High Court of Cassation and Justice
Five-Justice Panel

Journal of Jurisprudence in the Matter of Disciplinary Liability of Judges and Prosecutors

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LIST OF ABBREVIATIONS

Civil Procedure Code	**–** Law #134/2010 on the Civil Procedure Code
Criminal Procedure Code	**–** Law #135/2010 on the Criminal Procedure Code
ECtHR	**–** European Court for Human Rights
Code of Ethics for Judges and Prosecutors	– the Code of Ethics for Judges and Prosecutors, as approved by Decision #328/2005 of the Higher Council of Magistrates' Plenum.
The Convention	- the Convention for the Protection of Human Rights and Fundamental Freedoms
HCM	– the Higher Council of Magistrates
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 #317/2004 on the Higher Council of Magistrates
Regulation of Courts	– the Internal Regulation of Courts, as approved by Decision #1375/2015 of the Higher Council of Magistrates' Plenum
Regulation on the Organization and Operation of the HCM	- the Regulation on the Organization and Operation of the Higher Council of Magistrates, as approved by Decision #1073/2018 of the Higher Council of Magistrates' Plenum.
Regulation on the Conducting of Inspections	– the Regulation on the Rules for Conducting of Inspections by the Judicial Inspection, as approved by Decision #1027/2012 of the Higher Council of Magistrates' Plenum.

Note: The decisions underlying the drafting of this work are published and can be consulted on the High Court of Review and Justice's website, in the section including the 5-Justice Panel's jurisprudence.

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1. ***Prosecutor. Critical statements expressed in TV shows, which present the prosecutor's subjective perception.***

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

In the case, the Panel established that the constitutive elements of the disciplinary violation as under Art. 99 item a) of Law #303/2004 were not met, because the prosecutor did not breach his duty of restraint and moderation through his criticisms expressed in a TV show, as such statements represented his subjective perception on the criminal activity in his territorial jurisdiction, on his own activity and on that of judicial police bodies, on the manner in which authorities get involved in fighting the criminal phenomenon, and on consequences borne by him as a result of cases handled by him, and, therefore, no harm was caused to professional honor or probity or to the prestige of justice.

HCRJ, the 5-Justice Panel, Decision #31 of 3 February 2020

2. ***Judge. Opinions expressed online (Facebook) outside the performance of job duties, in breach of the duty of restraint and moderation imposed on magistrates in making use of their right to freedom of expression***

Law #303/2004, Art. 99 item a), Art.100 item b)

In the case, the Panel established that the constitutive elements of the disciplinary violation as under Art. 99 item a) of Law #303/2004 were met.

Regarding the objective side, the Panel established that the judge: (i) published in the virtual space, namely on Facebook social network, a posting in which he expressed himself in a non-principial manner, improper to his status, which was of nature to raise questions on the credibility of some state institutions; (ii) distributed, on the same social network, a comment referring to an article published online, in which he used a language that exceeded the limits of decency and the limits imposed by the status of his position.

The challenged acts contravene to the duty of restraint and moderation imposed on magistrates in making use of their freedom of expression dur to their status.

Even though the expression of criticisms as such is allowed precisely in consideration of the freedom of expression and based on reasonable arguments, based on punctual and factual aspects, in the case, the limit of this freedom was exceeded because: (i) in the opinion published on Facebook social network, the magistrate expressed himself in a non-principial manner, improper to the status of his position, suggesting that some

institutions of the state were allegedly politically controlled, and presenting as a "solution" for guaranteeing the constitutional democracy a possibility for the army "to get out in the street"; (ii) in the comment posted on the same social network, referring to an article published online, the magistrate used a language that exceeded by far the limits of decency specific to the position held by him, which requires sobriety and balance; (iii) his manner of expression was of nature to raise questions on the credibility of some state institutions and to cause harm to the impartiality and prestige of justice, a fact that contravenes to the duty of restraint and moderation imposed on magistrates; (iv) the opinion expressed by the judge, in the sense that important institutions of the state were subject to de-structuring and discrediting actions, as well as the rhetorical question regarding the solution to have the army outside in the street as a constitutional remedy, reflect a blatant excess of the limits of the freedom of expression accepted in the case of judges; (v) in light of the comments of those who read the opinion expressed by the judge, the message proved to have a potential to generate associations with historic events in the recipients' perception, and the expressed opinion was perceived by the online publications in the same way.

The judge was held responsible for the manner in which he understood to express his personal opinions, in a way that disrupted the just balance between the fundamental right of individuals to their freedom of expression and the legitimate interest of a democratic state to make sure that public functions are exercised in accordance to the purposes listed under Art. 10 paragraph 2 of the Convention, as the freedom of expression is subordinated to the duty of restraint and moderation, which is an inherent limitation of the status specific to a magistrate position, as also established by the jurisprudence of the ECHtR in respect of the restrictions that limit such freedom in case of persons who hold a public position (Morissens versus Belgium).

In terms of the subjective side, the form of guilt that characterizes this disciplinary violation is that of indirect intention, the judge accepting the possibility that the opinion expressed by him may get known to the public, through its publication on his Facebook page, which is accessible to the public and is followed by around 50,000 persons, and, even if he did not seek to affect the judicial system's image, he accepted the possibility that such result may occur.

The consequence caused by the commission of the challenged act consists of a deterioration of the public's confidence in and respect to the magistrate position, with the consequence of affecting the image of justice as a system and service in charge of protecting the rule of law, due to the fact that the opinions expressed by the judge were quoted by the media, generating extended public debates, due to the fact that headings in the media made reference to the remedy proposed by the judge for the protection of the constitutional democracy.

For the perpetrated misconduct, under Art. 100 item b) of Law #303/2004, a disciplinary sanction was applied to the judge consisting of the "reduction of his gross monthly basic salary by 5% for a period of 2 months."

HCRJ, 5-Justice Panel, Decision #62 of 18 May 2020

3. Judge. An interview published in the media, which contains criticisms against the legislative reforms in the domain of justice, which are within the limits imposed by the duty of restraint and moderation on magistrates.

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

In respect of the disciplinary violation as under Art. 99 item a) of Law #303/2004, the act held against the judge through the disciplinary action consists of the fact that he gave an interview outside his working hours, published in the media, in which he presumably made statements of a nature to affect the professional honor and rectitude or the prestige of justice.

In the case, the Panel established that the constitutive elements of the disciplinary violation were not met, for the following reasons: (i) the statements subject to review referred to the justice domain in the context of the legislative reforms subject to public debates in 2018; (ii) the duty of restraint and moderation imposed on judges and prosecutors, specific to the status of magistrates, is not equivalent to depriving magistrates of their right to freedom of expression. Even though magistrates have to accept specific restrictions of their right to freedom of expression due to the position they hold in the judicial system, they cannot be excluded from public debate that concerns precisely the area in which they work; (iii) examining the observance of the duty of restraint and moderation in counterbalance with the right to freedom of expression, based on the jurisprudence of the ECHtR, in interpreting and applying Art. 10 of the Convention [Decision #23 June 2016, returned in the case Baka versus Hungary (Application #20261/12; paragraphs 159 and 165); Decision #26 February 2009, returned in the case Kudeshkina versus Russia (Application #29492/05; paragraphs 99-100)], the Panel established that the magistrate's opinions expressed in the interview concerned matters of general interest for the judicial system, which benefited from an increased level of protection of the freedom of expression, and the statements given, despite their critical nature, did not exceed the limits of a decent language and did not affect the prestige of justice.

At the same time, based on the jurisprudence of the 5-Justice Panel concerning the freedom of expression of magistrates (Decision #62 of 18 May 2020, item 15), it was highlighted that in terms of the duty of restraint and moderation incumbent on magistrates, including in situations concerning the legislation in the domain of justice, through the use of the right to freedom of expression within the limits imposed by the expectations specific to the judicial position, the considerations of ECtHR under item 114 of Decision #8 December 2020 returned in the case Panioglu versus Romania were relevant in this respect, because the Court established there that individuals who hold public positions in the judicial system are subject to a restriction related to the use of their right to freedom of expression in all situations in which the system's authority and impartiality are brought into discussion, and have an obligation to show maximum discretion, including in resorting to the media, even in cases where they are provoked.

HCRJ, 5-Justice Panel, Decision #192 of 2 November 2020

Art. 99 item c) of Law #303/2004: "undignified attitude during the performance of job duties in relations with colleagues and other staff of the court or prosecutors' office with which the magistrate works, with judicial inspectors, solicitors, experts, witnesses, litigants or representatives of other institutions"

Prosecutor. Attitude contrary to the conduct standards required of magistrates in their professional relations.

Law #303/2004, Art. 99 item c), Art. 100 item a)

In the case, the prosecutor was found guilty for having perpetrated a disciplinary violation as under Art. 99 item c) of Law #303/2004.

In terms of the objective side, it was established that the prosecutor had engaged in the following acts: (i) acknowledgment and/or compliance mentions written by hand on the documents distributed to him for resolution, mentions addressed to the chief prosecutor, which prove that the prosecutor had constantly used a language contrary to the requirements of respect that must govern the relations between magistrates and their peers, regardless their seniority in the profession or the position's rank, and an attitude contesting the hierarchical authority; (ii) refusal by the prosecutor to accept the planning of the service of prosecutors on duty per unit sent by the chief prosecutor through a clerk, with a verbal specification that he would accept it only if it is changed, which is undignified for the position due to its authoritative tone and the improper way of communication with his direct supervisor; (iii) use of indecent language and offending expressions in addressing his supervisor and the specialist auxiliary staff of the prosecutors' unit.

The acts for which the prosecutor was found guilty reflect an attitude contrary to the conduct standards required of magistrates in their professional relations – an attitude materialized through derisive and non-principled statements and expressions, use of an improper, irritating and angry tone – which is incompatible with the honor and dignity of the magistrate profession, exceeding this way the limits of a behavior specific to a prosecutors' unit.

In terms of the subjective side, the guilt was established in the form of indirect intent, resulting from the way in which the magistrate breached his legal and ethical obligations derived from his status of prosecutor, the evidence produced proving the existence of the intentional and volitive element, which was of nature to trigger disciplinary liability.

Under Art. 100 item a) of Law #303/2004, a disciplinary sanction was applied to the prosecutor consisting of a "warning." In individualizing the applied sanction, the Panel also considered the tense relations existing between the prosecutor and the management of the prosecutors' unit as a result of tensions generated by flawed communication.

HCRJ, the 5-Justice Panel, Decision #30 of 3 February 2020

Art. 99 item f) of Law #303/2004: "unjustified refusal to fulfill a job duty"

1. Judge. Refusal to perform the activities assigned according to the planning of judges on duty.

Law #303/2004, Art. 99 item f)
Art. 5 para. (2) item f) and para. (3) of the
Internal Regulation of Courts

In the case, the judge was found guilty for having committed a disciplinary violation as under Art. 99 item f) of Law #303/2004.

In terms of the objective side, the Panel established that the judge, despite the fact that he had been notified that according to the planning of judges on duty he needed to replace certain judges whose activity had been terminated in the court, he explicitly refused to perform his job duties, in breach of the stipulations of Art. 5 para. (2) item f) and para. (3) of the Internal Regulation of Courts, under which judges have a duty to "*participate in court hearings in the judicial panels established under the law*" and to be present "*for the performance of activities for which they are scheduled [...] as an effect of legal or regulatory stipulations, or for court hearings to which they were assigned, as well as in activities established by the court president in compliance with the law*."

The consequence of the behavior consisted in a disturbance of the court's activity, materialized in the assignment of other judges to perform the activities resting on the magistrate who is subject to disciplinary investigation, a disturbance also proven by the fact that, eventually, the judge in question was excluded from the list of judges on duty precisely in order to avoid the inconveniences created by his conduct.

In terms of the subjective side, the Panel established that the judge acted with direct intent, by explicitly refusing to participate in the scheduled activities.

Since the judge was found guilty of two disciplinary violations [Art. 99 item f) and item k) of Law #303/2004], the Panel established that the punitive and preventive purpose of the disciplinary proceeding could be attained by the application, under Art.100 item b) of Law #303/2004, of a disciplinary sanction consisting of the "*reduction of his gross monthly basic salary by 20% for a period of 3 months*."

HCRJ, the 5-Justice Panel, Decision #214 of 16 November 2020

2. Prosecutor. Refusal to order a measure requested by the chief prosecutor, justified by the fact that the ordering of such measure fell under the authority of the chief prosecutor.

Law #303/2004, Art. 99 item f)
Law #303/2004, Art. 62 para. (2)
Code of Ethics for Judges and Prosecutors, Art. 12

In terms of the disciplinary violation as under Art. 99 item f) of Law #303/2004, in defining the concept of "unjustified refusal," reference was made to the explicit refusal of the magistrate to fulfill a job duty provided specifically by the law and regulations concerning the organization and operation of the judicial system.

Decision-making activities are performed in prosecutors' offices on two levels, namely a jurisdictional one (resolutions and prosecutor's orders) and an administrative one (materialized in orders, work orders, resolutions and decisions), and according to Art. 62 para. (2) of Law #304/2004, "*prosecutors perform their activities under the principles of legality, impartiality and hierarchical subordination,*" while according to Art. 12 of Code of Ethics for Judges and Prosecutors, they "*have an obligation to perform their professional duties with competence and fairness, to comply with their administrative duties set by laws, regulations and work orders*."

In the case, the Panel established that the subjective side of the disciplinary violation as under Art. 99 item f) of Law #303/2004 was not met because the prosecutor's refusal to order the measures requested through a letter by the chief prosecutor was justified, supported by legal arguments, according to which the authority to order the relevant measure rested with the chief prosecutor.

HCRJ, the 5-Justice Panel, Decision #30 of 3 February 2020

Art. 99 item g) of Law #303/2004: "failure by the prosecutor to comply the orders of his direct supervisor given in writing under the law"

Prosecutor. Failure to comply with an order from his direct supervisor regarding the monitoring of cases at the level of the prosecutors' unit. Non-existence of consequences of the challenged act. Absence of guilt.

Law #303/2004, Art. 99 item g)

From the perspective of the disciplinary violation as under Art. 99 item g) of Law #303/2004, in the case referred to the court, in terms of the objective side, the prosecutor is accused of a failure to comply with an order from his direct supervisor regarding the monitoring of cases at the level of the prosecutors' unit, whereby prosecutors under supervision were required to draft justified reports on the status of investigations by the 30th day of each month.

The fact that there had been an extremely large workload in the period of reference subject to review, the undersized organizational chart, the tense relations with the chief prosecutor in which the prosecutor subject to disciplinary investigation carried out his professional activity, who, in order to perform his professional duties, could not even leave on vacation, denote the cumulative existence of intellective and volitional factors in such failure to comply with the order of the direct supervisor.

At the same time, there was no consequence in the case as a result of the act held against the magistrate.

Therefore, the Panel established that the constitutive elements of the disciplinary violation subject to review were not met in terms of the subjective side and of the consequences of the challenged act.

HCRJ, the 5-Justice Panel, Decision #30 of 3 February 2020

Art. 99 item h) of Law #303/2004: "repeated failure to comply with the legal stipulations regarding the speedy settlement of cases or repeated delays in drafting the documents, for reasons attributable to the magistrate."

1. Judge. First-instance court cases between 5 and 12 years old

Law #303/2004, Art. 99 item h), first indent
Internal Regulation of Courts,
Art. 5 para. (2) item g)
Code of Ethics for Judges and Prosecutors, Art. 12, Art.13
Convention, Art. 6 par. 1

In the case, the Panel established the commission of a disciplinary violation as under Art. 99 item h), first indent, of Law #303/2004, and acknowledged the culpable nature of the judge's repeated application of the procedure rules in a way that resulted in delays of judicial proceedings of nature to harm the principle of speedy settlement of cases, within a reasonable term, by disregarding the obligation resting on the judge pursuant to Art. 21 of the Constitution, Art. 5 para. (2) item g) of the Internal Regulation of Courts, Art.12 and Art. 13 of Code of Ethics for Judges and Prosecutors and Art. 6 par. 1 of the Convention.

In terms of the objective side, the evidence produced revealed the existence of a number of 9 first-instance cases between 5 and 12 years old on the dockets of the panel the member of which the judge subject to disciplinary investigation was, due to the manner in which the magistrate either applied the procedure rules that resulted repeatedly in the successive adjournments of the trial and in extensions of the duration of judicial proceedings, situations that were not determined by objective causes, outside the conduct of the magistrate. In those cases, the judge repeatedly, and for a long time, adjourned the examination of cases both for the production of evidence consisting of assessment reports or for the replacement of experts, without indicating, most of the times, the considerations taken by him into account, in an unjustified manner and without observing the legal stipulations governing the production of evidence.

Concerning the subjective side, the Panel established the passive and firmness-lacking attitude of the judge in applying the procedure rules despite the old age of cases and the conduct of parties and of other participants in the proceedings, the magistrate foreseeing the consequences and accepting their occurrence, proof for this being his lack of diligence and care for the settlement of cases in a speedy way or within a reasonable term.

The panel considered the jurisprudence of the ECHtR (Decision #26 of November 2013 returned in the case Vlad *et al* versus Romania, published in Part I Official Journal of Romania #179 of 10 March 2016), in which the court established a breach of Art. 6 para. 1 of the Convention in respect of the excessive length of judicial proceedings in disputes that stayed on the dockets of courts for a period of about 9 years, 12 years and 16 years.

The magistrate's defense arguments, which focus on the high workload, the complexity of cases, the conduct of parties or of court-appointed experts or on other particularities of the case, do not eliminate the culpable nature of his repetitive misconduct, because the relevant circumstances are not be found exclusively in the activity of the judge subject to investigation, but are specific to the entire judicial system.

Since the Panel established the commission of two disciplinary violation acts [Art. 99 item h), first indent, and Art. 99 item t), second indent, of Law #303/2004], the Panel applied to the judge the sanction as under Art.100 item b) of Law #303/2004, consisting of a "*reduction of his gross monthly basic salary by 25% for a period of 6 months*."

HCRJ, the 5-Justice Panel, Decision #213 of 16 November 2020

2. Prosecutor. Failure to settle cases within a reasonable term. Absence of guilt. Objective factors.

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

Regarding the disciplinary violation as under Art. 99 item h) of Law #303/2004, in terms of the objective side, the prosecutor was accused on non-compliance, in 17 cases, with the legal stipulations referring to the settlement of cases within a reasonable term.

The circumstances of this disciplinary violation consist of the non-compliance with legal stipulations concerning the speedy settlement of cases or of the terms for the performance of works; the repeated nature of such non-compliance and the culpable nature of the act.

In the case, the factual situation under review was determined by the high workload faced by the magistrate and by his personal problems.

The prosecutor showed interest and diligence in settling the cases, by working beyond working hours, as well as on Saturdays and/or Sundays, being concerned by the quality of his work, which could lead to delays in the performance of other works in the absence of a work measurement and in the context of an understaffed organizational chart.

When corroborated, these aspects create an environment favorable to neuropsychic overstress for the magistrate, the consequence consisting of the occurrence of errors/delays in his work. Also, the existence of personal problems, in the context of such neuropsychic overstress, affects the quality of the performed work, including in

terms of the speedy performance of works, the complexity level of cases being also relevant in the case.

Given the circumstances presented above, it results that his failure to settle the cases assigned to him within the legal term is mainly a consequence of objective factors, not to reasons attributable to the magistrate, as established by the stipulations of Art. 99 item h) of Law #303/2004.

HCRJ, the 5-Justice Panel, Decision #30 of 3 February 2020

Art. 99 item j) of Law #303/2004: "unjustified failure to comply with orders or decisions of an administrative nature issued in compliance with the law by the head of the court or of the prosecutors' office or of other obligations of administrative nature provided by the law or regulations"

Prosecutor. References made in a press release to passages from recordings made at the seat of the prosecutors' unit in connection with a case that was at the criminal prosecution stage.

Law #544/2001, Art.12 para. (1) item e)
Law #303/2004, Art. 99 item j)
Criminal Procedure Code, Art.285 para. (2)

Referring to the disciplinary violation as under Art. 99 item j) of Law #303/2004, in terms of the substantive element of the objective side, one needs to establish the existence of information, on the one hand, of which the magistrate became aware while performing his/her job duties and, on the other hand, the non-observance of the secret or confidential nature of such information.

According to Art. 12 para. (1) item e) of Law #544/2001 on Unrestricted Access to Information of Public Interest, "*information regarding the proceedings during a criminal or disciplinary investigation are exempted from the Unrestricted Access of citizens if the result of such investigation would be jeopardized, confidential sources disclosed, or a person's life, bodily integrity or health were jeopardized as a result of a finalized or pending investigation (...)*," and according to Art. 285 para. (2) of the Criminal Procedure Code, "*proceedings during the criminal prosecution stage are not public*."

Regarding the aforementioned disciplinary violation, in terms of the objective side, the prosecutor was accused of having inserted passages in a press release from a recording of discussions at the seat of the prosecutors' unit between another prosecutor and a judicial police officer and persons in the entourage of some parties sent to trial in a pending case, about which the prosecutor under investigation became aware during the performance of his job duties.

Both the disciplinary court and the High Court decided that the constitutive elements of this disciplinary violation were not met, for the following reasons: **(i)** in respect of

this disciplinary violation, based on the stipulations of Art.12 para. (1) item e) of Law #544/2001 and Art. 285 para. (2) of the Criminal Procedure Code, one should have checked whether by disclosing potential information regarding the proceedings during a criminal investigation, the result of such investigation was jeopardized, whether confidential sources were disclosed, or whether a person's life, bodily integrity or health was jeopardized as a result of the finalized or pending investigation. **(ii)** in the case, the recordings the transcription of which was quoted partially had been made by a judicial police officer, without being authorized in a criminal trial under the terms of the Criminal Procedure Code. Therefore, at the time of the press release, they did not have a potential to influence the finalized or pending investigation; **(iii)** based on the stipulations of Art. 285 para. (2) of the Criminal Procedure Code, in the absence of a legal framework under which this can be defined as such, the confidential nature of the recordings cannot be admitted; **(iv)**, the jeopardizing of either the result of the investigation or of any person concerned by the criminal investigation was not proven in the case.

HCRJ, the 5-Justice Panel, Decision #75 of 2 June 2020

Art. 99 item k) of Law #303/2004: "repeated absence from work without leave, which directly affects the activity of the court or of the prosecutors' office"

Judge. Repeated absence from work without leave, which affected the court's activity.

Law #303/2004, Art.4, 90 para. (2), Art. 99 item k), Art.100 item b)
Internal Regulation
of Courts, Art. 5 para. (2) item a) b) and f) and para. (3)
Code of Ethics for Judges and Prosecutors, Art. 12 second indent,

In the case, the judge was found guilty of having committed a disciplinary violation as under Art. 99 item k) of Law #303/2004.

Concerning the objective side, Art. 99 item k) of Law #303/2004 stipulates that disciplinary liability can be triggered for absence without leave in the following two alternative situations: (i) repeated absence without leave; and (ii) absence without leave that directly affects the court's activity.

In the case, the Panel established that the 33 absences without leave from work in a period of 4 months reflected the repetitive nature of the judge's non-compliant conduct, since the existence of the objective side of the disciplinary violation was proven.

The arguments whereby the judge tries to confer a justified nature through his work related to the drafting of court judgments are not of nature to eliminate the disciplinary liability or to confer a justified nature to the breach of the stipulations of Art. 5 para. (2) item a) b) and f) and para. (3) of the Internal Regulation of Courts, of Art.4 and 90 para. (2) of Law #303/2004 and of Art. 12, second indent, of the Code of Ethics for Judges and Prosecutors, from the interpretation of which there results an obligation for the magistrate to be present in court in order to participate in the scheduled activities.

By repeated absences without leave from work, the court's activity was directly affected, because the activities that needed to be performed by the judge had to be assigned to other judges.

In terms of the subjective side, the guilt of the magistrate under investigation results from his conduct, which is contrary to the above-mentioned rules because, despite the fact that he knew that he had an obligation to come to work, he was absent without leave and, even if he did not seek this directly, he was aware of his non-compliant conduct and accepted the negative consequences caused by him to the court's activities.

Since the judge was found guilty of two disciplinary violation acts [Art. 99 item f) and item k) of Law #303/2004], the Panel established that the punitive and preventive purpose of the disciplinary proceeding could be reached by applying, under Art.100 item b) of Law #303/2004, a disciplinary sanction consisting of a "*reduction of his gross monthly basic salary by 20% for a period of 3 months*."

HCRJ, the 5-Justice Panel, Decision #214 of 16 November 2020

Art. 99 item m) of Law #303/2004: "unjustified failure to comply with orders or decisions of administrative nature issued in compliance with the law by the head of the court or of the prosecutors' office or of other obligations of an administrative nature provided by the law or regulations."

1. Prosecutor. Failure to comply with an order of the chief prosecutor related to the organization of analysis meetings. Absence of guilt. Objective factors.

Law #303/2004, Art. 99 item m)

In relation to the disciplinary violation as under Art. 99 item m) of Law #303/2004, in terms of the objective side, the prosecutor was accused of having failed to observe orders or decisions of an administrative nature issued in compliance with the law by the head of the court or of the prosecutors' office.

Unjustified non-compliance means an explicit or implicit refusal of the magistrate to perform a job duty contained in an order or decision of the head of the court or of the prosecutors' office.

The magistrate's refusal to perform an obligation can be justified only in a situation where pertinent arguments or personal circumstances are raised that justify the adopted attitude.

Considering the factors of objective nature (the high workload handled by the magistrate and also the previous practice) and the previous system (under which checks on the lawful and well-grounded nature of court judgments were conducted by the prosecutor who participated in the relevant cases, without an analysis of them together with the direct supervisor), the Panel established that the failure to comply with an

order of the chief prosecutor imposing the organization of analysis meetings did not take the form of an obvious opposition of the magistrate, because, in the same time interval, he engaged in in particular court hearings and in other related activities. Therefore, in terms of the subjective side, no form of guilt can be held against the prosecutor.

HCRJ, the 5-Justice Panel, Decision #30 of 3 February 2020

2. Prosecutor. A request for the chief clerk to mark criminal cases in ECRIS as being settled, even though such cases were not finalized. Failure to hand over files that did not exist factually at the premises of the prosecutors' unit on the date of expiry of his secondment to a managerial position.

Law #303/2004, Art. 99 item m)
Law #304/2004, Art. 62, Art. 65
Internal Regulation of Prosecutors' Offices,
as approved by Justice Minister's Order #2.632/C/2014,
Art. 134 para. (2)-(4), Art. 202
Code of Ethics for Judges and Prosecutors, Art. 12
Criminal Procedure Code, Art. 327, Art. 328

Concerning the disciplinary violation as under Art. 99 item m) of Law #303/2004, in terms of the objective side, the Panel ascertained the following facts: (i) the prosecutor asked the chief clerk to mark criminal cases in the ECRIS system as being settled, even though such cases were not finalized and had not been removed from the Registry of Criminal Prosecution and Investigation Supervision Activities; (ii) on the date when the period of his secondment to a managerial position with the prosecutors' unit expired, the prosecutor failed to hand over 39 files, which were not physically present at the premises of the prosecutors' unit, handing them afterwards to the delegated chief prosecutor either through the military post service or personally.

The above-mentioned facts reveal a breach of the stipulations of Art. 327 and Art. 328 of the Criminal Procedure Code, Art. 62 of Law #304/2004, Art. 134 para. (2)-(4) and Art.202 of the Internal Regulation of Prosecutors' Offices, as approved by Justice Minister's Order #2.632/C/2014, as subsequently amended and supplemented, and of Art. 12 of the Code of Ethics for Judges and Prosecutors.

The immediate and direct consequence of such breach of professional obligations and of work relations, which the magistrate under investigation is trying to minimize by blaming it on the high workload, insufficient staff and the lack of experience in the managerial position held by him, consists not only in harm caused to the principle of hierarchical subordination, which regulates the activities performed by prosecutors, but also in a disturbance of activities within the prosecutors' unit.

Under Art.100 item a) of Law #303/2004, a disciplinary sanction was applied to the prosecutor consisting of a "warning" for having perpetrated a disciplinary violation as under Art. 99 item m) of the same law.

Art. 99 item r) of Law #303/2004: "failure by a prosecutor to draft or sign court judgments or judicial documents within the terms provided by law for culpable reasons"

Judge. Repeated non-compliance with deadlines set for the drafting of court judgments, for culpable reasons.

Law #303/2004, Art. 99 item r), Art.100 item b)

The Panel established that the constitutive elements of the disciplinary violation as under Art. 99 item r) of Law #303/2004 were met, due to the fact that the circumstances of the case reflected the following aspects: **(i)** in terms of the objective side, the judge had a number of 265 unwritten judgments, the drafting deadline of which had been exceeded by intervals between 100 and 367 days in over 150 cases, while in a larger number of cases, the term had been exceeded by more than 60 days; **(ii)** in terms of the subjective side, the delays in drafting the court judgments are attributable to the magistrate, being caused by a flawed management of the working time and a poor planning of activities, and also by a state of assumed passiveness in relation to the performance of the obligation to draft court judgments within the terms provided by law, the mindset of the judge being that he could foresee the results of his conduct, the occurrence of which was accepted by him, even if he did not seek this directly.

Under Art.100 item b) of Law #303/2004, a disciplinary sanction was applied to the magistrate consisting of a "*reduction of his gross monthly basic salary by 15% for a period of 3 months*," the Panel deciding that the magistrate was either unaware of the ampleness and seriousness of his culpable conduct or was not able to remedy the flaws existing in his activity, due to the fact that he had constantly and repeatedly disregarded the deadlines for drafting the judgments provided by the legal stipulations, even though he had been investigated before for the same type of non-compliant conduct.

HCRJ, the 5-Justice Panel, Decision #70 of 25 May 2020

Art. 99 item t) of Law #303/2004: "performance of job duties in bad faith or by gross negligence"

1. Judge. Dismissal, as tardy, of a complaint filed within the term, through electronic means, but which received a certain hearing date only after the term expired. Logical and legal reasoning.

Law #303/2004, Art. 99 item t), second indent, Art. 99^1 para. (2)
Criminal Procedure Code, Art. 269-270
Decision #12 of 28 April 2020 of the High Court of Review and Justice – Panel for the Clarification of Certain Points of Law in criminal matters

For the existence of a disciplinary violation as under Art. 99 item t), second indent, of Law #303/2004, in respect of the objective side, in performing his/her job duties, a judge should have failed to comply with a substantive or procedure law rule, while in

respect of the subjective side, such non-compliance must have been serious, unquestionable and inexcusable.

As constantly established in the jurisprudence of the 5-Justice Panel in applying this stipulation, the lawmaker has included the breaches of substantive or procedure rules among those of extreme importance, which have consequences on the validity of documents drafted by magistrates, or which cause serious harm to the rights and interests of parties, and for which a reasonable observer cannot find a justification.

The act of the judge, who dismissed as tardily filed a complaint against a prosecutor's order establishing a preventive measure, a complaint filed within the legal term, via electronic mail, but which received a hearing date after the expiry of the legal deadline, does not fall under the substantive element specific to the objective side of the disciplinary violation as under Art. 99 item t), second indent, of Law #303/2004.

The interpretation given by the judge to the applicable legal stipulations does not fall under the concept referring to the performance of job duties by gross negligence, as the culpable nature of the act is missing, and the examination of the specific interpretation and application of the legal stipulations by the judge exceeds the disciplinary litigation area.

In the case, the decision returned by the judge is the result of a justified legal reasoning, accepted in fact by part of the doctrine and jurisprudence, and the circumstances of the case settlement do not reveal its handling by gross negligence, which results from the way in which the applicable legal stipulations were analyzed in the absence of explicit stipulations concerning the registration of complaints sent via electronic mail.

In fact, after having identified the existence of two jurisprudential directions related to the legal stipulations applicable in the case, by Decision #12 of 28 April 2020 returned in case #350/1/2020, the High Court of Review and Justice – the Panel for the Clarification of Certain Points of Law in criminal matters, in interpreting the stipulations of Art. 269 and Art. 270 of the Criminal Procedure Code, established that if a procedure document that needs to be sent within a specific term is sent via e-mail or fax on the last day of a term that is calculated in days, it is deemed to be sent within the legal term, even if such procedure document is registered with the judicial body after the expiry of such term.

HCRJ, the 5-Justice Panel, Decision #68 of 25 May 2020

2. Judge. Settlement of a case contrary to the solution of principle given by the Clarification of Certain Points of Law and without presenting the considerations for the judgment and the reasons why they eliminated the parties' defenses that were based on a preliminary ruling. Analysis of the disciplinary violation for which the judge was found guilty by reference to the misconduct regulated by Art. 99 item ș) of Law #303/2004.

Law #303/2004, Art. 99 item ș), Art. 99 item t) second indent,

corroborated with Art. 99^1 para. (2)
Civil Procedure Code, Art.425 para. (1) item b), Art.521 para. (3)

In the case, the judge was accused of having committed a disciplinary violation as under Art. 99 item t) second indent, corroborated with Art. 99^1 para. (2) of Law #303/2004.

Referring to the "performance of job duties by gross negligence," the jurisprudence in the area of disciplinary liability of judges and prosecutors has established that such misconduct, regulated by Art. 99 item t) second indent, corroborated with Art. 99^1 para. (2) of Law #303/2004, requires the cumulative fulfillment of the following conditions: (i) in performing his/her job duties, a magistrate should breach substantive or procedure law rules; (ii) such breach needs to take place by negligence. Such fault is consistently defined both in the civil (Art. 16 para. (3) of the Civil Code) and in the criminal (Art. 16 para. (4) of the Criminal Code) law area as being an attitude of the perpetrator who either anticipates that result of his/her act but does not accept it, believing unjustifiably that it will not occur, or does not anticipate the result of his/her act, even though he/she should have anticipated it. For the disciplinary violation in question, the form of guilt imposed by the law is gross negligence (*culpa lata*), in the sense that even the least informed person would have foreseen the result of his/her act if exercising minimal care; (iii) the breach of the legal rules must generate serious consequences; (iv) the breach must be obvious, unquestionable, unjustified and in blatant contradiction to the legal rule. In order to confirm the existence of gross negligence, the breach must concern an operational / prohibitive mandatory legal rule or must result in the adoption of a decision outside any law rules or based on a macroscopic error, for which a reasonable observer (an informed and good-faith person) cannot find a justification. (Decision #48 of 27 February 2017, Decision #130 of 24 April 2017).

In the case, in terms of the objective side, the Panel established that in settling the dispute brought before him the judge did not observe the solution of principle given through the preliminary ruling returned by the High Court of Review and Justice – Clarification of Certain Points of Law, and failed to present considerations in the judgment showing the reasons why he returned a contrary decision and why he eliminated the parties' defense arguments that were based on the preliminary ruling, this way breaching the imperative stipulations of Art.521 para. (3) and Art.425 para. (1) item b) of the Civil Procedure Code.

On the negligence side, the judge's attitude was that of anticipating but not accepting the results of his actions, which consisted of a breach of the procedure rules resulted from his failure to observe the solution of principle offered by the Clarification of Certain Points of Law, and in full disregard of the preliminary ruling at the time when he reasoned the returned judgment.

Gross negligence is highlighted by the flawed performance of job duties, is obvious, unquestionable, unjustified and is in full contradiction to the procedure stipulations, because the judge returned a judgment contrary to the interpretation of the solution of principle given by the preliminary ruling, which represented the main defense of the

respondents in that dispute, reiterated by all means of defense used in the case, and because in the judgment reasoning he did not make any reference to the preliminary ruling.

Art. 99 item ș) of Law #303/2004 regulates the disciplinary violation consisting of "*non-compliance with decisions returned by the Constitutional Court or by the High Court of Review and Justice in settling appeals in the interest of the law*."

Failure to comply with decisions returned by the High Court of Review and Justice in settling requests for a preliminary ruling for the clarification of points of law is not regulated explicitly as a disciplinary violation.

The absence of a distinct and explicit criminalization as disciplinary violation of the non-compliance with the obligation imposed by Art. 521 para. (3) of the Civil Procedure Code cannot lead to the conclusion that such non-compliance is excluded *de plano* from the scope of disciplinary liability of judges.

In other words, the absence of a distinct criminalization of a specific deficiency of the magistrate in performing his/her job duties does not justify the conclusion of permanent exclusion of it from the scope of disciplinary liability by reference to other acts that are somehow similar and are distinctly criminalized.

Based on the circumstances of the disciplinary action brought before the court, it has been established that the stipulations of Art. 99 item t) of Law #303/2004 represent a general rule applicable to situations in which the circumstances of a disciplinary dispute reveal a conduct of performance of job duties in bad faith or by gross negligence, while the misconduct regulated by Art. 99 item ș) of Law #303/2004 represents a special rule applicable to the two particular situations provided by the text.

HCRJ, the 5-Justice Panel, Decision #173 of 5 October 2020

3. Prosecutor. Issuance of orders to postpone the notification of persons subject to technical surveillance in breach of the term provided by the legal stipulations. Refusal to accept a criminal case for prosecution.

Law #303/2004, Art. 99 item t) second indent,
Criminal Procedure Code, Art. 145 para. (1), (4) and (5), Art. 324

From the perspective of misconduct as under Art. 99 item t), second indent, in Law #303/2004, the prosecutor was accused of a breach of the stipulations of Art. 145 para. (1), (4) and (5) (by issuing orders to postpone the notification of persons subject to technical surveillance in breach of the term provided by the legal stipulations) and of Art. 324 (by refusing to accept a criminal case for prosecution) of the Criminal Procedure Code.

In order for liability to be triggered in the case of this disciplinary violation, the following conditions must be met cumulatively: in performing his/her job duties, a magistrate should breach rules of substantive or procedural law; (ii) such breach needs

to take place by negligence, and such breach of legal rules should generate serious consequences and should be obvious, unquestionable, unjustified and in blatant contradiction to the legal rule.

The aspects held against the magistrate do not reflect the existence of any elements of gross negligence. Instead, they represent the way in which the magistrate applied the applicable procedure stipulations as part of his logical and legal reasoning.

A check on the logical and legal reasoning of the magistrate in relation to the interpretation and application of the stipulations applicable to the case in terms of their lawful and founded nature exceeds the scope of the disciplinary litigation area, and they may be subject to review only through the avenues of appeal regulated by law.

In the case, there was no violation of the procedural rights of persons involved in the criminal cases subject to review, and it is not any breach of the procedure law rules that can represent a disciplinary violation, but only those generating extremely serious consequences.

Referring to the subjective side, the Panel cannot ascertain that the prosecutor acted intentionally, because we are not dealing with a conduct of blatant breach of professional duties, with consequences on the rendering of justice, which would have caused serious harm to the procedural rights of the parties. At the same time, from the perspective of the psychological element, one cannot ascertain a conscious conduct of breach of the procedure law rules by seeking or accepting the causing of harm to the rights and interests of law subjects.

HCRJ, the 5-Justice Panel, Decision #30 of 3 February 2020

4. Prosecutor. Disregard of procedure law rules is not an expression of gross negligence, being generated by objective factors. Absence of harm.

Law #303/2004, Art. 99 item t) second indent, Art. 99^1 para. (2)
Criminal Procedure Code, Art. 2, Art. 6, Art. 16, Art. 300 para. (1) and (3), Art. 305 para. (1) and (3)

In terms of the objective side, the Panel established that the measure whereby the prosecutor ordered the continuation of criminal prosecution and the initiation of a criminal action against a natural person in whose respect a decision on dropping the criminal prosecution had been issued, confirmed by the court, represents a blatant disregard of the procedure law rules as under Art. 2, Art. 6, Art. 16, Art. 300 para. (1) and para. (3), Art. 305 para. (1) and para. (3) of the Criminal Procedure Code.

In terms of the subjective side, the lawmaker has established under Art. 99^1 para. (2) of Law #303/2004 that gross negligence exists "*when a judge or prosecutor seriously, undoubtedly and inexcusably disregards the substantive and procedure law rules by negligence*."

This rule complements the stipulations of Art. 4 in the aforementioned law, which reads that judges and prosecutors are under an obligation to secure the rule of law in all their

activities, to observe the rights and freedoms of persons, as well as their equality before the law, and to secure a non-discriminating legal treatment for all participants in judicial proceedings, regardless of their capacity, and to observe the Code of Ethics for Judges and Prosecutors.

From an interpretation of the above-mentioned stipulations it results that in order to establish the commission of a disciplinary violation it is necessary to establish the existence of a breach of the legal rules by negligence, and such error must be obvious, must have serious consequences and must have no justification.

In the case, the adoption by the prosecutor of decisions regarding the continuation of the criminal prosecution and the initiation of a criminal action was generated by the existence of objective factors, and the way in which the prosecutor performed his duties is not an expression of gross negligence in performing one's duties, because the existence in the case file of a court ruling confirming the dropping of the criminal charges had been proven, and the organizational chart for prosecutors at the level of the prosecutors' unit was undersized, the workload was very high, and the prosecutor simultaneously performed duties specific to both his managerial position and his execution position.

Moreover, in respect of the criminal case under review, the harm as a critical element for tort liability is absent, because by a subsequent order the prosecutor ordered the invalidation of the challenged measures.

Not any breach of the procedure rules can constitute a disciplinary violation, but only those that demonstrate extreme seriousness and cannot be effectively remedied.

HCRJ, the 5-Justice Panel, Decision #31 of 3 February 2020

II. ADMINISTRATIVE-JURISDICTIONAL PROCEDURE

1. Civil Procedure Code. Compatibility of the stipulations of the Civil Procedure Code with the proceeding for the settlement of disciplinary action conducted before the HCM

1.1. Incompatibility of the stipulations of Art. 61-64 in the Civil Procedure Code with the administrative-jurisdictional procedure for the settlement of disciplinary action conducted before the HCM when the latter acts as a disciplinary court.

Civil Procedure Code, Art.61-64
Law #317/2004, Art. 49 para. (7)

Art. 49 para. (7) of Law #317/2004 stipulates that "*The stipulations of this law regulating the procedure for the settlement of disciplinary action are complemented by the stipulations of Law #134/2010, as amended and republished, to the extent that they are not incompatible with it*."

The jurisprudence of the 5-Justice Panel of the High Court of Review and Justice has been consolidated in the sense that, in applying the reference rule provided by Art. 49 para. (7) of Law #317/2004, the stipulations of the Civil Procedure Code do not become automatically applicable, but only to the extent that they are not incompatible with the special stipulations regulating the proceeding for the settlement of disciplinary action contained in Law #317/2004. In this respect, the jurisprudence has established that "an essential argument consists of the fact that HCM's chambers, when they function as a disciplinary court for judges and prosecutors, are not courts of law in the meaning of Art. 126 para. (2) of the Constitution and of the stipulations of Law #304/2004 on Judicial Organization, but represent an extra-judicial court (Constitutional Court's Decision #148 of 16 April 2003), which performs an administrative & jurisdictional activity (Constitutional Court's Decision #391 of 17 April 2007), being therefore an administrative-jurisdictional body" (High Court of Review and Justice – 5-Justice Panel, Decision #266/2017, point 66; Decision #271/2017, point 45; Decision #293/2017, item 19).

From the perspective of the incompatibility of the procedural concept of voluntary intervention in the administrative-jurisdictional proceeding for the settlement of disciplinary action, the fact that disciplinary liability has a strictly personal nature is of decisive relevance, as the legal relation of disciplinary liability has a strong public law component, and the specific interest pursued by a private-law subject cannot be attached to such relation, in the meaning of the motion to intervene regulated by the Civil Procedure Code. As such, even if in the meaning of Art. 61 para. (3) of the Civil Procedure Code, it represents a mere defense argument raised by the accessory intervener in support of one of the parties in the litigation – as is the case in the procedural attempt of the plaintiff in extraordinary appeal – a motion to intervene is not admissible in case of applications of personal nature, a category that also includes

disciplinary liability actions. Considering the similarity existing in terms of the strictly personal nature between the disciplinary liability and the criminal liability, an additional argument in favor of the inadmissibility of the accessory motion to intervene in the disciplinary proceeding is represented, by analogy, by the fact that the Criminal Procedure Code does not regulate the legal concept of main or accessory intervention either.

HCRJ, the 5-Justice Panel, Decision #36 of 10 February 2020

1.2. Incompatibility of the stipulations of Art. 413 para. (1) item 2 of the Civil Procedure Code with the stipulations of Law #317/2004, which regulate the proceeding for the settlement of disciplinary action filed against judges and prosecutors. Applicability of the special stipulations of Art. 46 para. (3) of Law #317/2004.

Law #317/2004, Art.46 para. (3), Art.49 para. (7)
Civil Procedure Code, Art. 413 para. (1) item 2

When it acts, through its chambers, as disciplinary court for judges and prosecutors, the HCM is not a court of law in the meaning of the stipulations of Art.2 of Law #304/2004. In this respect, both the jurisprudence of the Constitutional Court and the practice of the High Court of Review and Justice – the 5-Justice Panel have established that, in performing this duty, HCM is an extra-judicial court, not a court of law in the meaning of Art. 126 para. (1) of the Constitution, corroborated with Art. 2 para. (2) of Law #304/2004 (Decisions of the Constitutional Court #148/2003, #391/2007, #514/2007 and #788/2007; Decisions of the High Court of Review and Justice – the 5-Justice Panel #266/2017, point 66; #271/2017, point 45; #293/2017, item 19; #5/2018, point 49 and #148/2018, item 19).

As such, the stipulations of the Civil Procedure Code are not automatically and fully applicable to the administrative-jurisdictional proceeding that is conducted before HCM's chambers in the disciplinary domain; instead, according to Art. 49 para. (7) of Law #317/2004, they complement the stipulations regulating the proceeding for the settlement of disciplinary action contained by Law #317/2004 only "*to the extent that they are not incompatible*" with such proceeding.

Since the facts that are subject to the disciplinary proceeding are also examined from the perspective of criminal liability, the special stipulations of Art. 46 para. (3) of Law #317/2004 are applicable, according to which "*A disciplinary investigation will be suspended when the initiation of criminal action for the same act is ordered against the judge or prosecutor subject to investigation*."

In the presence of the special stipulations of Art. 46 para. (3) of Law #317/2004, the stipulations of Art. 413 para. (1) item 2 of the Civil Procedure Code are not applicable in the case referred to the court.

An argument in favor of this is given precisely by the stipulations of Art. 413 para. (1) item 2 of the Civil Procedure Code, which specify that, "*unless the law provides otherwise*," the court may suspend the proceedings when "*criminal prosecution has*

been initiated for an offence that would have a decisive influence on the decision to be issued." Indeed, the special law does provide otherwise, through the stipulations of Art.46 para. (3) of Law #317/2004.

The previous jurisprudence of the 5-Justice Panels is also in favor of this, a fact presented in Decision #25 of 4 February 2019 and Decision #95 of 15 April 2019**.**

HCRJ, the 5-Justice Panel, Decision #76 of 15 June 2020
Decision #125 of 7 September 2020

2. A magistrate's conduct that is non-compliant with the Code of Ethics for Judges and Prosecutors is subject to checks under the proceeding regulated by Art. 64-65 of the Regulation on the Organization and Operation of the HCM only to the extent that it does not have the constitutive elements of one of the disciplinary violations as under Art. 99 of Law #303/2004.

Law #303/2004, Art. 97 item b) (*in its form prior to the amendments and additions operated by Law #247/2005*), Art. 99
Law #247/2005, Title XVII, Art. I item 102
Code of Ethics for Judges and Prosecutors
Regulation on the Organization and Operation of the HCM, Art. 64-65

Art. 97 item b) of Law #303/2004, in its form prior to the amendments and additions operated by Law #247/2005, published in Part I of the Official Journal of Romania issue #653 of 22 July 2005, regulated a disciplinary violation consisting of "non-compliance with the stipulations contained in the Code of Ethics of Magistrates."

Art. I item 102 of Title XVII – "Amendments and Supplements to Law #303/2004 on the Status of Magistrates" of Law #247/2005 repealed Art. 97 item b) of Law #303/2004.

The repealing of Art. 97 item b) of Law #303/2004, by Art. I item 102 of Title XVII – "Amendments and Additions to Law #303/2004 on the Status of Magistrates" of Law #247/2005 does not have an effect of removing the conduct non-compliant with the rules of ethics from the scope of disciplinary liability.

From the interpretation of the stipulations of Art. 64 para. (4) and Art. 65 para. (7) of the Regulation for the Organization and Operation of the HCM, it results that the breach of the rules of ethics as under the Code of Ethics for Judges and Prosecutors can be found by a decision of the relevant chamber of the HCM under the proceeding regulated by the above-mentioned Regulation and such decision is included in the professional file of the magistrate, but only in a situation where, following checks conducted by judicial inspectors, it is found that the initiation of a disciplinary action for any of the misconduct acts regulated by Art. 99 of Law #303/2004 is not justified.

In other words, a judge's conduct that is non-compliant with the Code of Ethics is subject to checks under the proceeding regulated by Art. 64-65 of the Regulation on

the Organization and Operation of the HCM solely to the extent that one does not establish that the constitutive elements of a disciplinary violation do not exist.

HCRJ, the 5-Justice Panel, Decision #62 of 18 May 2020

3. Impartiality. Observance of the duty of impartiality by judicial inspectors while holding managerial positions with the Judicial Inspection.

Law #317/2004, Art. 72 para. (1)

Art. 72 para. (1) and (2) of Law #317/2004 stipulates as follows:
"*Art. 72. - (1) Judicial inspectors perform their activities independently and impartially.*
(2) Judicial inspectors may not perform disciplinary investigations or any other works concerning judges or prosecutors of courts or prosecutors' offices in which they worked previously. In such situations, the case is randomly assigned to another judicial inspector, in compliance with the stipulations of Art. 73."

According to Art. 9 para. (1) and (2) of the Regulation on the Rules for Conducting of Inspections:
"*Art. 9. ─ (1) In performing their duties, inspectors have an obligation to adopt an objective, equidistant and neutral attitude, of nature to eliminate any suspicion related to their lack of impartiality.*
(2) In order to ensure the impartial and independent nature of activities, inspectors may not conduct disciplinary investigations or any other type of works concerning judges or prosecutors of courts or prosecutors' offices with which they worked previously."

The quoted stipulations are applicable to the activity of judicial inspectors related to the settlement on the merits of works assigned to them and to their duties specific to managerial positions with the Judicial Inspection.

The duty of impartiality imposed on the activity of judicial inspectors extends also to the situation of judicial inspectors who hold managerial positions, because, on one hand, the law does not make any distinction in this respect and, on the other hand, for instance, the reports on the extension of the term for performing preliminary checks, on changing the subject matter of the work, and on assigning a second judicial inspector, or the documents confirming resolutions on filing disciplinary action do not represent a mere formality; instead, they require an analysis of the lawfulness and founded nature of the stages of a disciplinary proceeding.

The observance of the principle of impartiality is generally applicable and concerns the whole disciplinary proceeding, including the stage of preliminary checks and the stage of disciplinary investigations, irrespective of the nature of documents prepared or approved, and independently from the regulation at a legislative or infra-legislative level of the duties resting on the chief inspector, the deputy chief inspector and the department managers related to the conducting of disciplinary proceedings.

4. Resolution on filing disciplinary action. Confirmation of the resolution to file a disciplinary action against a judge by a prosecutor, in performing his job duties, by the deputy chief inspector of the Judicial Inspection, in his capacity as substitute of the chief inspector of the Judicial Inspection.

Law #303/2004, Art. 1 para. (2)
Law #317/2004, Art. 47 para. (3), Art. 65 para. (2), Art. 67 para. (8)
Regulation on the Organization and Operation of the Judicial Inspection, Art. 5 para. (1) and Art. 6 para. (1)
Constitutional Court's Decision #421 of 4 July 2019

Performance by the prosecutor who holds the position of deputy chief inspector of the Judicial Inspection, in his capacity as substitute of the chief inspector, of the prerogative as under Art.47 para. (3) of Law #317/2004, consisting of the confirmation of a resolution to file a disciplinary action against a judge, does not represent a violation of the principle of separation between judge positions and prosecutor positions provided explicitly by Art.1 para. (2) of Law #303/2004.

From the interpretation of the stipulations of Art. 65 para. (2) and Art. 67 para. (8) of Law #317/2004, and of Art. 5 para. (1) and Art. 6 para. (1) of the Regulation on the Organization and Operation of the Judicial Inspection[1], it results that the deputy chief inspector "is the *de jure* substitute of the chief inspector," has the authority to assist the latter "in his activities related to the checking and approval of documents and resolutions drafted by judicial inspectors," and the law even confers him a right to act as interim chief inspector in case of termination of the mandate of the person holding the position of chief inspector (as a result of situations other than the mandate expiry).

The above-quoted stipulations give the deputy chief inspector an unconditional prerogative to perform all job duties pertaining to the position of chief inspector, both in case of termination of the term of office for such position (as a result of situations other than the mandate expiry) and in any other situation when the chief inspector is unable to perform the job duties related to his position.

The observance of the principle of separation between the two judicial positions is ensured in the disciplinary liability area both at the administrative stage and at the administrative-jurisdictional stage. At the administrative stage, conducted by the

[1] Regulation on the Organization and Operation of the Judicial Inspection, as approved by Order no. 134/2018 of the Judicial Inspection's Chief Inspector, published in Part I of Official Gazette of Romania no. 1049 of 11 December 2018, was repealed by Order no. 49/2021 of the Judicial Inspection's Chief Inspector approving the Regulation on the Organization and Operation of the Judicial Inspection, published in Part I of Official Gazette of Romania no. 591 of 11 June 2021. The provisions of Art. 5 para. (1) și Art. 6 para. (1) of the Regulation approved by Order no. 134/2018 of the Judicial Inspection's Chief Inspector have a correspondent in the provisions of Art. 3 para. (1) and Art. 4 of the Regulation approved by Order no. 49/2021 of the Judicial Inspection's Chief Inspector, under which: „*Art.3 – (1) The Judicial Inspection is run by a chief inspector, who is a judge, assisted by a deputy chief inspector, who is a prosecutor*"; "*The deputy chief inspector performs his/her job duties set by law, regulations and by orders from the chief inspector*".

Judicial Inspection, depending on the position of the magistrate under investigation, preliminary checks are performed either by the Inspection Directorate for Judges (as it happened in the case referred to the court) or by the Inspection Directorate for Prosecutors. Later on, at the administrative-jurisdictional stage, the disciplinary action is settled either by the Chamber for Judges in the disciplinary domain (as it happened in the case referred to the court) or by the Chamber for Prosecutors in the disciplinary domain of the HCM.

In this sense, the considerations under paragraphs 21, 24, 27 and 28 of Constitutional Court's Decision #421 of 4 July 2019, published in Part I of Official Journal of Romania #854 of 22 October 2019, are clarifying.

Therefore, the 5-Justice Panel established that the objection requesting for absolute nullity of the resolution to file disciplinary action against a judge, on the grounds that it had been confirmed by the deputy chief inspector of the Judicial Inspection, who was a prosecutor, was unfounded.

HCRJ, the 5-Justice Panel, Decision #63 of 18 May 2020

5. Resolution on filing disciplinary action. Preparation of preliminary acts in breach of the principle of impartiality. Absolute nullity.

Law #317/2004, Art.72 para. (1)
Civil Procedure Code, Art. 177 para. (2)

The jurisprudence in the area of disciplinary liability of judges and prosecutors (Decisions #312 of 4 December 2017 and #50 of 25 February 2019 of the High Court of Review and Justice – the 5-Justice Panel) has established that the document for the notification of the disciplinary court (the resolution on filing a disciplinary action) is a procedure document that can be reviewed (in terms of its nullity) by the notified court, and the validity of this document depends on the validity of the previous administrative and disciplinary procedure documents, the disciplinary court having the authority to review the validity of the notification document and of documents prior to it, on which it is based.

The objection regarding the absolute nullity of the resolution on filing a disciplinary action is founded due to the fact that the reports for the extension of the term for conducting preliminary checks, for changing the subject matter of the work and for the assignment of a second judicial inspector were approved in breach of the principle of impartiality set forth by Art.72 para. (1) of Law #317/2004 by the chief inspector and by the manager of the Inspection Directorate for Prosecutors, who had previously filed abstention statements.

The stipulations of Art.72 para. (1) of Law #317/2004, which stipulate that "*Judicial inspectors perform their activities independently and impartially*" are applicable both to the activity of judicial inspectors related to the settlement on the merits of works assigned to them and to administrative proceedings, such as approval and endorsement

decisions, conducted in performing their duties specific to managerial positions in the Judicial Inspection (chief inspector or manager of the Inspection Directorate).

The nullity of the relevant reports for a breach of the principle of impartiality has direct consequences on the validity of all documents drafted subsequently, according to the stipulations of Art. 177 para. (2) of the Civil Procedure Code, under which such nullity can be covered if a deadline violation or other procedure sanction occurs or if harm is caused or subsists.

HCRJ, the 5-Justice Panel, Decision #111 of 13 July 2020

6. Resolution on filing disciplinary action confirmed by the deputy chief inspector who was in an incompatibility situation. Absolute nullity.

Law #317/2004, Art.72 para. (1) and (2)
Civil Procedure Code, Art. 41 et seq., Art.176

According to Art.72 para. (1) and (2) of Law #317/2004:
"*Art. 72. - (1) Judicial inspectors perform their activities independently and impartially.*
(2) Judicial inspectors may not perform disciplinary investigations or any other works concerning judges or prosecutors of courts or prosecutors' offices in which they worked previously. In such situations, the case is randomly assigned to another judicial inspector in compliance with the stipulations of Art. 73."

From an interpretation of the above-quoted stipulations, corroborated with the stipulations referring to "incompatibility" and "abstention" of Art.41 *et seq.* of the Civil Procedure Code, it results that the non-observance by the deputy chief inspector of the rules providing for an incompatibility situation (when the disciplinary proceeding concerns a prosecutor of the prosecutors' unit in which the prosecutor holding the position of deputy chief inspector worked previously) in performing his job duty related to the confirmation of a resolution on filing a disciplinary action, triggers the sanction of absolute nullity of the resolution on filing disciplinary action.

The confirmation of the resolution on filing a disciplinary action in disregard of the stipulations of Art. 72 para. (2) of Law #317/2004 overturns the presumption of lawfulness of such administrative document and, given that a breach of a legal provision regarding the extrinsic condition of the document has been acknowledged, the applicable sanction is absolute nullity, under the terms of Art. 176 of the Civil Procedure Code, because such resolution represents the document through which the disciplinary court has been notified, and the effects on the career of the magistrate in the case can be eliminated only by confirming the absolute nullity of the disciplinary action as a result of a breach of an imperative rule concerning a general interest, namely the lawful performance of activities by a public entity.

HCRJ, the 5-Justice Panel, Decision #184 of 19 October 2020

III. JUDICIAL PROCEDURE

1. Appeal for annulment. Art. 503 para. (2) item 1 of the Civil Procedure Code. Inadmissibility.

Civil Procedure Code, Art. 503 para. (2) item 1
Constitutional Court's Decision #685 of 7 November 2018

An appeal for annulment based on the grounds set forth by Art. 503 para. (2) item 1 of the Civil Procedure Code (concerning a decision returned in appeal on law by a court completely without jurisdiction) is inadmissible if the requirements referring to the raising of this objection during the examination of the appeal on law, on one hand, and the court's omission to decide on such objection, on the other, are not met.

In support of the appeal for annulment, the party relied on the Constitutional Court's Decision #685 of 7 November 2018, whereby the court established the existence of a conflict of a constitutional nature between the Parliament and the Supreme Court for non-observance by the latter of the rules referring to the composition of judicial panels.

Under paragraph 161 of Decision #685 of 7 November 2018 of the Constitutional Court, the constitutional litigation court "*establishes that […] the decision returned in appeal on law is subject to an appeal for annulment if returned in breach of the rules referring to the composition of judicial panels, provided that the relevant objection has been raised, and the court adjudicating the appeal on law has omitted to rule on it (our highlight) [Art. 503 para. (2) item 1 of the Civil Procedure Code]. It also establishes that such rule is also a public order rule and, as such, no breach of the legal rules referring to the panel composition can be accepted in any way*."

Based on the above-quoted considerations of Constitutional Court's Decision #685/2018, the appellant had and used avenues of appeal, based on the grounds set forth by Art. 503 para. (2) item 1 of the Civil Procedure Code, only if he observed the conditions specified by this legal provision, namely if, during the examination of the appeal on law, he invoked the fact that the judge panel had been created in breach of the rules referring to the composition of panels, which did not happen.

By setting the above-mentioned condition, the lawmaker intended to sanction the party's inaction and passiveness, and one cannot state that after the rendering of Decision #685/2018 of the Constitutional Court, one no longer needs to prove the fulfillment of the conditions as under Art. 503 para. (2) item 1, second indent, of the Civil Procedure Code since the Constitutional Court itself has stipulated them explicitly in the Decision's considerations.

HCRJ, the 5-Justice Panel, *Decision #50 of 9 March 2020*

2. Appeal for annulment. Art. 503 para. (2) item 2 of the Civil Procedure Code. Interpretation of the concept of "*material error*."

Civil Procedure Code, Art. 503 para. (2) item 2

Referring to the grounds for appeals for annulment set forth by Art. 503 para. (2) item 2 of the Civil Procedure Code (under which the verdict given in an appeal on law was the result of a material error), the interpretation of the concept of "material error" is restrictive, in the sense that it includes blatant and involuntary mistakes related to essential aspects of a formal and procedural nature, which have led to the returning of an erroneous decision. This concept does not refer to errors related to the case examination, such as, for example, the way in which the court has assessed the evidence and has interpreted a legal provision.

A check on such material error does not have to imply a reexamination of the case merits or a reassessment of the evidence, because an appeal for annulment seeks the cancellation of a court decision not because the case examination was poor but for the reasons explicitly and limitedly as under the law.

HCRJ, the 5-Justice Panel, *Decision #50 of 9 March 2020*

3. Appeal for annulment. Art. 503 para. (2) item 1, 3 and 4 of the Civil Procedure Code. Complaints regarding the assistant magistrate's duties related to his participation in deliberations and the drafting of court decisions. Right of access to a judge.

Constitution, Art. 21
Civil Procedure Code, Art. 401 para. (2), Art. 426 para. (1), Art. 503 para. (2) item 1, 3 and 4
Law #303/2004, Art. 66 paras. (1), (3) and (4), and Art. 71

In respect of the grounds for appeal for annulment as under Art. 503 para. (2) item 1, 3 and 4 of the Civil Procedure Code, the party complained that the appealed decision had been written by the assistant magistrate and that the deliberation process was secret, including for the assistant magistrate, and claimed a breach of its right of access to a judge as a form of the fundamental right of access to justice.

The job duties of assistant magistrates related to their participation in deliberations and to the drafting of decisions are explicitly regulated by the law as follows:

- Art.71 of Law #303/2004 stipulates explicitly that "*Assistant magistrates who participate in court sessions of the High Court of Review and Justice [...] participate in deliberations, having a consultative vote, and draft decisions according to the distribution decided by the presiding justice for all members of the panel*";

- Art.401 para. (2) of the Civil Procedure Code: "*Under sanction of nullity of the court decision, hearing minutes will be signed on each page by the justices and, as applicable, by the assistant magistrates [...]*."

- Art.426 para. (1) of the Civil Procedure Code: "*The decision is drafted by the justice who adjudicated the case. When the panel composition also includes [...] assistant magistrates, the presiding justice may nominate one of them to draft the decision.*"

As long as the assistant magistrate position is regulated by Law #303/2004 as a position specific to the judicial system, and assistant magistrates enjoy stability (Art. 66 para. 1 of the Law), the general conditions for appointment set forth for the position of judge and prosecutor (Art.66 para.3 of the Law) apply to them and the legal stipulations regarding the incompatibilities and prohibitions, the continuous professional training and the periodical evaluation, the rights and obligations, and the disciplinary liability of judges and prosecutors (Art.66 para.4) also apply to them, and they have a consultative vote in deliberations (Art.71 of the Law), it is established that, through the activities performed by them in the case adjudication activity, the right of parties to have access to a court of law, in the meaning of the Convention, is ensured in respect of its component referring to the independence and impartiality of the court, as established in the jurisprudence of ECHtR (Campbell and Fell/United Kingdom, #7819/77 and 7878/77, 28 June 1984, point 81; Ibrahim Gürkan/Turkey, #10987/10, 3 July 2012, item 18).

HCRJ, the 5-Justice Panel, Decision #190 of 26 October 2020

4. Constitutional challenge. Request for trial suspension filed under Art. 413 para. (1) item 1 of the Civil Procedure Code pending the settlement by the Constitutional Court of a constitutional challenge.

Civil Procedure Code, Art. 413 para. (1) item 1, Art. 509 para. (1) item 11
Law #47/1992, Art. 29 para. (5)

Referring to the suspension application filed under Art. 413 para. (1) item 1 of the Civil Procedure Code, whereby the court is requested to suspend its proceedings pending the settlement by the Constitutional Court of the constitutional challenge, it is established that the absence of an explicit procedural provision regarding the suspension of a trial in the event of admission of a notification filed with the constitutional litigation court, based on a constitutional challenge, and the repealing of Art. 29 para. (5) of Law #47/1992, which stipulated the *de jure* suspension of proceedings in a case pending the settlement of a constitutional challenge, reveals the intent of the lawmaker, shown through the new stipulations, to not require a compulsory, imperative and *de jure* order of such measure by a judge, the court being the one called to decide on the timeliness of such measure, including by considering the procedural position of the party who requested suspension of proceedings, under circumstances where the interest in a speedy settlement of the case belongs to it.

The possibility to decide on a trial suspension, depending on the actual circumstances of the case, is conditioned by the observance of the right to a fair trial and of the obligation to settle the case within a reasonable term for an improved rendering of justice and for the observance of the principle of finding the truth, the court having the duty to make use of the applicable legal stipulations without causing any harm to the rights and legitimate interests of the other parties.

Therefore, this case of optional suspension represents a useful instrument for preventing the rendering of contradictory decisions, and the settlement of a constitutional challenge cannot justify the optional suspension measure, as the party has had available the procedural remedy set forth by the stipulations of Art. 509 para. (1) item 11 of the Civil Procedure Code, and a contrary decision would lead to a delay in the case settlement. This is the reason why the High Court decided to dismiss the suspension application filed in the case.

HCRJ, the 5-Justice Panel, Decision #31 of 3 February 2020

5. Appeal on law as regulated by Art. 51 para. (3) of Law #317/2004 brought against decisions returned by the HCM acting as disciplinary court for judges and prosecutors. Legal classification. Effective and devolutive avenue of appeal.

Constitution, Art. 134 para. (3)
Law #317/2004, Art. 51 para. (3)
Decisions #17 of 21 January 2020
and #381 of 31 May 2018
of the Constitutional Court

The avenues of appeal called "appeal on law," regulated by Art. 51 para. (3) of Law #317/2004, which may be brought against decisions returned by the HCM on disciplinary action filed against judges or prosecutors, is a genuine, effective and devolutive avenue of appeal against the disciplinary body, under which all aspects are considered, and both the lawfulness of the proceeding and the grounded nature of the appealed decision are reviewed, this also being the purpose sought by Art. 134 para. (3) of the Constitution (Constitutional Court's Decision #17 of 21 January 2020, items 31-34; and Constitutional Court's Decision #381 of 31 May 2018, item 24, 25 and 30).

HCRJ, the 5-Justice Panel, Decision #126 of 7 September 2020

6. Revision. Art. 509 para. (1) item 11 of the Civil Procedure Code. Constitutional challenge sustained in relation to the stipulations of Art. 51 para. (3) of Law #317/2004.

Law #317/2004, Art. 51 para. (3)
Decisions of the Constitutional Court #17 of 21 January 2020
and #381 of 31 May 2018

In the case concerning an appeal on law filed under Art. 51 para. (3) of Law #317/2004, the appellant challenged the constitutionality of the relevant stipulations.

By Decision #17 of 21 January 2020, the Constitutional Court dismissed a constitutional challenge against the stipulations of Art. 51 para. (3) of Law #317/2004, because it had become inadmissible, establishing that, by Decision #381 of 31 May 2018, the constitutional challenge had been admitted and the court had established that the relevant stipulations were constitutional only to the extent that they were

interpreted in the sense that the appeal on law brought by them was a devolutive avenue of appeal against decisions of HCM's Chambers returned in the disciplinary area.

In the considerations of Decision #17 of 21 January 2020, the Constitutional Court established that, even though according to Art. 29 para. (3) of Law #47/1992, the constitutional challenge was dismissed because it had become inadmissible, according to the Court's jurisprudence[2], this decision could be a ground for a motion for revision, pursuant to Art. 509 para. (1) item 11 of the Civil Procedure Code.

Being vested with the settlement of the motion for revision filed under Art. 509 para. (1) item 11 of the Civil Procedure Code, the High Court established that the motion was unfounded for the following arguments:

(i) The admission of the constitutional challenge against the stipulations of Art. 51 para. (3) of Law #317/2004 can be the basis for a potential admission of the motion for revision only to the extent that one establishes that the decision the revision of which is requested is in contradiction to the decision and considerations of the Constitutional Court. In other words, the admission of a constitutional challenge does not automatically trigger the admission of the motion for revision and the full or partial change of the appealed decision.

(ii) In the case referred to the court, based on the decision and considerations of Constitutional Court's Decision #381 of 31 May 2018, it has been established that the decision challenged with motion for revision, returned for the settlement of an appeal on law filed under Art. 51 para. (3) of Law #317/2004, observes the arguments taken into account by the Constitutional Court supporting the constitutionality of those stipulations.

(iii) The essence of the Constitutional Court's reasoning concerns the constitutionality of the stipulations of Art. 51 para. (3) of Law #317/2004 in the sense that the appeal on law filed against the decision of the section deciding on a disciplinary action needed to represent "*a genuine devolutive avenue of appeal [...], by considering all aspects and by checking both the lawfulness of the proceeding and the founded nature of the decision of the disciplinary court."*

(iv) Based on an analysis of the appealed decision, it has been established that the High Court, vested with the appeal on law filed under Art. 51 para. (3) of Law #317/2004, has not limited itself to an analysis of the lawfulness but has also examined the grounds of the disciplinary court's decision in terms of the factual situation established based on the evidence produced. Therefore, based on the evidence produced, the High Court has analyzed the existence of the constitutive elements of the disciplinary charges, has examined all defense arguments presented in relation to the *de facto* and *de jure* situation, and has answered item by item to the defense arguments raised by the parties in respect of the objective and subjective side of the misconducts and of the disciplinary sanction customization.

[2] Decision #22 of 21 January 2015, paragraph 18; Decision #866 of 10 December 2015, paragraphs 19-23; Decision #365 of 2 June 2016, paragraph 40; and Decision #708 of 15 November 2018, paragraph 23