, 5-Justice Panel, Judgment #82 of 1 April 2019

3. Appeal on annulment filed against decision returned in review procedure. Inadmissibility.

Constitution of Romania, Art. 129
Civ.Proc.C, Art. 7, Art. 457 para. (1), Art. 503 para. (2) and (3)

On the grounds stipulated at Art. 503 para. (2) and (3) Civ.Proc.C, the appeal on annulment is only admissible if brought to challenge judgments returned by courts for appeal on law or appellate courts that cannot be challenged by an appeal on law, and is not admissible if brought to challenge judgments returned in the review procedure.

Under Art. 129 in the Constitution of Romania, "Court judgments can be challenged by the interested parties and the Public Ministry as stipulated by law."

Under Art. 457 para. (1) in the Civil Procedure Code, "A court judgment is only subject to avenues of appeal stipulated by law, in the conditions and time frames established thereunder, irrespective of the mentions in its operative part."

Considering the principles provided by the above texts, admissibility of an avenue of appeal and, consequently, causing a judicial examination of the challenged judgment, is conditional on it being exercised in the circumstances stipulated by law.

Recognizing an avenue of appeal in situations other than those provided by procedural law constitutes a violation of the principle of lawfulness, specifically stipulated at Art. 7 of the Civil Procedure Code, as well as of the constitutional principle of equality before the law and authorities and, for those reasons, appears as an inadmissible alternative in the lawful order.

HCRJ, 5-Justice Panel, Judgment #61 of 4 March 2019; Judgment #73 of 18 March 2019

4. Appeal on annulment. Failure by the court for appeal on law to examine any of the grounds for reversal.

Civ.Proc.C, Art. 503 para. (2) item 3

Under Art. 503 para. (2) item 3 Civ.Proc.C:

"Art. 503. – […] (2) Judgments returned by courts for appeal on law can be challenged by appeal on annulment when: […]

3. the court for appeal on law, in denying the appeal on law or sustaining it only in part, failed to examine any of the grounds for reversal raised by the appellant within the legal deadline."

The appeal on annulment is an extra-ordinary avenue of appeal, which can only be exercised in the conditions and on the specifically limited grounds stipulated by law, without requiring an examination of the lawfulness or soundness of the judgment that was returned in the trial on the merits of that case.

In the case brought before this Court, the appeal on annulment challenges the court for appeal on law's failure to examine the ground for reversal provided by Art. 488 para. (1) item 5 Civ.Proc.C, in the meaning of a concrete and detailed presentation of the arguments in support of the finding that the disciplinary court complied with every one of the procedural stipulations raised in support of the grounds, namely Art. 14 para. (5) and (6), Art. 22 para. (4) and Art. 224 Civ.Proc.C.

The appellant's challenge does not demonstrate, in the meaning of the above quoted stipulations of Art. 503 para. (2) item 3 Civ.Proc.C, the hypothesis of the court for appeal on law's failure to examine the ground for reversal as raised by the appellant.

Examination of the judgment challenged by appeal on annulment shows that the court for appeal on law did examine the grounds for appeal on law under Art. 488 para. (1) item 5 Civ.Proc.C and did provide, in the considerations for the judgment it had returned, its arguments in finding that the challenges raised in support for the appeal on annulment were not acceptable.

Thus the court for appeal on law found that the facts, legal grounds and arguments considered by the disciplinary court had not been unrelated to the object of the charges or the object of the debates, and the defendant's line of defense used exactly those aspects, which were known to them and about which they could build their chosen defense. Under these circumstances the court for appeal on law found that none of the allegedly-violated principles (right to defense and principle of the right to be heard) had been ignored at the time of returning the Decision in the disciplinary action, with the defendant having been heard with their defense concerning the actions committed outside the exercise of their professional responsibilities.

On the other hand it is worth noting that the appellant's claim cannot be accepted that the stipulations they mentioned in support of the grounds for reversal under Art. 488 para. (1) item 5 Civ.Proc.C are, as defined by Art. 503 para. (2) item 3 Civ.Proc.C, distinct grounds for appeal on law because in terms of procedure the grounds for appeal on law are not equivalent to the criticism, arguments or legal stipulations raised in support of a claim.

As for the criticism raised in support of the appeal on annulment, namely that the court for appeal on law was under an obligation to examine and respond to the criticism formulated in the appellant's appeal on law, in a manner more detailed or in a meaning different from the one used in the justification of the judgment, it is edifying to look at the considerations provided by the European Court on Human Rights which held that the obligation for national courts, arising from Art. 6 paragraph 1 in the Convention, to provide justification for their decisions does not involve the existence of a detailed reply to each argument raised (judgments returned in the cases Perez v. France and Van der Hurk v. The Netherlands, of 19 April 1994), and the notion of fair trial involves that a domestic court has genuinely examined the essential issues brought before it, and not just simply taken up again the conclusions reached by a lower court (judgments returned in the cases Helle v. Finland, of 19 December 1997 and Albina v. Romania, of 28 April 2005). The Court finds that the Decision that makes the object of the appeal on annulment does meet the requirements established in the ECHR jurisprudence.

HCRJ, 5-Justice Panel, Judgment #208 of 7 October 2019

5. Suspension from office of the magistrate pending final Decision in disciplinary action. Challenge filed on grounds provided by Art. 52 para. (1^1) in Law #317/2004.

5.1. HCM. Absence of passive legal standing.

Law #317/2004, Art. 44, Art. 45, Art. 52 para. (1^1)

HCM does not have passive legal standing in the procedural framework of the challenge filed on grounds provided by Art. 52 para. (1^1) in Law #317/2004 against the decision of the disciplinary Chamber to suspend the defendant magistrate from office pending the final verdict in the disciplinary action, as under Art. 52 para. (1) in the Law.

Under Art. 44 and 45 in Law #317/2004 the Judicial Inspection has legal standing as bringer of the disciplinary action, and HCM with its Chambers has the role of a disciplinary court.

HCRJ, 5-Justice Panel, Judgment #62 din 4 March 2019

5.2. The object and the party entitled to file the challenge stipulated by Art. 52 para. (1^1) in Law #317/2004. Inadmissibility of the challenge filed by the Judicial Inspection against the Decision returned by the HCM which denies suspension from office of a magistrate pending the final verdict in a disciplinary action.

Law #317/2004, Art. 52 para. (1) and (1^1)

The stipulations of Art. 52 para. (1^1) in Law #317/2004, a paragraph added under Law #234/2018, are clear and imperative in regards to both the object of challenge it regulates and the party entitled to file it, stating explicitly that only "the decision to suspend from office" can be challenged and only "by the judge or prosecutor who is suspended from office."

From the way in which the lawmaker chose to comply with Constitutional Court Decision #774/2015 it results that the need to regulate an avenue of appeal only covered the situation where suspension from office was ordered, and not also the situation where such order was denied.

Recognizing an avenue of appeal in situations other than those provided by procedural law constitutes a violation of the principle of lawfulness, specifically stipulated at Art. 7 of the Civil Procedure Code, as well as of the constitutional principle of equality before the law and authorities and, for those reasons, appears as an inadmissible alternative in the lawful order.

The procedural rules regarding motions filed with courts of law and resolution of motions within the limits of jurisdiction established by law are matters of public order, as established by Art. 126 para. (2) in the Constitution of Romania, so failure to observe such rules is subject to nullification of a judgment returned in disregard thereof.

Under these circumstances the challenge is inadmissible as filed by the Judicial Inspection based Art. 52 para. (1^1) in Law #317/2004 against the Decision returned by the appropriate Chamber of the HCM whereby in the procedure put in place by Art. 52 para. (1)

in the law the suspension order is denied for the magistrate pending a verdict in the disciplinary action.

HCRJ, 5-Justice Panel, Judgment #108 of 6 May 2019

6. Decision by the HCM Chamber for Prosecutors ordering suspension from office of magistrate prosecuted on criminal charges. Avenue of appeal. Jurisdictional court.

Law #303/2004, Art. 62 para. (1^1)
Law #317/2004, Art. 29 para. (5) and (7), Art. 40 para. (2) letter l), Art. 52 para. (1) – (1^3)

In the Decision challenged by appeal on law before the 5-Justice Panel of the HCRJ, the HCM Chamber for Prosecutors had ordered suspension from office of the prosecutor as a result of the fact that said prosecutor was being prosecuted on criminal charges.

The order was issued on the following grounds:

- Art. 40 para. (2) letter l) in Law #317/2004: „Art. 40. – [...] (2) The Higher Council of Magistrates' Chamber for Prosecutors has the following responsibilities concerning the prosecutors' career: [...] l) can order prosecutors suspended from office."

- Art. 62 para. (1^1) in Law #303/2004: „Art. 62 – [...](1^1) The judge or prosecutor can also be suspended from office in case they are brought to court on criminal charges, if it is felt that given the circumstances of the case the prestige of the profession is being tarnished. Wherever it is felt that the judge or prosecutor can be maintained in office, it is possible that they be placed under a provisional ban from exercising certain responsibilities pending the final resolution of the case."

Such order can be challenged as under Art. 29 para. (7) and with reference to para. (5) in Law #317/2004, according to which the decisions returned by the Plenum concerning the career and rights of judges and prosecutors can be challenged by any interested party, within 15 days of their being communicated or published, before the Chamber for Administrative and Tax Litigations of the HCRJ.

In the situation in this case the procedure is not applicable of challenging the suspension order of the magistrate for the duration of the disciplinary procedure regulated by Art. 52 para. (1) – (1^3) in Law #317/2004, according to which:

"Art. 52. - (1) For the duration of the disciplinary procedure the appropriate Chamber of the Higher Council of Magistrates can, ex officio or on motion by the Judicial Inspector, order suspension from office of the magistrate pending the final resolution of the disciplinary action, if continued exercise of said office is of a nature that could impact the impartial operation of the disciplinary procedures or if the disciplinary issue is of a nature that might seriously tarnish the prestige of the judiciary. The suspension order is subject to reassessment at any time during the disciplinary action trial and until the appropriate Chamber returns its Decision.

(1^1) The order to suspend from office as under para. (1) can be challenged within 5 days of its communication, by the suspended judge or prosecutor. Jurisdiction to try the

challenge rests with the 5-Justice Panel of the High Court of Review and Justice, which cannot contain voting members of the Higher Council of Magistrates.

(1^2) The challenge is to be tried in emergency procedure and with priority, and the trial does not suspend enforcement of the Decision of the Higher Council of Magistrates. The Judgment returned by HCRJ is final.

(1^3) Pending resolution of the challenge the court can, on demand, suspend enforcement of the Decision."

HCRJ, 5-Justice Panel, Judgment #44 of 25 February 2019

7. Motion of unconstitutionality of Art. 51 para. (3) in Law #317/2004 raised as part of appeal on law before the 5-Justice Panel. Inadmissibility.

Civ.Proc.C, Art. 483 para. (1) final thesis
Law #317/2004, Art. 51 para. (3)
Law #47/1992, Art. 29 para. (1)

In the case before the 5-Justice Panel brought as an appeal on law based on Art. 51 para. (3) in Law #317/2004 against the Decision returned by one of the HCM Chambers in disposing of a disciplinary action, a motion of unconstitutionality was raised concerning Art. 51 para. (3) in Law #317/2004 and Art. 483 para. (1) final thesis Civ.Proc.C, and the claim was that since the Judgment of the 5-Justice Panel is final the challenged stipulations violate the principle of the double degree of jurisdiction.

The motion to refer the motion of unconstitutionality to the Constitutional Court does not meet, in the meaning of Art. 29 para. (1) in Law #47/1992, the condition of a link to the resolution of the case, because the solution provided to the motion of unconstitutionality would not have an impact on the Judgment in the appeal on law brought on grounds of Art. 51 para. (3) in Law #47/1992.

Such motion of unconstitutionality would be relevant, in the meaning of Art. 29 para. (1) in Law #47/1992, in settling a potential avenue of appeal brought against the Judgment by the 5-Justice Panel in the appeal on law grounded on Art. 51 para. (3) in Law #317/2004, a hypothesis where admissibility would be in question of that particular avenue of appeal.

In other words, the 5-Justice Panel Judgment in the appeal on law brought against the disciplinary Decision by the HCM Chamber is not impacted by the existence or non-existence of an avenue of appeal against the Judgment to be returned by the 5-Justice Panel.

HCRJ, 5-Justice Panel, Judgment #130 of 27 May 2019

8. Judgment. Justification. ECHR Jurisprudence.

Civ.Proc.C, Art. 426 para. (1) letter b)

In the matter of the requirement for the full justification text of a Judgment be written, as under Art. 426 para. (1) letter b) Civ.Proc.C, a judgment must contain the arguments on facts and on law as elements of the logical-legal reasoning and in consideration of which the verdict in the operative part was returned. The arguments on facts and on law that formed the court's belief that the conditions are cumulatively met for disciplinary liability to exist are, at the same time, the court's explanation why it rejected the arguments whereby the opposing side sough to demonstrate the contrary.

Similarly, the ECHR jurisprudence holds that: "Since the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective […], the Court recalls that the right to a fair trial cannot be considered as effective unless the motions and observations of the parties are genuinely 'considered', meaning properly analyzed, by the referred court. In other words, Art. 6 stipulates it is the 'court's' obligation to proceed to an effective analysis of the grounds, arguments and evidence brought by the parties on condition it assess their relevance and without this involving a detailed response for each separate argument […]. The significance of this task can vary depending on the nature of the decision. The question whether a court has failed in its obligation to justify, under Art. 6 in the Convention, can only be analyzed in the light of the circumstances of the case […]" (ECHR, Decision of 16 November 2006 returned in the case Dima v. Romania, published in the Official Journal of Romania Part I, #473 of 13 July 2007, item 34).

Owing to this, the court is not under the exorbitant obligation to respond effectively, item by item and exhaustively to each one of the material acts presented in the facts submitted with the material elements examined in terms of the magistrate's disciplinary liability.

HCRJ, 5-Justice Panel, Judgment #92 of 15 April 2019

9. Independence and impartiality of the court. ECHR, Decision of 9 January 2013, case Oleksandr Volkov v. Ukraine.

*In our legal system, the matter of disciplinary liability for judges and prosecutors does not contain any of the elements that prompted the conclusion of the ECHR in Case Oleksandr Volkov v. Ukraine (Decision of 9 January 2013) in the sense of violated principles concerning the independence and impartiality of the court, namely: **(i)** the fact that the great majority of the members of the disciplinary court – the High Council of Justice of Ukraine – was made up of non-judicial staff (item 109-111 in the Decision); **(ii)** the participation of the Prosecutor General as an ex-officio member on High Council of Justice of Ukraine that held the disciplinary procedure against a judge (item 114); **(iii)** members of the High Council of Justice of Ukraine had previously filed requests for the dismissal of the judge under disciplinary investigation (item 115); **(iv)** the personal bias on the part of certain members of the disciplinary court (item 116); **(v)** examination of the case by a legislative body, which politicized the procedure and deepened the incompatibility of this procedure with the principle of separation of powers (item 118); (**vi)** impossibility of the Higher Administrative Court of Ukraine, which reexamined the case, to reverse the*

decisions of the disciplinary court and absence of regulations concerning absence of rules as to the further progress of the disciplinary proceedings (item 125); ***(vii)*** *judicial review performed by judges who were also under the jurisdiction of the disciplinary court and who could have also been subject to similar disciplinary procedures, devoid of a guarantee of the independence and impartiality of the High Council of Justice of Ukraine (item 130).*

It is true that in Romania the Judicial Inspection and HCM have responsibilities in the matter of disciplinary action concerning magistrates, both entities' jurisdiction covering even the Justices who make up the 5-Justice Panel – a judicial formation that has jurisdiction to try an appeal on law against a Decision returned by the HCM as a disciplinary court, which itself tries the disciplinary action exercised by the Judicial Inspection.

This distribution of jurisdictions does not constitute an objective basis for a de plano impartiality of judges in legal action where the Judicial Inspection and the HCM are parties, because it is the domestic laws – constitutional, legislative and infra-legislative – that provide the needed guarantees for observance of the principles of a court's independence and impartiality.

HCRJ, 5-Justice Panel, Judgment #37 of 18 February 2019, Judgment #72 of 18 March 2019

10. Appeal on law as regulated by Art. 51 para. (3) in Law #317/2004. Devolutive avenue of appeal. Constitutional Court Decision #381/2018.

In the meaning of Constitutional Court Decision #381/2018 and in agreement with what the ECHR stated in its Decisions of 21 June 2016, returned in the cases Tato Marinho Dos Santos Costa Alves Dos Santos and Figueiredo v. Portugal (motions #9023/13 and 78077/13) and Ramos Nunes de Carvalho E Sá v. Portugal (motions 55391/13, 57728/13 and 74041/13), as part of an appeal on law filed under Art. 51 para. (3) in Law #317/2004 against disciplinary Decisions returned by the HCM, the analysis shall include criticism as raised about the grounds for the disciplinary court's decision in terms of establishing the facts and examining evidence brought.

The previous jurisprudence of the 5-Justice Panel of the HCRJ also agrees with that of the Constitutional Court, examples of this being Judgments #129/2017, #139/2017, #164/2017, #5/2018 (item 70), #173/2018 (item 78), posted on the HCRJ's website in the Jurisprudence tab.

HCRJ, 5-Justice Panel, Judgment #93 of 15 April 2019

11. Revision. Decision returned by HCM as a disciplinary court. Inadmissibility of revision as regulated by Art. 509-513 Civ.Proc.C.

Constitution of Romania Art. 126 para. (1)
Civ.Proc.C, Art. 509-513
Law #304/2004, Art. 2 para. (2)

Law #317/2004, Art. 44 para. (1)

Decisions returned by the HCM Chambers, when operating as a disciplinary, extra-judicial court for magistrates, in an administrative-jurisdictional procedure, constitute administrative-jurisdictional acts and not court judgments as defined by the Civil Procedure Code, as results from the corroborated interpretation of the stipulations of Art. 126 para. (1) in the Constitution of Romania, Art. 2 para. (2) in Law #304/2004 and Art. 44 para. (1) in Law #317/2004 and as has been held in the jurisprudence of both the Constitutional Court[9] *and the High Court of Review and Justice*[10]*.*

The avenue of appeal of revision, regulated by Art. 509-513 Civ.Proc.C, can only be exercised to challenge a court judgment and not an administrative-jurisdictional act.

HCRJ, 5-Justice Panel, Judgment #71 of 18 March 2019

12. Revision. Condition of mentioning the merits. Judgment that denied an appeal on law filed against a decision returned in an appeal on annulment.

Civ.Proc.C, Art. 509 para. (1)

Given the stipulations of Art. 509 para. (1) Civ.Proc.C, the primary condition of admissibility for a revision is for the judgment whose revision is requested should have been returned on the merits of the case or at least have mentioned the merits of the case.

Mentioning the merits in the avenues of appeal involves changing the factual situation following an analysis of the evidence or following application of other legal stipulations to circumstances that have already been established, in such manner as to produce a different resolution of the disputed legal relationship.

The above condition is not met in the situation where the judgment whose revision is required denied an appeal on law filed to challenge a judgment returned in an appeal on annulment, because the latter is not a judgment on the merits or that mentions the merits.

HCRJ, 5-Justice Panel, Judgment # 134 of 27 May 2019

13. Revision. Condition of mentioning the merits. Judgment on an appeal on annulment.

Civ.Proc.C, Art. 509 para. (1) item 5 and para. (2)

From interpretation of Art. 509 para. (1) item 5 and para. (2) Civ.Proc.C, it results the primary condition of admissibility for a motion on revision that relies on the above stipulations is that only a judgment on the merits or that mentions the merits is subject to revision, since the grounds for revision listed in para. (1) item 5 are not listed in para. (2) of

[9] Decisions #148/2003, #391/2007, #514/2007, #788/2007

[10] Judgments returned by the 5-Justice Panel #266/2017 (item 66), #271/2017 (item 45), #293/2017 (item 19) and #5/2018 (item 49).

the Article as one of the reasons why judgments that do not mention the merits can be still be challenged by motion on revision.

The jurisprudence holds that judgments returned in appeals on annulment do not constitute judgments on the merits or that mention the merits (Judgments #385 of 19 February 2016, #210 of 31 January 2017, #434 of 14 March 2017 and #466 of 16 March 2017 by the High Court of Review and Justice – Chamber I Civil Matters, posted on the website of the High Court of Review and Justice in the Jurisprudence tab).

For these reasons the Court cannot accept the theory that a judgment returned in an appeal on annulment is a judgment on the merits because it examines the conditions of that avenue of appeal regarded ipso facto as a dispute on the merits.

HCRJ, 5-Justice Panel, Judgment # 14 of 21 January 2019

14. Revision. Condition of mentioning the merits. Judgment on a motion on revision.

The primary condition of admissibility for a motion on revision that relies on Art. 509 para. (1) item 5 Civ.Proc.C is that only a judgment on the merits or that mentions the merits is subject to revision, since the grounds for revision listed in para. (1) item 5 are not listed in para. (2) of the Article as one of the reasons why judgments that do not mention the merits can be still be challenged by motion on revision.

In the case brought before it, the Court cannot identify such a situation, because what the judgment challenged by this motion on revision did was to deny another motion on review as inadmissible.

The jurisprudence of the High Court of Review and Justice holds that a motion on review is inadmissible that is brought against a judgment that denied another motion on review as inadmissible, because it does not meet the admissibility requirement of having been returned on the merits or having mentioned the merits of a case (Judgments #1683 of 27 October 2017, #1228 of 19 September 2017 by the High Court of Review and Justice – Chamber I Civil Matters, posted on the website of the High Court of Review and Justice in the Jurisprudence tab).

HCRJ, 5-Justice Panel, Judgment #19 of 21 January 2019

15. Revision. Criticism brought around the grounds for appeal on annulment.

Civ.Proc.C, Art. 503 para. (2) item 1, Art. 509 para. (1) item 1-11

The motion on revision that relies on arguments extraneous to cases where revision is possible, on the specific and limited grounds stipulated by the Civ.Proc.C, is inadmissible.

The claim that the judgment whose revision is requested was returned by a judicial panel that had not been established lawfully, by relying on Constitutional Court Decision

#685/2018, is in fact grounds for appeal on annulment, as under Art. 503 para. (2) item 1 Civ.Proc.C.

HCRJ, 5-Justice Panel, Judgment # 98 din 15 April 2019

16. Revision. Documentary evidence. Constitutional Court Decision.

Civ.Proc.C, Art. 509 para. (1) item 5 și 11

The grounds for revision at Art. 509 para. (1) item 5 Civ.Proc.C cannot be successfully raised in order to obtain a retrial of a case by showing that after the case was disposed of there was a Decision returned by the Constitutional Court, so much the more so as the lawmaker did regulate such a situation in Art. 509 para. (1) item 11 Civ.Proc.C.

Constitutional Court Decision #685/2018 cannot be qualified as "documentary evidence" in the meaning of Art. 509 para. (1) item 5 Civ.Proc.C, because that is not a document that would prove a certain state of facts relevant for the resolution of the dispute but a jurisdictional act that contains the legal reasoning underlying the Constitutional Court's verdict on a conflict of a constitutional nature.

Nor does Constitutional Court Decision #685/2018 come as one of the reasons stipulated by Art. 509 para. (1) item 11 Civ.Proc.C, because that Decision was not returned in a motion of unconstitutionality raised in the case whose resolution is challenged by motion on revision, but in settling the legal conflict of a constitutional nature between the Parliament of Romania on the one hand and the High Court of Review and Justice on the other hand.

HCRJ, 5-Justice Panel, Judgment #13 of 21 January 2019, Judgment #106 of 22 April 2019

17. Revision. Art. 509 para. (1) item 11 Civ.Proc.C. Constitutional Court Decision #381/2018. The appeal on law regulated by Art. 51 para. (3) in Law #317/2004. Devolutive avenue of appeal.

Civ.Proc.C, Art. 509 para. (1) item 11
Law #317/2004, Art. 51 para. (3)
Constitutional Court Decision #381/2018

The motion on revision is admissible as filed on the grounds of Art. 509 para. (1) item 11 Civ.Proc.C in relation to the Constitutional Court Decision that sustained the exception of unconstitutionality raised in a different case, because in the dispute where the judgment was returned that was challenged by motion on revision the same exception of unconstitutionality had been raised, and denied by the Constitutional Court as having become inadmissible because of its previous Decision to sustain the exception, a Decision that has been raised in support of revision.

In its Decision #381/2018 the Constitutional Court sustained the exception of unconstitutionality and found that the stipulations of Art. 51 para. (3) in Law #317/2004 were only constitutional insofar as the "appeal on law" it speaks of is interpreted as a devolutive avenue of appeal against decisions returned by the HCM Chambers in disciplinary matters.

Considering the above Decision by the Constitutional Court the grounds for revision in Art. 509 para. (1) item 11 Civ.Proc.C are baseless because an analysis of the Judgment in appeal on law returned by the 5-Justice Panel shows the Court did examine the decision of the disciplinary court, including in terms of reliability, did respond to the criticism raised by the appellant concerning acceptance, introduction or assessment of evidence in the case, and to that concerning the existence of the conditions needed for disciplinary liability to exist, in terms of the facts and also of the law that applied to the disciplinary violations held against the magistrate and the customization of the penalty ordered.

Thus in the very beginning of the considerations for the judgment challenged by motion on revision, the court for appeal on law specifically stated that "considering the specificity of cases in disciplinary action brought against magistrates, as well as the jurisprudence of the 5-Justice Panel of the HCRJ, in full agreement with the jurisprudential orientation established by the ECHR in its Decisions in cases Oleksandr Volkov v. Ukraine – 2013, Sofia Tato Marinho Dos Santos Costa Alves Dos Santos and Figueiredo v. Portugal - 2016 and Ramos Nunes de Carvalho E Sá v. Portugal – 2016, it must be noted that in what follows the court's examination will include criticism of the justification of the challenged decision, by relating matters to the cases of reversal stipulated by Art. 488 of the Civil Procedure Code, because in reality those are more or less explicit claims of unlawfulness of that decision."

The lack of grounds of the motion on revision also arises from the fact that among their criticisms the appellant states their disagreement with the judgment returned in the appeal on law and its rationale, and in reality tries to introduce a new perspective on the merits of the case. The court's conclusion arises from the principle of res judicata, according to which in an extra-ordinary appeal such as the motion on revision the case cannot be retried on the merits.

HCRJ, 5-Justice Panel, Judgment # 12 of 21 January 2019

18. Revision. Art. 509 para. (1) item 11 Civ.Proc.C. Constitutional Court Decision #685/2018.

Civ.Proc.C, Art. 509 para. (1) item 11
Constitutional Court Decisions #68/2018 and #685/2018

One of the requirements for admissibility of a motion on revision that relies on the grounds stipulated by Art. 509 para. (1) item 11 Civ.Proc.C resides in the fact that the Constitutional Court Decision the procedural text makes reference to must have been returned in the matter of a motion of unconstitutionality that is raised in the case where the challenged judgment has been returned.

In the case before the Court the above requirement for admissibility is not satisfied because in its Decision #68 of 22 February 2018 the Constitutional Court denied, as lacking merit, the motion of unconstitutionality of Art. 32 in Law #304/2004 and Art. 44 para. (1) in Law #317/2004, raised in the dispute that received the judgment which is challenged by motion on revision on the grounds under Art. 509 para. (1) item 11 Civ.Proc.C.

The motion on revision filed under Art. 509 para. (1) item 11 Civ.Proc.C, as relating to Constitutional Court Decision #685 of 29 November 2018, is inadmissible because:

(i) In its Decision #685/2018 the Constitutional Court did not examine the constitutionality of Art. 32 in Law #304/2004 but, as part of the mechanism of the legal conflict of a constitutional nature, ruled on the manner of enforcing those stipulations.

(ii) It is true that the Constitutional Court's jurisprudence holds that "only final court judgments can make the object of revision that have been returned in cases where the motion of unconstitutionality was sustained or cases where such motion was raised before the public release of the Court's Decision to sustain and was therefore dismissed as having become inadmissible" (Constitutional Court Decision #163/2017). In this case, though, the requirement is not satisfied that the motion mentioned in the dispute should have been dismissed as having become inadmissible, because the same motion had previously been sustained and the challenged stipulations had been declared unconstitutional.

HCRJ, 5-Justice Panel, Judgment #159 of 10 June 2019

19. Revision. Art. 509 para. (1) item 11 Civ.Proc.C. Constitutional Court Decision returned prior to the date the judgment became final whose revision is now requested.

Civ.Proc.C, Art. 509 para. (1) item 11
Constitutional Court Decision #381/2018

Under Art. 509 para. (1) item 11 Civ.Proc.C, filing a motion on review on those grounds is conditioned by several aspects, among which is the fact that the Constitutional Court should have ruled on the motion of unconstitutionality after the date the judgment challenged with revision became final.

In support of their grounds for revision the appellant raises Constitutional Court Decision #381 of 31 May 2018, stating they had raised, before the court for appeal on law, the same motion of unconstitutionality that the aforementioned Decision is about.

The conditions are not met under Art. 509 para. (1) item 11 Civ.Proc.C, because the judgment challenged with revision became final on 25 June 2018, while the Constitutional Court had ruled on 31 May 2018 on the motion the appellant raised in their appeal on law.

Since the date of Constitutional Court Decision #381 of 31 May 2018 when it ruled on the motion of unconstitutionality, a Decision raised by the appellant, is prior to the date the challenged judgment became final, the avenue of appeal in this case is inadmissible.

HCRJ, 5-Justice Panel, Judgment #79 of 25 March 2019

20. Revision. Art. 509 para. (1) item 11 Civ.Proc.C. Motion of unconstitutionality raised in a different case.

Civ.Proc.C, Art. 509 para. (1) item 11

Only final court judgments can make the object of revision that have been returned in cases where the motion of unconstitutionality was sustained by the Constitutional Court or cases where such motion was raised before the public release of the Court's Decision to sustain and was therefore dismissed as having become inadmissible, after a prior Decision to sustain the motion.

A motion on revision is inadmissible on the grounds provided by Art. 509 para. (1) item 11 Civ.Proc.C when raised against a judgment returned in a case where a motion of unconstitutionality was not filed, and the revision avenue was exercised based on a Constitutional Court Decision that had sustained that motion of unconstitutionality in a different case.

HCRJ, 5-Justice Panel, Judgment # 134 of 27 May 2019

21. Revision. Art. 509 para. (1) item 11 din C. proc. civ. Exception of absolute nullity of a decision challenged on revision for failure to comply with public-order rules concerning the setting up of the court. Grounds for appeal on annulment. Inadmissibility of revision.

Civ.Proc.C, Art. 503 para. (2) item 1, Art. 506 para. (1), Art. 509 para. (1) item 11
Constitutional Court Decision #685/2018

The motion on revision based on Art. 509 para. (1) item 11 Civ.Proc.C raises the exception of absolute nullity of the challenged judgment, relying on Art. 176 para. (4), Art. 178 and Art. 245 of the Civil Procedure Code and Constitutional Court Decision #685/2018, claiming that the challenged judgment was returned in violation of the public-order rules concerning the setting up of the court stipulated by Art. 32 in Law #304/2004.

Art. 178 para. (1) and Art. 247 para. (1) first thesis Civ.Proc.C instate on the one hand the rule that nullity, with the exception of absolute nullity, can be claimed at any stage of the trial and, on the other hand, an exception from this rule consisting of situations where the law stipulates otherwise.

In the case before the Court the claim of nullity concerns precisely such a situation where the law stipulated a different procedure, and specifically a judgment in an appeal on law which is represented as having been returned in violation of the public-order rules concerning the setting up of the court stipulated by Art. 32 in Law #304/2004.

But that is a situation which is in fact regulated distinctly by Art. 503 para. (2) item 1 Civ.Proc.C, which reads that "Judgments by courts for appeal on law can be challenged by appeal on annulment when: 1. The judgment in the appeal on law was returned by an absolutely non-jurisdictional court in violation of the rules concerning the setting up of the

court and, in spite of the fact that the appropriate motion to challenge this were raised, the court for appeal on law failed to rule on said motion."

Therefore, the nullity raised by the appellant cannot be raised by way of exception as part of a motion on revision, but exclusively in the avenue, conditions and time frames specifically stipulated by Art. 503 para. (2) item 1 and Art. 506 para. (1) Civ.Proc.C, and the nullity case in discussion is in fact a distinct basis for an appeal on annulment brought against judgments returned by a court for appeal on law.

HCRJ, 5-Justice Panel, Judgment #79 of 25 March 2019