ROMANIA

THE HIGH COURT OF CASSATION AND JUSTICE

THE 5-JUDGE PANEL

Civil Decision no. 336 **File no. 869/1/2017**

Court session of 13 December 2017

CHAIRPERSON:	**Gabriela Elena Bogasiu**		**Deputy-Chairperson of the High Court of Cassation and Justice**
	Rodica Susanu	**-**	**judge**
	Mihaela Tăbârcă	**-**	**judge**
	Mirela Poliţeanu	**-**	**judge**
	Cristian Daniel Oana	**-**	**judge**
	Niculina Vrâncuţ	**-**	**assistant magistrate**

The court took under advisement the final appeals submitted by the defendant Camelia Bogdan and by the intervener the Association Forum of Romanian Judges against Ruling no. 1/J dated 8 February 2017, issued by the Superior Council of Magistracy - the Division for Judges in disciplinary matters in file no. 14/J/2016.

Debates were recorded in the court minutes dated 4 December 2017, forming an integral part hereof, while ruling was deferred until 11 December 2017 and, afterwards, until 13 December 2017.

Upon deliberation;

THE HIGH COURT

In respect of the final appeals at hand, upon the examination of the proceedings in this file, has ascertained the following:

1. Summary of case

1.1. Proceedings initiated before the Judicial Inspection. Disciplinary action

By means of the protocol dated 11 February 2016, the Judicial Inspection initiated proceedings *ex officio*, following the *mass media* reporting that, while she was trying the I.C.A. file, Judge Camelia Bogdan allegedly received RON 10,000 from the Ministry of Agriculture, an injured party in the above-mentioned file and that she allegedly spent a 2-week vacation in Poiana Braşov, as part of a program financed by the same ministry, and, several days after returning from such vacation, while subject to incompatibility, she rendered a final judgment in favor of the Ministry of Agriculture, whereby the defendants in that file were compelled to pay the damage claimed by the above-mentioned authority, in particular EUR 60,482,615.

Afterwards, on 2 March 2016, paper no. 1734/IJ/977/DIJ/2016 was registered with the Judicial Inspection, concerning the motion to initiate proceedings submitted by the claimant the Foundation for the Protection of Citizens against State Abuse, a motion that was merged with the above-mentioned paper, bearing no. 1096/IJ/623/DIJ/2016. The motion referred to the same summary of facts, subject to the additional clarification that the defendant allegedly collected the amount of RON 10,000 for consultancy services provided to the ministry's employees, as lecturer.

The materials that underlay the motion for the initiation of proceedings before the Judicial Inspection pointed to the fact that, after the examination by the panel of judges comprising judges Camelia Bogdan and Alexandru Mihalcea, with Bucharest Court of Appeals, of the "ICA File", upon the court hearing dates of 1 July 2014 and 7 July 2014, Judge Camelia Bogdan spent a portion of her vacation in Poiana Braşov, as part of a program financed by the Ministry of Agriculture, which had the capacity as injured party in the file. Furthermore, it was also noted that the judge collected from the said institution an amount of RON 10,000, for consultancy services provided to the employees of the ministry, as lecturer.

It was also noted that, after the end of her vacation, on 8 August 2014, Judge Camelia Bogdan rendered a judgment in favor of the Ministry of Agriculture, the defendants in this file being compelled to pay the prejudice claimed by the Ministry of Agriculture, in particular EUR 60,482,615, while subject to incompatibility.

By means of the Resolution dated 31 March 2016, the Court ordered to initiate the disciplinary investigation against Judge Camelia Bogdan, with the Bucharest Court of Appeals, for having committed the disciplinary misconduct provisioned for in Article 99 letter (b), letter (i) the first sentence and letter (k) the first sentence of Law no. 303/2004 on the status of judges and prosecutors, republished, as subsequently amended.

By means of the Resolution dated 16 June 2016, issued in reliance upon Article 47 paragraph (1) letter (c) of Law no. 317/2004 on the Superior Council of Magistracy, the Court ordered to dismiss the initiation of proceedings *ex officio* by the Judicial Inspection and of the joint motion for the initiation of proceedings, submitted by the claimant the *Foundation for the Protection of Citizens against State Abuse*, for having committed the disciplinary misconduct provisioned for in Article 99 letter (b), letter (i) the first sentence and letter (k) the first sentence of Law no. 303/2004 on the status of judges and prosecutors, republished, as subsequently amended and supplemented.

By means of the Note dated 23 June 2016 issued by the manager of the Directorate for Judicial Inspection for judges within the Judicial Inspection, the latter proposed to partially set aside the above-mentioned resolution, in reference to the disciplinary misconduct provisioned under Article 99 letter (b) of Law nr, 303/2004 on the status of judges and prosecutors, republished, a proposal prepared in reliance upon Article 33 paragraph (4) of the Regulation on the rules upon the performance of inspection works.

By means of the resolution dated 24 June 2016 of the head inspector of Judicial Inspection, the latter ordered to partially set aside the Resolution dated 116 June 2016, in connection with the decision to dismiss the motion for the initiation of proceedings *ex officio* and the

motion related thereto, submitted by the Foundation for the Protection of Citizens against State Abuse against Judge Camelia Bogdan, for having committed the disciplinary misconduct provisioned for in Article 99 letter (b) of Law no. 303/2004 on the status of judges and prosecutors, republished as subsequently amended and supplemented.

The same resolution ordered the enforcement of disciplinary action against Judge Camelia Bogdan, with the High Court of Cassation and Justice, for having committed the disciplinary misconduct provisioned for in Article 99 letter (b) of Law no. 303/2004 on the status of judges and prosecutors, republished as subsequently amended and supplemented, requesting the Division for judges in disciplinary matters, to order, by means of the ruling to be issued, the enforcement of one of the penalties provisioned for in Article 100 of Law no. 303/2004 on the status of judges and prosecutors, republished, as subsequently amended and supplemented, against the defendant judge.

In motivating the disciplinary proceedings, it was alleged that, between 7 July 2014 and 2 August 2014, the defendant Judge Camelia Bogdan took part, as trainer, in the Professional Training Program "*Implementation and Enforcement of the Future Joint Agricultural Policy. Prevention of Fraud and Corruption with a view to Protecting the Financial Interests of the European Union*" organized in the UMP – CESAR project "*Supply of consultancy services for the training held with A.P.I.A.*".

The above-mentioned activity was initiated by the Management Unit of the Project "Supplementation of the Financial Support granted by the European Union in view of Agriculture Restructuring in Romania (UMP - CESAR)", within the Ministry of Agriculture and Rural Development.

The training program was dedicated to civil servants within the Agency for Payments and Intervention for Agriculture (APIA), a structure operating within the Ministry of Agriculture and Rural Development and focused on the topics of implementation/enforcement of the future Joint Agricultural Policy and preventing fraud and corruption, with a view to protecting the financial interests of the European Union, and, in this last section, Judge Camelia Bogdan provided training.

It was further revealed that, in accordance with the professional services contract (training services) civil convention no. 17.07.3/17 July 2014, concluded with SC FDI Top Consult S.R.L., the magistrate supplied training services, in exchange for a remuneration, for the organization of training sessions dedicated to 260 people within APIA, on the topic of Prevention of Fraud and Corruption with a view to Protecting the Financial Interests of the European Union.

Before the agreement was concluded with SC FDI Top Consult S.R.L., Judge Camelia Bogdan submitted an application to the National Agency for Integrity, meant to determine whether her concurrently holding the capacity as magistrate and trainer (lecturer) in the Project on the topic "Enforcement of the Future Joint Agricultural Policy and Preventing Corruption in view of Protecting the Financial Interests of the European Union" is likely to generate a status of incompatibility.

By means of letter no. 10626/14 July 2014, delivered by the National Agency for Integrity, the opinion was delivered that concurrently holding the capacity as magistrate and trainer (lecturer) in the above-mentioned Project is not likely to result in a status of incompatibility.

Later on, by means of assessment report no. 21350/G/l 1/20 May 2016, drawn up by the integrity inspector within the National Agency for Integrity, in paper no. 17002/A/H/15 April 2016, it was decided that holding the capacity as lecturer in the Project "Enforcement of the Future Joint Agricultural Policy. Preventing Fraud and Corruption in view of Protecting the Financial Interests of the European Union" falls under the scope of the theory envisaged in Decision no. 261/2008 of the Superior Council of Magistracy, stating that magistrates may take part as experts in programs financed from foreign funds for justice.

It was further indicated that the defendant Judge Camelia Bogdan did not approach the Superior Council of Magistracy, but the National Agency for Integrity, a circumstance that, in subjective terms, has the meaning that she accepted the possibility that she could be in a status of incompatibility.

The Judicial Inspection reached the conclusion that Judge Camelia Bogdan took part in extra-professional activities, which were not compatible with her position as magistrate, as she was not involve in activities specific to a teaching position in the higher education system.

In law, the Judicial Inspection relied in its disciplinary proceedings on the provisions of Article 47 of Law no. 317/2004 on the Superior Council of Magistracy, republished.

1.2. Defenses of the magistrate

The defendant judge submitted a *statement of defense* to the case file, whereby she requested the Court to dismiss the disciplinary proceedings and relied on the plea for illegality in initiating proceedings before the Division for judges in disciplinary matters, providing several grounds.

Thus, the party claimed that the examination of the potential status of incompatibility was exclusively incumbent upon the National Agency for Integrity, and pointed, in that respect, to Decision no. 1245 dated 20 November 2014 of the Superior Council of Magistracy. By means of the said decision, it was stated that the institution ascertaining that the status of incompatibility and conflict of interest for magistrates is the National Agency for Integrity, and the Superior Council of Magistracy and the Judicial Inspection were notified by the said institution only after the assessment report prepared in the procedure remained final. Consequently, the defendant claimed that, whereas the National Agency for Integrity ascertained, by means of an undisputed assessment report, that there is no status of incompatibility, the conditions are not met to conduct disciplinary proceedings, a step contained in the resolution of the head inspector that is obviously abusive.

It was further ascertained that, by means of assessment report no. 21356/G/II/20 May 2016, the National Agency for Integrity stated that no elements were identified attesting to the infringement of the laws governing the legal regime of incompatibilities, in light of Judge Camelia Bogdan concurrently holding the capacity as magistrate and the office of lecturer in a professional training program.

In that context, the defendant contended that she has been registered in the list of experts of the European Commission since 2009 and, from that time, she was invited to take part as expert/lecturer/ trainer in several forms of training organized in Romania and abroad.

As for her potential incompatibility, as a consequence of the fact that she also took part in other lifelong learning programs, not organized by the National Institute of Magistracy and the National School of Clerks, the defendant claimed that the National Institute of Magistracy fails to provide sufficient training for judges in the field of fighting against corruption, money laundering and recovering the proceeds of crime.

Before signing the civil convention for the provision of services with SC FDI TOP Consult SRL, the defendant requested the National Agency for Integrity to look into a potential incompatibility between the capacity as magistrate and the office of lecturer in the program "Enforcement of the Future Joint Agricultural Policy. Preventing Fraud and Corruption in view of Protecting the Financial Interests of the European Union", an institution that replied that there is no such incompatibility in place.

The defendant also relied on the fact that the head inspector failed to settle the motion for incompatibility which she delivered on 17 May 2016, a motion whereby she relied on the absolute nullity of the resolution initiating the disciplinary investigation dated 31 March 2016, following the infringement of Article 7 and Article 8 of Decision no. 1027/2012 of the Plenum of the Superior Council of Magistracy, namely the principles of impartiality, independence of inspectors and confidentiality.

Thus, the defendant stated that the case file does not contain the minutes for random distribution and the examinations having underlain the preparation thereof, while the Judicial Inspection is not competent to conduct the examination into the alleged status of incompatibility.

Furthermore, she requested to verify the leakage of information from the Judicial Inspection during the performance and after the completion of disciplinary investigation, but also to clarify the circumstances under which the investigation took place, which was initiated and relied precisely on the replies provided by the spokesman of the Court of Appeals to the questions asked by luju.ro, only one day later or even on the same day (24 February 2016) during the program Sinteza Zilei at Antena 3.

She further contended that the head inspector has close relationships with several journalists of the media corporation owned by Dan Voiculescu, as deriving from his comments posted on a social network.

To conclude, the defendant claimed that the head inspector breached the duties specific to that institution, and placed no relevance whatsoever to the official report issued by the National Agency for Integrity.

The defendant further stated that she was not held by the obligation to inform the chairperson of the division whether she was remunerated or not for the seminaries to which she was invited as expert/lecturer, as there is no legal provision in force concerning the obligation to have a written permit, expressing the consent of the chairperson of division to approve participation by a judge in seminaries organized in Romania.

In her defense, she requested the Court to admit documentary evidence and testimonial evidence, brought forth by the witnesses proposed during the disciplinary investigation.

In law, she relied on the provisions of Article 205 *et seqq*. of the Civil Procedure Code.

After the statement of defense was lodged, the defendant relied on the plea for statute of limitation in respect of disciplinary liability, motivated by the fact that the offence for which disciplinary proceedings were undertaken became time-barred on 2 August 2016.

1.3. Motions for intervention

On 12 September 2016, the Association the Forum of Romanian Judges submitted to the case file a motion for accessory intervention for the interest of the defendant Judge Camelia Bogdan.

As grounds for the above-mentioned motion, it was stated that, in reference to the provisions of Article 124 paragraph (3) of the Constitution of Romania and Article 1 and Article 2 paragraph (3) of Law no. 303/2004, the Association the Forum of Romanian Judges justifies lawful interest, claiming that the legal provisions were observed, as a key condition in guaranteeing an independent justice and observing the magistrate's status.

As for the lack of merit of the disciplinary proceedings, it was stated that the determination of any incompatibility or conflict of interest of an administrative nature in charge of judges may only be achieved by means of an assessment report prepared by the National Agency for Integrity, and neither the Judicial Inspection or any other institution may decide, on a separate basis, whether a certain magistrate is subject to incompatibility or conflict of interest. In the case at hand, the National Agency for Integrity held, by means of assessment report no. 21356/G/II/20 May 2016, that no elements have been identified as a result of Judge Camelia Bogdan concurrently holding the capacity as magistrate and lecturer in the professional training program "Implementation and Enforcement of the Future Joint Agricultural Policy. Preventing Fraud and Corruption in view of Protecting the Financial Interests of the European Union".

On 23 November 2016, the Foundation for the Protection of Citizens against State Abuse FACIAS lodged a motion for accessory intervention for the interest of the Judicial Inspection.

As grounds for such motion, it was stated that FACIAS submitted the motion for the initiation of proceedings having underlain file no. 14/J/2016, justifying a lawful interest and aiming to secure the rule of law, protection of citizens and equality before the law and law enforcers, by means of a fair and impartial trial. It was noted that the court trial needs to take place by unbiased judges.

On 16 December 2016, the Foundation for the Protection of Citizens against State Abuse FACIAS and the Association the Group for Political Investigations GIP lodged a motion for accessory intervention for the interest of Judicial Inspection, and requested the Court to admit in principle the motion for intervention and to admit the disciplinary proceedings initiated by the Judicial Inspection against the defendant Judge Camelia Bogdan.

As grounds for the above-mentioned motion, it was contended that Judge Camelia Bogdan could not provide training services for people not making part of the legal system, in any

training sessions, in a program that was obviously not dedicated to the judicial system, but to agriculture and she was not entitled to receive remuneration for such services supplied while she was trying a file before the Bucharest Court of Appeals – Second Criminal Division, where the Ministry of Agriculture and Rural Development had the capacity of civil party.

By means of the court minutes dated 25 January 2017, the Division for Judges in disciplinary matters *admitted, as a matter of principle, both the motions for accessory intervention* submitted by the Foundation for the Protection of Citizens against State Abuse FACIAS and the Association the Group for Political Investigation GIP, for the plaintiff's interest, *but also the motion for intervention* submitted by the Association the Forum of Romanian Magistrates, for the interest of the defendant.

During the same court hearing, the defendant judge submitted a motion requesting the Court to grant indemnification amounting to RON 1, relying on Article 189 of the Civil Procedure Code.

2. The ruling issued by the disciplinary court

By means of decision no. IJ dated 8 February 2017, the Superior Council of Magistracy - the Division for Judges in disciplinary matters dismissed the plea for illegal initiation of proceedings before the Division for judges in disciplinary matters, as ungrounded; it dismissed the plea for statute of limitation, raised by the defendant-Judge Camelia Bogdan, as ungrounded; it admitted the disciplinary proceedings conducted by the Judicial Inspection against the defendant Camelia Bogdan - judge within Bucharest Court of Appeals and, in accordance with Article 100 letter (e) of Law no. 303/2004 on the status of judges and prosecutors, republished, as subsequently amended and supplemented, the disciplinary penalty was imposed against her consisting of *her expulsion from magistracy* for having committed the disciplinary misconduct provisioned for in Article 99 letter (b) of the same legal enactment.

At the same time, it admitted the motions for accessory intervention submitted for the plaintiff's interest the Judicial Inspection by the Foundation for the Protection of Citizens against State Abuse -FACIAS and the Group for Political Investigations - GIP, dismissed the motion for accessory intervention submitted for the interest of the defendant Camelia Bogdan by the Association the Forum of Romanian Judges, as ungrounded, and dismissed the claim for indemnification lodged by the defendant Judge Camelia Bogdan, as ungrounded.

2.1. As regards the plea for illegal initiation of proceedings before the Division for judges, referred to in the statement of defense, the lack of merits in respect of each and every of the arguments listed in support of the pleas was detailed and motivated.

Thus, it was deemed that, in substance, although the provisions of Law no. 176/2010 apply to judges and prosecutors, in the field of disciplinary liability of magistrates, having regard to the provisions of Article 44 paragraph (4), Article 45 paragraph (2) and paragraph (6) letter (b) of Law no. 317/2004, Article 26 paragraph (1) letter (e) of Law no. 176/2010 and Decision no. 1245/20 November 2014 of the Plenum of the Superior Council of Magistracy, Law no. 317/2004 generally applies to all of the offences provisioned for in Law no. 303/2004, and proceedings may not be directly initiated before the disciplinary court in

reliance upon the assessment report prepared by the National Agency for Integrity, but only in the manner specifically set out in Law no. 317/2004, by the entities entitled to initiate the disciplinary proceedings expressly indicated in such legislative enactment, even if the offences subject of the disciplinary investigation were also ascertained by means of such a report.

And this because the verifications undertaken by the National Agency for Integrity within its legal boundaries of competence refer to the instances involving conflicts of interest and incompatibilities, and not those falling under the scope of disciplinary misconduct committed by magistrates, and verifications conducted by this public institution cannot replace those performed by the Judicial Inspection in disciplinary matters, even if referring to the same issues.

In the case at hand, it was appraised that the initiation of proceedings before the Division for judges of the Superior Council of Magistracy, as disciplinary court, was conducted in observance of the applicable legal provisions in the field, by the Judicial Inspection drawing up a motion initiating proceedings, as entity competent in the disciplinary action.

As regards the grounds for illegality concerning the absence of a protocol for the distribution of work, the Division substantially noted that the assignment of work forming the object of this file took place on 16 February 2016, after initiation of proceedings *ex officio*, on a random basis, in cyclic system, by the head of the Judge Inspection Directorate, in observance of both of Article 11 paragraph (3) of the Regulation on the rules applicable during inspection works by the Judicial Inspection, approved by Decision of the Superior Council of Magistracy Plenum no. 1027/15 November 2012, and of Article 17 paragraph (1) letter (f) and Article 47 of the Regulation for the organization and operation of Judicial Inspection, considering that the file also contains a distribution protocol dated 16 February 2016.

In respect of the ground for illegality in the initiation of proceedings following the infringement of Article 7 and Article 8 of Decision no. 1027/2012 of the Superior Council of Magistracy Plenum, in particular the principles of impartiality and independence of inspectors, but also the principle of confidentiality, it was found that the allegations raised by the author of the plea lack merit, considering that none of the judicial inspectors having taken disciplinary investigation measures was or is a colleague of the defendant in the court where she works, i.e. Bucharest Court of Appeals, and the motion to ascertain the incompatibility of judicial inspectors, as submitted by the defendant judge, was settled by the resolution of 28 April 2016 issued by the head inspector of the Judicial Inspection, and was dismissed. Furthermore, the resolution dated 25 May 2016, issued by the head inspector of the Judicial Inspection, also dismissed as inadmissible the request filed, as a result of such instance, by the judicial inspectors, to review, in reliance upon Article 27 of the Regulation on the rules for the performance of inspection works by the Judicial Inspection, approved by Decision no. 1027/2012 of the Superior Council of Magistracy Plenum, a potential measure to reassign the work.

As concerns the lack of impartiality by the head inspector of the Judicial Inspection, the disciplinary court has ascertained that there are no specific elements to question his

impartiality and independence in conducting his legal duties, and, as regards the infringement of the confidentiality principle, it was deemed that the evidence submitted failed to reveal that the information which was made public in the mass media in relation to the disciplinary investigation undergone by the defendant was disclosed by the head inspector of the Judicial Inspection or by anyone else with that institution.

2.2. In connection with the plea for statute of limitation on the disciplinary liability, *raised by the defendant*, the disciplinary court has substantially ascertained that it should, in reliance upon Article 44 paragraph (3), Article 46 paragraph (7) and Article 47 of Law no. 317/2004 and Article 2500 paragraph (1) of the Civil Code, given the period in which the offences were committed, in particular, 17 July 2014 - 2 August 2014, and in relation to which the disciplinary proceedings, performed on 27 June 2016 (when proceedings were initiated before the Division for judges), took place before the expiry of the statute of limitation period of 2 years after the misconduct was committed, but also within the 30-day period after the completion of disciplinary investigation - 30 May 2016.

2.3. On the merits of the case, in order to rule as described herein above, the Division for Judges deemed, in substance, that, as deriving from the evidence submitted to the case file, it was proven that the constituent elements of the disciplinary misconduct provisioned for in Article 99 letter (b) of Law no. 303/2004 were cumulatively fulfilled.

It was considered that, the fact that the defendant judge participated, as lecturer- trainer, in a training activity for civil servants within the Ministry of Agriculture and Rural Development, as part of a program that was not dedicated to the judicial system in general, and in light of the considerable remuneration she received for her work, taking into account the fact that the amount collected exceeded both the salary of a judge of a court of appeals, in 2014, and the salary of an university assistant professor PhD in the School of Law, and failed to fall under any of the exceptions provisioned for by law, while concurrently holding and exercising the office of judge, the content of the *objective side* of the disciplinary misconduct at issue has been fulfilled.

In respect of the *subjective side*, it was deemed that the defendant's guilt is proven and consists of her conduct, materialized in the fact that, in order to clarify potential doubts in connection with that situation, which could have generated a status of incompatibility, on an unofficial basis, she *exclusively* approached the National Agency for Integrity, and was given a favorable reply within a very short period of time, without following the procedure especially set up by law to verify whether there are any conflicts of interest or incompatibilities. Relevance was placed on the fact that the defendant wilfully ignored even the warning contained in the reply from the National Agency for Integrity and failed to approach either the Superior Council of Magistracy or the management board of the court, in order to clarify her situation. The disciplinary court has ascertained that all these matters point to the fact that the defendant intended to take part in that training, and sought to fabricate defenses, for the case where a potential instance of incompatibility would be addressed.

As for the *consequence deriving* from the perpetration of this disciplinary misconduct, it was ascertained that it consists of the erosion of the trust and respect of public opinion for the

office of magistrate, with the consequence of an impaired image of justice, as a system and service protecting the rule of law, considering that the conduct of the defendant judge created the context for doubt as regards the integrity and impartiality of magistrates, but also of the judicial system as a whole, in the context where information referring to the particular situation of the defendant judge reached the public opinion.

In *calculating the penalty,* consideration was given to the circumstances, the specific severity and the consequences of the offence committed by the defendant who, as judge, through her actions, impaired the prestige and image of justice, as **public service,** as her offence was likely to result in discrediting of justice, and the court noted that, having regard to the context in which the offence was committed, it is particularly severe, thus rendering the defendant incompatible with the requirements imposed by the appropriate discharge of the office of judge.

During the calculation of the penalty, the disciplinary court has ascertained that Judge Camelia Bogdan's behavior was incompliant with her status as magistrate, manifested in the repeated submission of complaints and notifications against the authorities competent to conduct the disciplinary investigation and against the management of Bucharest Court of Appeals, but also her delivering electronic correspondence not only to the authorities competent to undertake the disciplinary investigation, but also to institutions outside the judicial system (the President of Romania, the European Commission, the Ministry of Justice, the Prime-Minister of Romania, the National Agency for Integrity, including criminal investigation authorities, such as the Prosecutor's Office attached to the High Court of Cassation and Justice and the National Anti-Corruption Directorate).

In the context described above, the Division for Judges considered that these steps taken by Judge Camelia Bogdan amounted to indirect pressure on all of the authorities involved in the disciplinary procedure and reached the conclusion that she failed to understand the severity of her offence, the importance of the rules governing incompatibilities and prohibitions and, last but not least, the consequences of her actions on the image of justice.

2.4. As for the claim for indemnification submitted by Judge Camelia Bogdan*,* the Division for Judges has ascertained that the conditions for tort civil liability for its own actions were not cumulatively met, requirements deriving from the provisions of Article 1357 of the Civil Code, considering that the plaintiff the Judicial Inspection did not have a procedural conduct within the meaning of delaying the issuance of a ruling, the mere postponement of the trial, not based on abuse of law, does not allow the defendant to claim indemnification in the trial.

2.5. As regards the motions for accessory intervention submitted both for the interest of the plaintiff the Judicial Inspection by the Foundation for the Protection of Citizens against State Abuse - FACIAS and the Group for Political Investigations - GIP, and for the interest of the defendant Judge Camelia Bogdan by the Association the Forum of Romanian Judges, the Division for Judges deemed that this ruling should be issued, having regard to the judicial nature of the voluntary accessory intervention and to the decision rendered in this case.

3. Motions for final appeal

Final appeals were lodged against Decision no. 1/J of 8 February 2017, rendered by the Superior Council of Magistracy - the Division for Judges in disciplinary matters, both by the defendant Judge Camelia Bogdan (by means of two motions, drawn up, as representatives, by attorneys Lucian Mihai and Valentin Berea, with "*RTPR in association with Allen & Overy" Attorneys at Law*, on the one hand, and by *Madalin Irinel Niculeasa Law Practice*, on the other hand), but also by the intervening party the Association the Forum of Romanian Judges.

3.1. The final appeal submitted by the defendant judge

In upholding her final appeal, the magistrate relied on objections that fall, in her opinion, under the scope of the grounds provisioned for in Article 488 paragraph (1) items (6) and (8) of the Civil Procedure Code and requested the Court to admit the final appeal, to set aside the impugned decision and, consequently, to dismiss the disciplinary proceedings under way against her conducted by the Judicial Inspection through the resolution dated 24 June 2016.

The first objections raised refer to the determination whether a disciplinary misconduct occurred.

While not challenging the factual existence of events, the party challenged, in that context, the disciplinary importance assigned thereto, by the erroneous enforcement of the legal regulations.

First of all, the author of the final appeal made a list of the legal frame which she believed to apply, in particular the constitutional and legal provisions, but also the relevant rules of interpretation applicable, in her opinion, in this case.

In the defendant appellant's opinion, the Superior Council of Magistracy undertook an inadmissibly extensive interpretation of the provisions governing the incompatibility of judges and prosecutors.

In substance, the magistrate upheld the direct enforceability of the rule contained in Article 125 paragraph (3) of the Constitution. It was stated that the prohibition stipulated by that constitutional text refers to a specific restriction of the right to work, strictly applicable to the case of judges – being, therefore, restricted - and setting forth an exception from the constitutional principle sanctifying free work, as set out in Article 41 paragraph (1) of the fundamental law.

Considering that the above-mentioned legal provision is in the form of an exception, and it may only be interpreted on a restrictive basis, which does not justify the infringement of the principle according to which exceptions from the rule fall under strict interpretation, otherwise, the path would be opened for unpredictable analogy, and that would result in the restriction of civil rights, an analogy expressly prohibited by law.

Based on grammar, systematic and teleological interpretation of that constitutional regulation, the appellant claims that what is stipulated is the prohibition of the so-called "*plurality of offices*", within the meaning that a judge is not entitled to conduct remunerated work in instances where, on a cumulative basis, they: have an organized nature, have a regular nature, are not activities relating to teaching offices in the higher education system. As for everything

outside the scope of the constitutional prohibition of "*plurality of offices*" (as described herein above), the constitutional principle of free works would fully apply, without any other constitutional restrictions, and in this latter case, the ordinary law-maker could lay down regulations governing the status of judges, including through potential prohibitions.

In respect of the interpretation and enforceability of the provisions in Article 5 paragraph (1) of Law no. 303/2004, they would depend of and be subordinated to interpretation of the content of Article 125 paragraph (3) of the Constitution.

In that context, the appellant finds that the particular interpretation of the constitutional regulation described in the phrase "*in accordance with the law*" contained in Article 5 paragraph (1) of Law no. 303/2004 contradicts both the letter and the spirit of that regulation, and is therefore unconstitutional.

To conclude, the appellant specifies that, as for the judge fulfilling any activities other than in relation to this office, the following rules are in place, deriving from the relevant constitutional and legal provisions:

A. In reliance upon Article 125 paragraph (3), the office of judge:

a) shall be incompatible with any other public or private office, performed in a regular and organized manner in an institution (organization), in exchange for remuneration (payment);

b) shall however be compatible with academic activity supplied in a regular and organized manner in a public or private higher education institution (organization), in exchange for remuneration (payment).

B. In the field falling under the scope of Article 125 paragraph (3) of the Constitution, it is contrary to the constitution for incompatibility between the office of judge and any other public or private office and, respectively, the exceptions from such incompatibility (consisting of academic offices in the higher education system) to be determined in reference not only to Article 125 paragraph (3), but also to the conditions contained in laws adopted by the Parliament or ordinances issued by the Government.

C. In reliance upon Article 41 paragraph (1), in conjunction with Article 125 paragraph (3) of the Constitution, for everything exceeding the scope of the constitutional prohibition regarding the "*plurality of offices*" (as defined in Article 125 paragraph (3) in connection with judges), the constitutional principle of free work (Article 41 paragraph (1)) fully applies, without any other constitutional restrictions, entailing the consequence that the Parliament (through laws) or the Government (through ordinances) have discretionary right to regulate, including by setting forth any prohibitions, only this latter area.

Therefore, the appellant contends that, in the field of incompatibility and prohibitions applicable to judges, regulation by laws enacted by the Parliament or ordinances issued by the Government is unconstitutional in the matters governed by Article 125 paragraph (3), both as regards the prohibition of holding a plurality of offices, and the exceptions from such prohibitions and is allowed for any matters other than as governed by Article 125 paragraph (3).

As such, the author of this final appeal finds that the Superior Council of Magistracy Plenum lacks the constitutional or legal competence to issue enactments for interpretation in the two fields specified above, and consequently relies on the absolute nullity of the 6 decisions "of principle" issued by the Superior Council of Magistracy Plenum in for *lato sensu* interpretation of the legal provisions governing incompatibility, more specifically: Decision no. 261/2008, Decision no. 316/2010, Decision no. 1245/2014, Decision no. 1434/2014, Decision no. 1022/2015 and Decision no. 1184/2015, referenced in the impugned ruling.

Considering that the above-mentioned decisions were issued in the absence of legal support, in her opinion, the qualification as disciplinary misconduct, in terms of the objective side, in reliance upon them is, primarily, inadmissible.

On a secondary basis, such qualification is considered ungrounded. Even if we disregarded the illegal nature of the "*lato sensu* interpretation" decisions adopted by the Superior Council of Magistracy Plenum, in reviewing the summary of facts in accordance with the rules and conditions set forth therein, the ruling reached by the disciplinary court should also be set aside.

Thus, the proof would unquestionably be made that the program in which the appellant took part benefited from foreign financing (as it was supported through the BIRD 4875-RO loan) for justice (in light of its scope, purpose and topic), within the meaning of Article 1 of Decision no. 261/2008. The interpretation given by the disciplinary court, namely that program dedicated to justice shall mean a program dedicated to law practitioners is restrictive, in disregard of the preventive-educational function of justice and, in particular, of criminal law.

Also referring to other decisions of principle adopted by the Superior Council of Magistracy Plenum in this field, the appellant underlined that she was aware that, prior to her taking part in that Program, the Superior Council of Magistracy had checked, in the case of other judges and prosecutors, the compatibility between the office of magistrate and the specific activity as lecturer in training programs, and ascertained that there is no incompatibility between the two and that, as far as she was concerned, she believed in good faith that the program benefited from foreign financing for justice.

She contended that the court had erroneously ascertained in the decision that the appellant judge was not an expert of the European Commission, although this is unquestionably attested to by several invitations which the magistrate had received from TAIEX, but also by the correspondence exchanged with an official of the European Commission, as the Online data base is not the only instrument which may certify her capacity as expert.

The author of the final appeal contended that the legal conditions are neither fulfilled in respect of the subjective side of the disciplinary misconduct.

The conclusion of the disciplinary court, within the meaning that the offence qualified as disciplinary misconduct was committed with guilt is contradicted, first of all, by the fact that the appellant took part in the Program believing that such activity did not form the material element of any disciplinary misconduct. The truth of that belief resided in the following issues, listed and detailed one by one: the National Agency for Integrity returned a favorable

reply to her participation in the Program, the legal provisions and conduct of the National Agency for Integrity reasonably entitled her to consider that the National Agency for Integrity was competent to check whether there was any incompatibility, the program in which she took part benefited from foreign financing for justice, within the meaning of Decision no. 261/2008 of the Superior Council of Magistracy Plenums.

The appellant clarified that she neither foresaw the outcome of her actions, nor accepted, in a manner indicative of indifference, the possibility that such outcome could occur, so that the Division for Judges erroneously enforced the legal provisions concerning the determination of indirect intention, by making a confusion between the subjective and the objective sides, and automatically inferring, by the alleged fulfillment of the objective side and the consequence actually occurred, the existence of guilt.

Furthermore, considering that her work was remunerated as negotiated, depending on the work actually performed, the criterion of remuneration, relied upon by the Division for Judges, could not play any role in appraising on her guilt.

Also infringing the analysis of the subjective side are, in the opinion of the author of this final appeal, the considerations concerning the favorable reply, provided in a very short period of time, by the National Agency for Integrity, and the alleged informal approach, because, on the one hand, the first matter is beyond the control of the applicant, and, on the other hand, the second matter was insufficiently reviewed by the disciplinary court

Emphasis was made that, in the case at hand, there is none of the forms of guilt provisioned for by law, because the subjective condition characterizing the appellant at the time of the offence held in her charge does not match the slightest unintentional guilt.

Another set of objections was also raised in relation to the quashing cases provisioned for in Article 488 paragraph (1) item 8 of the Civil Procedure Code in respect of *calculating the disciplinary penalty imposed.*

The magistrate deems that the decision is illegal, having regard to the provisions of Article 49 paragraph (6) of Law no. 317/2004, considering that the calculation criteria for the disciplinary penalty has not been observed.

In substance, in her opinion, the Division for Judges failed to enforce, in accordance with the law, the following calculation criteria: her irreproachable professional conduct, proven by the fact that, throughout her career as a judge, she was not subject to any disciplinary penalty, the exceptional professional grades granted, her constant concern both for her own professional improvement, and for sharing her theoretical and practical knowledge, to civil servants, the circumstances under which the offence was committed, which is indicative of the low severity thereof, the absence of any particular consequences of the offence – including on the rights of the parties in the files pending before the court.

Similarly, it was claimed that enforcement of the most severe disciplinary penalty is illegal, considering that it breaches the principle of proportionality between the penalty and the severity of the offence, laid down in Article 100 of Law no. 303/2004, considering that, as attested by all of the above, the severity of the offence was low or, at any rate, not particularly high, as held in in the decision.

The author of the final appeal further claimed that the considerations referring to Article 5 paragraph (2) of Law no. 303/2004 do not relate to the object of the disciplinary proceedings, because they refer to the content of another disciplinary misconduct, namely the one set out in Article 99 letter (i) of the above-mentioned law, misconduct that was not reviewed by the Division for judges and which had been closed by the Judicial Inspection.

The disciplinary court made, as such, on the one hand, a confusion between the concepts of *conflict of interest* and *incompatibility* and, on the other hand, disregarded the resolution to close the case, despite not being vested with such matter.

In supplementation of the grounds detailed above, the appellant Camelia Bogdan, through attorney Mădălin Niculeasa, set forth, also in relation to the quashing case governed under Article 488 paragraph (1) item (8) of the Civil Procedure Code, several considerations on illegality concerning, first of all, the settlement of the issue consisting of the exclusive competence of the National Agency of Integrity in connection with her incompatibility, and, second of all, the settlement of the plea for statute of limitation of the disciplinary liability.

As regards the exclusive competence of the National Agency for Integrity in connection with potential incompatibilities of judges, this vastly derives from Law no. 176/2010 on integrity in exercising public offices and dignities, amending and supplementing Law no. 144/2007 on the setting up, organization and operation of the National Agency for Integrity, but also amending and supplementing other legislative enactments, the provisions stipulated in Law no. 317/2004, as officially interpreted by the Superior Council of Magistracy Plenum through Decision no. 1245 dated 20 November 2014 and would also rely on the principle of fair cooperation between public authorities, in conjunction with the principle avoiding institutional parallelism.

Hence, it was deemed that the issuance of the assessment report by the National Agency for Integrity is a reason to carry on the disciplinary proceedings with a view to enforcing disciplinary penalties, if the report finds any incompatibility, and conversely, it is a reason to cease the disciplinary proceedings, if the report finds no incompatibility, as it happened in the case at hand. Furthermore, in order to avoid competence parallelism and to support fair institutional cooperation, as one side of the principle of separation of power, the disciplinary court ought to have observed and taken into account the competence of the National Agency for Integrity, in the issue regarding the incompatibility of magistrates.

The appellant claimed that, the manner in which the Division for Judges interpreted, in the considerations of the impugned ruling, the provisions of Article 46 paragraph (7) of Law no. 317/2004, would point to the lack of statute of limitation for the disciplinary liability of magistrates. However, such a conclusion contradicts the considerations of Decision no. 71/1999 of the Constitutional Court and the Decision of the European Court of Human Rights in the case *Oleksandr Volkov v. Ukraine* (*Application no.* 21722-11), which ruled that disciplinary liability is subject to statute of limitation.

In light of the binding legal force of Decision no. 71/1999 of the Constitutional Court and the fact that it preceded the enactment of Law no. 317/2004 and Law no. 303/2004, in the opinion of the appellant judge, the statute of limitation periods stipulated in Article 46

paragraph (7) of Law no. 317/2004 apply not only to disciplinary proceedings, as the disciplinary court has claimed, but to the entire procedure determining the disciplinary liability of magistrates.

By applying in the case forming the object of this file the statute of limitation period set out in Article 46 paragraph (7) of Law no. 317/2004, *i.e.* a 2-year period, which started running on the date when the disciplinary misconduct was committed (in particular, 2 August 2014), it means that the statute of limitation period expired on 2 August 2016, and the impugned decision was issued more than 6 months later after that time frame expired.

On a secondary basis, considering that the provisions of Article 46 paragraph (7) of Law no. 317/2004 were not interpreted as detailed herein above, mention is made that, in order to comply with Decision no. 71/1999 of the Constitutional Court, relevance should be placed, by analogy, to the enforceability of Article 252 of the Labor Code or Article 77 paragraph (5) of Law no. 188/1999.

However, by applying the above-mentioned legal provisions to the summary of facts in this case, the conclusion would be reached that the alleged disciplinary misconduct was time barred either on 2 February 2015, if relevance is placed on the 6-month period set out in the Labor Code, or on 2 August 2016, if relevance is given to the 2-year period provided in Law no. 188/1999.

To conclude, the appellant requested the Court to admit the final appeal, as submitted.

3.2. The final appeal submitted by the intervening party the Association the Forum of Romanian Judges

The author of this final appeal requested the Court to admit the final appeal, to set aside the impugned ruling and, in conclusion, to dismiss the disciplinary proceedings undertaken by the Judicial Inspection through the resolution of 24 June 2016, against Judge Camelia Bogdan.

In supporting its final appeal, the intervening party relied on several illegality objections, which were deemed to fall under the quashing case provisioned for in Article 488 paragraph (1) item 8 of the Civil Procedure Code.

After a brief description of the interest held by the professional association in this case, the appellant-intervening party contended, in substance, that the decision was issued in breach or erroneous enforcement of the substantive law regulations, or the legal provisions governing:

- the constituent elements of disciplinary misconduct, provisioned for in Article 99 letter (b) of Law no. 303/2004;

- the incompatibility scope, provisioned for in Article 5 of Law no. 303/2004, as interpreted by means of 6 principle decisions issued by the Superior Council of Magistracy Plenum for the "*lato sensu interpretation of the legal provisions in incompatibility matters*";

- competence of the National Agency for Integrity to ascertain or not the existence of incompatibility consisting of a plurality of "*offices*", in accordance with Article 1 paragraph

(1) item 7, Article 8 paragraph (1) and Article 26 paragraph (1) letter (e) of Law no. 176/2010;

- conflict of interest and duty of the management board of the court to appraise whether this impacts on the impartial delivery of their professional duties, in accordance with Article 5 paragraph (2) of Law no. 303/2004;

- calculation criteria for the disciplinary penalty and proportionality principle

- Article 49 paragraph (6) of Law no. 317/2004 and Article 100 of Law no. 303/2004.

In respect of Decision no. 261/2008 of the Superior Council of Magistracy Plenum, the author of this final appeal specified that, in the case at hand, the program in which Judge Camelia Bogdan participated cumulatively fulfills all three conditions provisioned for in Decision no. 261/2008, namely: it benefited from foreign financing, it contained a component dedicated to justice, the judge took exclusive part in the component dedicated to justice, as expert.

The appellant-intervening party deems that the manner in which the Division for Judges within the Superior Council of Magistracy restricts, in a disciplinary action, the scope of Decision no. 261/2008 issued by the Superior Council of Magistracy Plenum, is lacking predictability at best, considering that the anti-corruption elements provided by a judge to the officers of a public authority as part of a project benefiting from foreign financing can only amount to an integral component "*dedicated to justice*".

The appellant association believes that, absent a legal provision, the penalized judge cannot be held accountable for having failed to request the standpoint of the Superior Council of Magistracy in relation to the compatibility between that work and the office of judge, considering that not even the Division for Judges (separate from the Plenum) brought to the attention of the Plenum such interpretation of the legal provisions and a clarification of Decision no. 261/2008 of the Superior Council of Magistracy Plenum.

The author of this final appeal considers that, on an illegal basis, the Division for Judges removed the effects of administrative instrument of the National Agency for Integrity, which had not ascertained the existence of any incompatibility consisting in a plurality of "*offices*", in accordance with Article 1 paragraph (l) item 7, Article 8 paragraph (1) and Article 26 paragraph (1) letter (e) of Law no. 176/2010, because, in its opinion, holding in charge of judges any incompatibility or conflict of interest of an administrative nature can only be achieved through the preparation of an assessment report by the National Agency for Integrity.

It was deemed that the Division for Judges erroneously enforced Article 5 paragraph (2) of Law no. 303/2004 on conflict of interest and the duty of the management board of the court to appraise whether it impacts or not the impartial delivery of professional duties, in relation to the misconduct provisioned for in Article 99 letter (i) of Law no. 303/2004, for which a resolution ordered this case to be closed.

This appellant too deems, therefore, that the Division for Judges made a confusion between the concepts of *conflict of interest* and *incompatibility*.

The appellant association also submitted a set of objections in respect of the calculation of the disciplinary penalty.

It was deemed that the enforcement of the penalty consisting of the expulsion from magistracy lacks proportionality, considering that the defendant judge was never before subject to any disciplinary penalty throughout her career, had exceptional professional grades and proved constant concern for professional development and sharing her knowledge, no repetition of the offence was ascertained (in particular, survival of the alleged incompatibility over a long period of time), the circumstances revealed point to the low severity thereof, in light of the lawful expectation created by other principle decisions of the Superior Council of Magistracy Plenum, the guilt held in the form of indirect intention and there are no negative consequences resulting from the offence.

In the opinion of the appellant-intervening party, the impugned decision did not reach the conclusion that any prejudice of justice was incurred by justice and this is a dangerous precedent for all magistrates, to consider that the judge's conduct during the course of disciplinary investigation may amount, in itself, to an element upon calculating the penalty.

Similarly, the fact that the Decision for Judges placed legal relevance on a factual circumstance consisting in the repeated submission of complaints and notifications against the persons holding legal competence to conduct activities specific to disciplinary investigation and undertaking the disciplinary proceedings, but also against the management of Bucharest Court of Appeals, expressly included in a "*behavior incompliant with her profession*", is deemed to be equivalent to the enforcement of a penalty for other offences than the subject of the file.

It was further claimed that, absent any legal provision justifying the conclusion that the level of the remuneration collected could influence in appraising the severity of the offence, it was illegally deemed that the "substantial" value of the remuneration was a criterion in determining the particular severity of the offence.

4. Defenses of the respondents

The respondent the Judicial Inspection submitted, on 24 April 2017, a *statement of defense* both against the final appeal of the defendant judge, and against the final appeal lodged by the intervening party, and requested, based on reasons, for the Court to dismiss each of them, as ungrounded, as the impugned decision was, in the opinion of the initiator of the disciplinary proceedings, legal and well-grounded.

The respondent intervening party the Foundation for the Protection of Citizens against State Abuse (*FACIAS*), through Suciu, Popa & Asociaţii S.P.A.R.L., Attorneys at Law, submitted a *statement of defense* against the final appeal of Judge Camelia Bogdan, requesting, based on reasons, to dismiss it as ungrounded.

The same intervening party, through attorney Adrian Toni Neacșu, lodged a *statement of defense* against the final appeal submitted by the defendant magistrate, relying, on a preliminary basis, on the following: the lack of the capacity as representative of attorneys Lucian Mihai, Valentin Berea and Mădălin Irinel Niculeasa; nullity of the grounds for final appeal submitted as supplementation by attorney Mădălin Irinel Niculeasa, following their

submission directly to the court of final appeal and in excess of the legal timeframe in which grounds could be raised for the means of appeal; partial inadmissibility of the ground for final appeal, or lack of merit, to determine whether the disciplinary misconduct was committed and the ground set forth in Article 488 paragraph (1) item (6) of the Civil Procedure Code, for which no arguments were submitted. On a secondary basis, the Court was requested, based on reasons, to dismiss the second appeal, as ungrounded.

The respondent intervening party the Association the Group for Political Investigations (GIP), through attorney Adrian Toni Neacşu, submitted a *statement of defense* against the final appeal lodged by Judge Camelia Bogdan, and requested, based on reasons, to dismiss it as ungrounded.

The respondent intervening party the Foundation for the Protection of Citizens against State Abuse (FACIAS), through Suciu, Popa & Asociatii SPARL, Attorneys at Law, submitted a *statement of defense* against the final appeal of the Association the Forum of Romanian Judges, and requested, based on reasons, to dismiss the final appeal, as ungrounded.

Afterwards, *both respondents intervening parties the Foundation for the Protection of Citizens against State Abuse (FACIAS) and the Association the Group for Political Investigations (GIP),* through attorney Adrian Toni Neacşu, lodged a *statement of defense* against the final appeal of the intervening association, and raised arguments against objections filed by the appellant, requesting the Court to dismiss the final appeal, as ungrounded.

5. Procedure of the final appeal

The report prepared in this case, in the context of Article 493 paragraphs (2) and (3) of the Civil Procedure Code, was analyzed in the screening panel, and was delivered to the parties, in accordance with Article 493 paragraph (4) of the above-mentioned code.

By means of the court minutes of the closed session dated 13 November 2017, the screening panel dismissed, as ungrounded, the following pleas raised by the respondent the intervening party the Foundation for the Protection of Citizens against State Abuse (FACIAS), through attorney Adrian Toni Neacşu: plea for the lack of capacity as representative, in connection with the representatives of the appellant Judge Camelia Bogdan; the plea for nullity in connection with the grounds for final appeal submitted in supplementation by attorney Mădălin Irinel Niculeasa, in favor of the appellant Judge Camelia Bogdan and, considering that the motions for final appeal fulfill the requirements of form provisioned for in Article 486 of the Civil Procedure Code, but also the conditions for admissibility, in reliance upon Article 51 paragraph (3) of Law no. 317/2004, admitted in principle the final appeals brought before the court.

6. Considerations of the High Court on the final appeal

In reviewing the impugned decision in reference to the documents of the file, the objections raised by the appellants, the defenses of respondents, but also the applicable legal regulations, by majority of votes, the High Court will admit the final appeals, within the meaning and for the considerations to be detailed herein below, considering that, for the sake of structure, the objections raised by the authors of the two final appeals and the appropriate defenses will be

reviewed together, in a sequence determined depending on the nature of the legal matters invoked and the criterion of effects which they may entail in settling this case, in observance of Article 248 paragraph (1) of the Civil Procedure Code.

6.1. In relation to the object of the disciplinary proceedings

Prior to the examination of final appeals brought before the Court, having regard to the allegations submitted by both respondent intervening parties, both upon public debates, and through the procedural documents delivered to the case file, in light of the offences making up the material element of the misconduct held in charge of the appellant judge and the evidence submitted for each and every of them, but also considerations held in that respect in the impugned decision, the High Court finds that certain clarifications should be made in connection with the vesting limits of the disciplinary court and, afterwards, of the High Court, in reference to the object of the disciplinary proceedings brought before the court in the case at hand.

As stated herein above, in item 1.1., the Division for Judges within the Superior Council of Magistracy was vested with the disciplinary proceedings having as its exclusive object the disciplinary misconduct provisioned for in Article 99 letter (b) of Law no. 303/2004, a text referring to the infringement of the incompatibility and prohibition status, in this context the appellant defendant was sanctioned for having taken part in extra-curricular activities, not falling under the scope of compatibility with the office of magistrate, in breach of Article 5 paragraph (1) of Law no. 303/2004.

The content of the resolution dated 24 June 2016 issued by the head inspector of the Judicial Inspection, to undertake the disciplinary proceedings, reveals both the specific offence held in charge of the defendant – *between 17 July 2014 and 02 August 2014, the defendant took part, as trainer/lecturer, in the professional training program "Implementation and Enforcement of the Future Joint Agricultural Policy. Prevention of Fraud and Corruption with a view to Protecting the Financial Interests of the European Union", organized in the UMP – CESAR project "Supply of consultancy services for the organization of training held with A.P.I.A. personnel"*. But also the legal ground of the alleged incompatibility, in particular that the defendant disregarded the provisions set out in Article 5 paragraph (1) of Law no. 303/2004 – *(1) the offices of judge,…are incompatible with any other public or private offices, except for academic activities, but also training in the National Institute of Magistracy and National School of Clerks, under the law.*

In that case, the object of judicial censure strictly consists of the considerations held in the resolution dated 24 June 2016, as regards the compatibility of the office of judge with that of lecturer in the Program *"Implementation and Enforcement of the Future Joint Agricultural Policy. Prevention of Fraud and Corruption with a view to Protecting the Financial Interests of the European Union".*

Consequently, in that procedural frame, the Court may not review offences that allegedly fall in the content of the material element of another disciplinary misconduct, consisting of the failure to comply with the obligation to refrain, when the judge or prosecutor know that one of the causes provisioned for in the law for its refrain is in place, misconduct provisioned for

in a different incriminating text, Article 99 letter (i) of Law no. 303/2004, in reference to the infringement of Article 5 paragraph (2) of Law no. 303/2004.

Indeed, in the case at hand, the Judicial Inspection was also vested with an analysis of disciplinary misconduct provisioned for in Article 99 letters (i) and (k) the first sentence of Law no. 303/2004 *[(i) failure to comply with the obligation to refrain, when the Judge or prosecutor knows that one of the causes stipulated by law for refrain is in place ...; (k) unjustified absence from work, in a repeated manner or directly hindering the activity of the court or of the prosecutor's office]*, however, the Resolution dated 16 June 2016 ordered to dismiss the *ex officio* and related initiation of proceedings in connection with the above-mentioned misconduct. The solution was not contradicted, in such terms, by the Resolution of 24 June 2016 and it was not challenged before the competent administrative litigation court by the author of the motion, holding active legal standing in accordance with Article 47 paragraph (5) of Law no. 317/2004 on the Superior Council of Magistracy.

The law prescribes, in clear terms, access to justice by the possibility to challenge the resolution to dismiss the motion for initiating proceedings, by the person having submitted such motion, before the Administrative and Fiscal Litigation Division of Bucharest Court of Appeals, within 15 days after service of process, without fulfilling a preliminary procedure.

Consequently, the conclusions of judicial inspectors, who ascertained that there are no indications in connection with the two misconducts referred to above, cannot be brought back before the court at the current stage of the trial, and no relevance is held by the allegations referring to the infringement, by the appellant judge, of the obligation to refrain, resulting from an alleged incompatibility (in a procedural meaning) between the fulfillment of jurisdictional duties in a criminal case in which the Ministry of Agriculture held the capacity of civil party and the office of lecturer in a training program organized and financed by the same ministry and dedicated to the officers of a subordinated institution, or the judge's failure to approach the management of the court. Such allegations would require, in fact, the examination of circumstances relating to the status of conflicts of interest, and not the status of incompatibility, which exceeds the limits within which the disciplinary court is vested and, even less, of judicial control.

Leaving aside the specificity of disciplinary proceedings, the approach proposed by the respondent - intervening party who submitted the motion to initiate proceedings also contradicts the *non formatio in peius* principle, set forth in Article 502, in reference to Article 481 of the Civil Procedure Code, which does not allow the appellant - defendant to be subject, in its own means of challenge and in the absence of a final appeal submitted by parties driven by contrary interest, to a situation worse than as existing through the impugned disciplinary decision, by adding elements of a misconduct that did not form the object of a disciplinary proceedings.

6.2. As regards the legality of the motion initiating proceedings before the Division for Judges in disciplinary matters

There is no doubt that, in accordance with Article 98 paragraph (1) of Law no. 303/2004, judges and prosecutors are held accountable for any departure from their professional duties,

but also for offences impacting the prestige of justice, such offences being listed in Article 99 and Article 99^1 of the same legislative enactment.

In accordance with the express provisions of Article 99 letter (b) of Law no. 303/2004 on the status of judges and prosecutors, the violation of legal provisions governing incompatibility and prohibitions amounts to disciplinary misconduct.

In observance of Article 44 paragraph (3) of Law no. 317/2004 on the Superior Council of Magistracy, in the case of disciplinary misconduct committed by a judge, the initiators of disciplinary proceedings may be the Judicial Inspection, the Ministry of Justice and the chairperson of the High Court of Cassation and Justice.

Furthermore, in accordance with Article 45 paragraph (2) of the same law: "*where the Judicial Inspection is the initiator of the disciplinary proceedings, it may initiate proceedings ex officio or may be notified in writing and based on reasons by any stakeholder, including the Superior Council of Magistracy, in connection with the disciplinary misconduct committed by judges and prosecutors."* The issues thus notified are subject to preliminary verification by judicial inspectors within the Judicial Inspector, a verification that determines whether there are any clues attesting to the perpetration of misconduct forming the object of disciplinary investigation and, afterwards, of disciplinary proceedings.

Therefore, the Judicial Inspection holds the capacity and competence to initiate proceedings in disciplinary matters and to conduct disciplinary proceedings in respect of all misconducts committed by judges, with no procedural distinctions depending on the misconduct thus notified.

In the case at hand, proceedings were initiated before the Judicial Inspection, first of all, *ex officio*, in accordance with Article 45 paragraph (2) of Law no. 317/2004, which means that the disciplinary proceedings were conducted in observance of Article 47 paragraph (1) of the specified law, the Division for Judges correctly determining that it holds the capacity as initiator of the disciplinary proceedings.

In the absence of express provisions in that regard, the disciplinary status applicable to judges and prosecutors, both in procedural terms, and in light of the special rules of substantive law, cannot be devoid of content in relation to the misconduct provisioned for in Article 99 letter (b) of Law no. 303/2004 (former Article 99 letter (a), in the wording preceding the amendment of Law no. 24/2012), as resulting from the regulation of setting up, organization, operation, duties and procedures applicable to the National Agency for Integrity, as the appellants seek to prove.

Law no. 144/2007 on the setting up, organization and operation of the National Agency for Integrity and Law no. 176/2010 on integrity in delivering public offices, amending and supplementing Law no. 144/2007 on the setting up, organization and operation of the National Agency for Integrity, but also amending and supplementing other legislative enactments, contain general rules governing incompatibility and conflicts of interest, applicable to all categories of persons listed in Article 1 paragraph (1) of Law no. 176/2010, among which, in item 7, judges, prosecutors, assistant magistrates, offices assimilated thereto

and judicial assistants, however, the new legal frame down not contain any provision excluding the competence of the Legal Inspection in the disciplinary investigation procedure.

On the contrary, Article 63 paragraph (3) of Law no. 144/2007, which was not amended or repealed by Law no. 176/2010, laid down a limitation for the National Agency for Integrity, within the meaning that the provisions governing the verification of conflicts of interest and ascertaining incompatibility do not apply to magistrates while settling cases pending before the courts and prosecutor's offices attached to such courts, in relation to which conflict of interest or incompatibility was claimed.

Consequently, it was correctly ascertained that the Judicial Inspection holds the legal competence to ascertain the offence falling under the scope of the disciplinary misconduct provisioned for in Article 99 letter (b) of Law no. 303/2004 republished, verifications in that respect being conducted as part of the preliminary disciplinary investigation.

The defendant's allegations within the meaning that, in this case, only the provisions of Law no. 176/2010 apply cannot be admitted, considering that proceedings cannot be directly initiated before the Division for Judges in disciplinary matters in reliance upon the assessment report prepared by the National Agency for Integrity, but only in the manner provisioned for in Law no. 317/2004, by the initiators of the disciplinary proceedings, expressly specified in that legislative enactment, even if the offences subject to disciplinary verifications have also been ascertained by means of a report drawn up by the National Agency for Integrity.

Besides, the verifications conducted by the National Agency for Integrity within the legal competence limits refer to situations questioning the conflicts of interest and incompatibility, but not those falling under the scope of disciplinary misconduct performed by magistrates. Verifications undertaken by that public institution cannot replace the verifications conducted by the Judicial Inspection in disciplinary matters, even if they concern the same matters, but in light of additional requirements, relating to the procedure, not to the merits.

Therefore, initiation of proceedings before the Division for judges within the Superior Council of Magistracy, as disciplinary court, took place in observance of the legal provisions governing this field, through the preparation of a motion initiating proceedings by the Judicial Inspection, as initiator of the disciplinary action.

In the grounds for final appeal prepared by attorneys Lucian Mihai and Valentin Berea, the appellant-defendant claimed that the legal provisions in effect entitled the latter to reasonably consider that the National Agency for Integrity is the institution competent to verify the existence of a potential incompatibility, and, in the grounds for final appeal drawn up by the attorney Mădălin Niculeasa, it pointed to the exclusive competence of the National Agency for Integrity, as vastly deriving from Law no. 176/2010, from Law no. 317/2004, as officially interpreted by the Superior Council of Magistracy Plenum, through Decision no. 1245 of 20 November 2014 and from the enforcement of the principle of fair cooperation between public authorities, in conjunction with the principle of precluding institutional parallelism.

As repeatedly ascertained in the case-law of the European Court of Human Rights, the quality requirements contained in the law point to its clarity, accessibility and predictability, so that

addressees are provided with sufficient information on the applicable legal rules and are able to foresee, to a reasonable extent, depending on the circumstances of the case, the meaning of restrictions and consequences that could occur in a certain case (*the case Sunday Times v. the United Kingdom, judgment of 26 April 1979*), wither by seeking the advice of the superior or in reliance upon an interpretation contained in a court decision (*case of Revenyi v. Hungary*) or by approaching professionals in that field (*case of Open Door and Dublin Well Woman v. Ireland*), and the latter have an obligation to prove great care in fulfilling their activity (*case Cantoni v. France*).

In that context, even if we start from the assumption that the legislative evolution in these matters was likely to generate, in the case of magistrates, partial parallelism in respect of the competence held to verify incompatibility and conflicts of interest, the High Court holds that the administrative and case-law practice does not provide elements able to substantiate the interpretation contained in the grounds for final appeal.

Thus, contrary to the arguments invoked in the final appeal, Decision no. 1245 of 20 November 2014 of the Superior Council of Magistracy Plenum did not ascertain the exclusive competence held by the National Agency for Integrity, but analyzed the compatibility between the two types of regulations (contained, on the one hand, in Law no. 176/2010 on integrity in delivering public offices, amending and supplementing Law no. 144/2007 on the setting up, organization and operation of the National Agency for Integrity, but also amending and supplementing other legislative enactments and, on the other hand, in Law no. 303/2004 on the status of judges and prosecutors and in Law no. 317/2004 on the Superior Council of Magistracy), setting forth regulations to be observed in the procedure for ascertaining and penalizing incompatibilities in the case where the Superior Council of Magistracy was notified by the National Agency for Integrity, not excluding the assumption where the disciplinary procedure was initiated and is conducted whether an assessment report was prepared or not by the National Agency for Integrity.

It mainly derives from the explicit wording of Article 3 of the operative part of the reviewed decision that this does not concern the exclusive competence of the above-mentioned public authority: "*The provisions of Law no. 176/2010 concerning the impossibility to enforce the penalty of warning apply to judges and prosecutors in all cases, whether proceedings were initiated before the Superior Council of Magistracy by the National Agency for Integrity or not*".

The case-law of the High Court of Cassation and Justice and of the divisions within the Superior Council of Magistracy in disciplinary matters can no more amount to a ground able to reasonably result in the conclusion that the National Agency for Integrity is the single institution competent to ascertain the existence of potential incompatibility. On the contrary, in the judicial practice of the 5-judge panel, final decisions were identified for the disciplinary penalty of judges for the incompatibility entailed from the infringement of Article 5 paragraph (1) of Law no. 303/2004, considering that the Judicial Inspection initiating proceedings *ex officio*, and not in reliance upon a motion delivered by the National Agency for Integrity. Mention is to be made, in that respect, of Decision no. 27 dated 2 March 2015, dismissing the final appeal against Judgment no. 7J dated 11 June 2014

rendered by the Superior Council of Magistracy - the Division for Judges in disciplinary matters (incompatibility between the capacity of seconded judge and member of boards of directors); Decision no. 229 dated 27 June 2016, dismissing the final appeal against Judgment no. 16J dated 9 September 2015 rendered by the Superior Council of Magistracy - the Division for Judges in disciplinary matters (incompatibility between the capacity of judge and shareholders and director in a company); Decision no. 165 dated 26 October 2015, settling the final appeal against Judgment no. 3J dated 18 February 2015 of the Superior Council of Magistracy - the Division for Judges in disciplinary matters, remade only as regards the calculation of the disciplinary penalty (incompatibility between the capacity of judge in Romania and judge in the EULEX mission of Kosovo).

It was also contended that the existence of an assessment report issued by the National Agency for Integrity determining that there is no incompatibility in place would contradict, in legal terms, the disciplinary procedure, either by the fact that the disciplinary investigation is no longer continued, or that the disciplinary proceedings are discontinued (in the assumption where the disciplinary investigation was completed before the submission of the Assessment Report), by reiteration of the considerations concerning the exclusive competence of the National Agency for Integrity.

A relevant reply can only be issued by examining the legislative content of pieces of law referring to the duties, procedure and solutions that may be adopted by the Superior Council of Magistracy, or the National Agency for Integrity, respectively.

This argument may not be admitted, for considerations pertaining, first of all, to the manner in which the law-maker regulated their work – *the Superior Council of Magistracy is the guarantor of an independent justice* - Article 1 paragraph (1) of Law no. 317/2004; the Superior Council of Magistracy plays, through its divisions, the role of court of law in the field of disciplinary liability held by judges and prosecutors, for the offences stipulated in Law no. 303/2004, republished, as subsequently amended and supplemented - Article 44 paragraph (1) of the law; *as for the work of the National Agency for Integrity*, what is relevant are the provisions of Article 8 of Law no. 176/2010, stating that (1) the purpose of the Agency is to ensure the integrity in the fulfillment of public dignities and offices and preventing institutional corruption, *by fulfilling responsibilities in assessing declarations of assets, data and information on the fortune, but also on property changes occurred, potential incompatibility and conflicts of interest to which the persons stipulated in Article 1 were subject, while holding public offices and dignities*. In achieving the above-mentioned purpose, the Agency may develop cooperation relationships by concluding protocols with entities in Romania or abroad, in particular (2) the assessment conducted by integrity inspectors within the Agency is performed in relation to the status of the assets owned while holding public dignities and offices, conflicts of interest and incompatibility of persons concerned in this law, in observance of its provisions, *supplemented with the provisions of the legislative enactments in effect*.

The provisions of Article 22 paragraph (3) of Law no. 176/2010 are the most indicative in respect of the manner in which the two legal entities interact, according to separate procedures, but very clearly outlined – *(3) If the assessment report for incompatibility was*

not challenged within the time frame stipulated in paragraph (1) before the administrative litigation court, the Agency notifies, within 15 days, the authorities competent to initiate the disciplinary procedure.

The two authorities, having in place procedures that mingle in reliance upon explicit legal provisions, cannot reach a situation of an actual conflict of competence, as the principle of fair cooperation between the public authorities, in conjunction with the principle precluding institutional parallelism are fully observed. Furthermore, the regulation referred to herein above falls under the purpose of that law – provision of integrity and transparency in fulfilling public offices and dignities and preventing institutional corruption.

The provisions of Article 22 paragraph (4) of Law no. 176/2010, according to which if, further to assessing the statement of interests, but also other data and information, the integrity inspector ascertains the inexistence of any incompatibility or conflict of interest, prepares a report in that respect, to be delivered to the person concerned in that assessment, in the context of Article 17 paragraph (5) the second sentence, have formed the basis in reliance upon which the defendant received an assessment report which it used in her defense, in the case pending before the court.

The significance of that assessment report will be put to use on the merits of the disputed legal relationship, taken in conjunction with the other evidence submitted in this case.

Consequently, the decision to dismiss the plea for illegal initiation of proceedings by the Division for Judges in disciplinary matters, ordered by the decision challenged by final appeal, is illegal.

6.3. As regards the statute of limitation of disciplinary liability

In accordance with Article 46 paragraph (7) of Law no. 317/2004, republished, as subsequently amended and supplemented "*the disciplinary proceedings may be undertaken within 30 days after the completion of disciplinary investigation, but no later than 2 years after the date when the offence was committed*".

As deriving from the evidence submitted in this case, there is no doubt that the offence construed as disciplinary misconduct took place between 17 July 2014 and 2 August 2014, had a continuous nature, and therefore the disciplinary action conducted by the Judicial Inspection, on 27 June 2016 (date when the disciplinary proceedings were registered on the dockets of the Division for judges), was performed in observance of the 2-year period after the misconduct took place, as laid down in the above-mentioned legal provision, but also the 30-day period after the completion of disciplinary investigation – *i.e.* 30 May 2016.

The assertion of that appellant, within the meaning that the 2-year period also included the completion of the disciplinary proceedings, and consequently the settlement thereof, both on the merits, and in the final appeal, lacks substance and shall be dismissed.

The accuracy of the rationale followed by the disciplinary court relies, first of all, in terms of terminology, on the text of law, explicitly governing the **"***delivery*" of the disciplinary proceedings, and not its "*completion*". Upon examining that matter, what is relevant, in light of its accordance, is also the content of the concept of statute of limitation, defined as "*the*

removal of civil liability, consisting of the expiry of the substantive right to bring suit that was not fulfilled within the time frame provided by law".

The interpretation of the regulation specified above, in the context of the other regulations within the same law, is also able to contradict the defendant appellants' argument, within the meaning that the law does not contain provisions in that matter or that it infringes the principle according to which statute of limitation periods refer to legal liability as a whole, and not the stages based on which such liability is determined.

By means of Decision no. 71 dated 11 May 1999, referred to by the appellant judge, the Constitutional Court of Romania has ascertained, in substance, that statute of limitation periods in connection with disciplinary liability "*amount, on the one hand, to a measure of protecting the employees against the arbitrary enforcement of penalties, and on the other hand, they provide the stability of legal labor relationships*".

To an equal extent, the European Court of Human Rights decided that the statute of limitation periods serve several significant purposes, in particular to ensure the security and legal finality, to protect potential defendants from late complaints that may be difficult to challenge and prevent any injustice that could occur, should the courts be compelled to rule in respect of events which took place in a distant past, in reliance upon evidence which may have become uncertain and incomplete because of the lapse of time (please see *Stubbings et al. v. United Kingdom*, 22 October 1996, item 51, *Collection* 1996-1V). The statute of limitation periods amount to a feature shared by domestic legal systems of the contracting states, a regards criminal, disciplinary or other offences (case *Oleksandr Volkov v. Ukraine, Application no. 21722-11, paragraph 137*).

However, in the case of judges and prosecutors, by means of Law no. 317/2004 and the secondary regulations in that field, a disciplinary procedure was laid down providing additional securities for compliance with the rights of the envisaged magistrate, through the separate regulation of a preliminary disciplinary investigation procedure, conducted by the Judicial Inspection, which may not enforce, in itself, a penalty, but vests, by means of disciplinary proceedings, the competent division of the Superior Council of Magistracy in that respect. After the completion of an administrative-jurisdictional procedure characterized by adversariality, the division thus vested renders a decision whereby, as the case may be, it admits the proceedings and imposes a disciplinary penalty. The disciplinary penalty thus imposed is not final, because the decision may be challenged by final appeal, staying its enforcement, in accordance with Article 51 paragraph (4) of Law no. 317/2004.

Therefore, the disciplinary procedure applicable in the case of magistrates contains several stages which may not reasonably be enclosed within a definite period of two years after the offence was committed, the legal relationship in relation to which the disciplinary liability is entailed expires after the settlement of the final appeal, in accordance with the rules contained in the Code of Civil Procedure. This is why the interpretation proposed by the appellant judge, within the meaning that the timeframe stipulated in Article 46 paragraph (7) of Law no. 317/2004 refers to the statute of limitation in imposing the disciplinary penalty, and not the right to bring disciplinary suit, may not be admitted.

In consideration of the special status of judges and prosecutors, regulated on a separate basis, by means of a law containing express provisions in this field, the Court may not hold the enforceability, as supplement or by analogy, of the general provisions contained in Article 252 of the Labor Code or Article 77 paragraph (5) of Law no. 188/1999, on the status of civil servants, also relied upon by the appellant - defendant.

In accordance with Article 252 of the Labor Code,

"*(1) The employer orders the enforcement of disciplinary penalties by means of a decision issued in writing, within 30 calendar days after it became aware of the disciplinary misconduct being committed, but no later than 6 months after the offence was perpetrated.*

(2) Under penalty of absolute nullity, the decision shall necessarily contain:

a) the description of the offence forming the disciplinary misconduct;

b) the stipulation of provisions in the By-Laws for personnel, internal regulation, individual employment agreement or collective bargaining contract in effect which were infringed by the employee;

c) the reasons for dismissing the defenses submitted by the employee during the preliminary disciplinary investigation or the reasons why, in accordance with Article 251 paragraph (3), the investigation was not undertaken;

d) the legal ground in reliance upon which the disciplinary penalty is imposed;

e) the timeframe within which the penalty may be challenged;

f) the competent court before which the penalty may be challenged.

(3) The penalty decision shall be delivered to the employee within no more than 5 calendar days after the issuance and shall take effects commencing with the delivery date.

(4) The notification shall be handed over to the employee in person, in exchange for a signature attesting to its receipt, or in case of refusal to receive, by registered letter, to the domicile or residence advised by the latter.

(5) The penalty decision may be challenged by the employee before the competent courts of law within 30 calendar days after the date of delivery."

As for the disciplinary status enforceable to civil servants, Article 77 paragraph (5) of Law no. 188/1999 stipulates that "*disciplinary penalties shall be imposed within no more than 1 year after the notification of the disciplinary commission in respect of the disciplinary infringement having been committed, but no later than 2 years after the disciplinary infringement was committed*". In accordance with Article 80 of the same law, "*civil servants dissatisfied with the penalty imposed may refer to the administrative litigation court, and request it to cancel or amend, as the case may be, the penalty order or notice*".

It may easily be noticed that in both cases referred to above, contrary to the manner in which the disciplinary liability of magistrates is held, the disciplinary penalty is enforced by means of a unilateral legal instrument, which takes effects from the date of delivery to the addressee, given that the law fails to contain any effects staying the right to challenge before the

competent court of law, and that difference in the legal status resides in incompatibility of regulations, excluding the possibility to enforce them in the case at hand.

The legal matter consisting of the unenforceability of the general provisions set forth in the Labor Code in respect of the statute of limitation for disciplinary liability of judges and prosecutors was also settled, under similar circumstances, in Decision no. 269 of 23 October 2017 of the High Court of Cassation and Justice, the 5-judge panel, dismissing the final appeal against the court minutes dated 13 January 2016 and Decision no. 20J dated 31 October 2016, rendered by the Superior Council of Magistracy - the Division for Judges in disciplinary matters in file no. 39/J/2015.

Similarly, the case-law argument deriving from Decision of the European Court of Human Rights in the case *Oleksandr Volkov v. Ukraine (Motion no. 21722-11*) does not have the meaning suggested by the appellant judge, both in domestic regulations, and the factual circumstances are different.

In that decision, the European litigation court ascertained that the Ukrainian domestic law "*stipulates no statute of limitation period in connection with the procedures for revocation of judges from office for having infringed their oath*" and deemed that it was not necessary to indicate the duration of the statute of limitation period, but considered that an approach so restrictive to the disciplinary measures enforceable to judges severely jeopardizes the security of legal relationships (paragraph 139).

The European Court of Human Rights reached that conclusion in the context where the offences reviewed by the Superior Council of Magistracy in 2010 dated from around 2003 - 2006, and the party was faced with difficulty, as he had to build his defense in connection with certain events that happened in a distant past (paragraph 138). The situation is not similar to the one in this dispute, considering that the disciplinary proceedings were initiated within the 2-year period set forth in Article 46 paragraph (7) of Law no. 317/2004, the time elapsed since the offence was committed (July - August 2014) and the entire context of the circumstances of this case is likely to narrow the opportunities to build an efficient defense by the appellant - defendant.

Consequently, the calculation method for the statute of limitation period, set forth by the Division for Judges, as disciplinary court, in reference to Article 46 paragraph (7) of Law no. 317/2004 and upon the completion of the offence, is legal, the disciplinary liability of the Judge Camelia Bogdan for the offence consisting the object of the disciplinary proceedings undertaken in this case by the Judicial Inspection is not time-barred.

6.4. As concerns the existence of the disciplinary misconduct

- ***Legal frame. Meaning of the concepts "office" and "incompatibility"***

As specified herein above, the provisions of Article 98 paragraph (1) of Law no. 303/2004 on the status of judges and prosecutors limits the frame of disciplinary liability held in charge of judges and prosecutors not only to departures from professional duties, but also to offences hindering the prestige of justice.

In the case at hand, the disciplinary proceedings undertaken against Judge Camelia Bogdan has as object the perpetration of the disciplinary misconduct provisioned for in Article 99 letter (b) of Law no. 303/2004 on the status of judges and prosecutors.

In accordance with the provisions of the above-mentioned legal text, a disciplinary misconduct consists of the infringement of legal provisions concerning incompatibility and prohibitions in connection with judges and prosecutors.

The status of incompatibility in these matters has constitutional coordinates, in Article 125 paragraph (3) of the Constitution of Romania, stipulating that the "*office of a judge shall be incompatible with any other public or private office, except for academic activities*".

Similarly, in accordance with Article 132 paragraph (2) of the Constitution of Romania, "*The office of public prosecutor is incompatible with any other public or private office, except for academic activities*".

The above-mentioned constitutional regulations are transposed in the organic law through Article 5 paragraph (1) of Law no. 303/2004 on the status of judges and prosecutors, stipulating that "*The offices of judge, prosecutor, assistant magistrate and judicial assistant are incompatible with any other public or private offices, except for academic activities, but also training activities in the National Institute of Magistracy and the National School of Clerks, under the law*".

A similar regulation may also be found in Article 101 of Law no. 161/2003 on certain measures to secure transparency in delivering public dignity, public offices and in the business environment, preventing and penalizing corruption, stipulating that "*The offices of judge and prosecutor is incompatible with any other public or private offices, except for academic activities*".

Similarly, Article 21 paragraph (1) of the Code of Ethics for Judges and Prosecutors stipulates that "*Judges and prosecutors may not hold this office together with any other public or private office, except for academic activities*".

In the context subject to review, the legal meaning of Article 7 of the Universal Charter of Judges may also be ascertained, stipulating in an undisputed manner the fact that judges shall not hold any other office, either public or private, remunerated or not, not fully compliant with the duties and status of a judge.

What is attributable, in the case at hand, to the appellant Camelia Bogdan is the fact that, while actually holding the office of judge, she was also a provider of services, in reliance upon a professional services contract (training services), concluded with SC. FDI Top Consult SRL (as beneficiary), the object of the civil agreement residing in the provision of training services by the magistrate as part of training sessions held for 260 employees of APIA, as part of the professional training Program "*Implementation and Enforcement of the Future Joint Agricultural Policy. Prevention of Fraud and Corruption with a view to Protecting the Financial Interests of the European Union*", conducted as part of the UMP - CESAR project "*Supply of Consultancy Services for the organization of training in favor of APIA personnel"*, as provided in agreement no. 1290/16 July 2014 concluded between the

above-mentioned beneficiary and the Management Unit of the Project "Supplement for the Financial Support granted by the European Union for Agriculture Restructuring in Romania".

What is relevant is that the summary of facts thus held was not challenged in its materiality by the appellants.

The legal grounds and theoretical, doctrine, interpretation arguments relied upon by the authors of the final appeals are not able to substantiate the challenges submitted in that respect, referring to: extending the legal text beyond the constitutional text having the same governing scope, the alleged errors in the determination, interpretation and enforcement of the applicable legal frame, failure to meet the conditions stipulated in the above-mentioned legal provisions, to entail the disciplinary liability of Judge Camelia Bogdan, but also the lack of constituent elements of the misconduct at issue.

As indicated herein above, the prohibition for judges and prosecutors to hold any other public or private office is provisioned at a constitutional level, being governed as a key requirement for their status.

First of all, mention should be made that this prohibition, set forth both by Article 125 paragraph (3) of the Constitution, and by Article 5 paragraph (1) of Law no. 303/2004, amounts to a security of the *independence and impartiality of justice*, supreme values of the judicial system.

During the final appeal, it was stated that the incompatibility was an exception from the fundamental principle of the right to work, as sanctified by Article 41 paragraph (1) of the Constitution of Romania ("*The right to work shall not be restricted. Everyone has a free choice of his/her profession, trade or occupation, as well as work place*") and, therefore, Article 125 paragraph (3) shall be interpreted in a restrictive manner.

The prohibition to conduct certain activities or hold certain offices in parallel with the office of judge cannot be construed as an unreasonable restriction of the right to work, because the person falling under the scope of such prohibitions freely chose her profession, namely that of magistrate, *with the restrictions specific to that profession, servicing the purpose of the specific activity*, to deliver the act of justice or to contribute to its delivery, while the magistrate was aware of the restrictions imposed by her status.

The arguments *exceptio est strictissimae interpretationis* and *ubi lex non distinguit nec nos distinguere denemus* do not operate in this case, with the lack of constitutional incompliance, because, unlike the general status of employment relationships, where, as deriving from Article 35 of the Labor Code, the plurality of offices is the rule, save for the express exceptions provisioned for by law, in the case of judges and prosecutors, the constitutional provisions and other rules in this field stipulate incompatibility as a rule, leading to the purpose of complying with the principle of separation of powers in State and independence of judicial power, while not contradicting in any way her personal freedom in selecting her profession at her own free will, a freedom guaranteed by Article 41 paragraph (1) of the Constitution.

From another perspective, the High Court notes that the constitutional provision set out in Article 125 paragraph (3), has general applicability, in principle, which does not preclude the

possibility to influence, in the dynamic of social life, through the legislative enactments for the implementation of constitutional principles, the regulation of the social relationship.

That is why there is no merit to the argument according to which by including the phrase "*under the law*" in the provisions of Article 5 paragraph (1) of Law no. 303/2004 an unlawful addition is made to the constitutional provision, which entails the unenforceability of the organic legal text to the case brought before the Court.

In stipulating this method, the law maker acknowledged and issued legislative regulations on a factual reality, in particular that, by taking part in the social and judicial life, in observance of the law, the judge may hold certain "offices", similar to an academic office in the higher education system, not incompatible with the office of judge or prosecutor, assigning to the concept of *office* a new meaning, specific to the context and for the purpose of regulating and in full compliance with the letter and spirit of the Constitution.

The restrictive interpretation of the concept of *office* within the meaning of remunerated activity, supplied on a regular and organized manner, proposed by the appellant judge, does not comply with the letter and spirit of the provisions in Article 125 paragraph (3) of the Constitution, considering that the teleological interpretation of the above-mentioned rule reveals, beyond any doubt, that setting as rule the incompatibility between the office of judge and other offices, the constitution maker had regard to the nature of that profession and the requirement of complying with securities of impartiality, independence and transparency.

In its case-law (please see, for instance, Decision no. 1082 of 8 September 2009, published in Official Gazette of Romania, Part I, no. 659 of 3 October 2009), the Constitutional Court stated, among others, that the law-maker was free to lay down additional obligations in charge of the personnel conducting activity of a certain nature and significance, while such obligations amount to genuine securities for the performance of work under the aegis of impartiality, integrity and transparence.

In consideration of all of the above, strictly in connection with the misconduct consisting of the infringement of the status of incompatibility and prohibitions, within the above-mentioned restrictions set out in item 6.1, it was ascertained that the disciplinary court correctly determined the legal frame, the applicability of Article 5 paragraph (1) of Law no. 303/2004, and of the appropriate text of the secondary laws, and was correctly held as legal substance underlying the impugned ruling.

What needs to be specified in that context is the fact that, despite the arguments and challenges detailed from the examined perspective, the appellant judge chose not to explicitly submit a plea for unconstitutionality or any plea for illegality.

The concept of *office* does not solely have the semantic meaning specified by the appellant judge, deriving from a restrictive interpretation, the dictionary meaning of the word also being that of "work supplied by someone to fulfill the professional obligations imposed; duty, task; job" or "capacity, role, duty".

If we admitted that the prohibition provided in the Constitution, but also in Law no. 303/2004 solely refers to the offices held on an organized and regular manner, this would mean that a judge would be deemed to perform, on an occasional basis, any type of work, except for

those expressly provided, without becoming incompatible, and that is not compliant with the spirit of the regulations, the purpose of such restrictions being precisely to preclude the magistrate from becoming involved in any activity, either part or full time, which could prejudice its credibility before justice seekers and which could create even the slightest appearance of lack of impartiality.

Through its nature, the concept of "incompatibility" referred to in Article 99 letter (b), in conjunction with Article 5 paragraph (1) of Law no. 303/2004, has a general definition, but in determining the meaning of that concept in the legislative context of the status of judges and prosecutors also contributes to other provisions in the same law which, on the one hand, expressly list several activities or capacities prohibited to judges and prosecutors, delineating the status of prohibitions (Articles 7-10) and, on the other hand, expressly govern the activities that are allowed, together with the academic offices held in the higher education system and for training in legal professions: Article 10 paragraph (3) the first sentence "*Judges and prosecutors are allowed to plead, under the law, only in their personal cases or cases of their predecessors and successors, spouses, but also of persons under their custody or trust*"; Article 11 "*(1) Judges and prosecutors may take part in the writing of publications, may write articles, specialized studies, literary or scientific works and may take part in audio-visual programs, except for political ones. (2) Judges and prosecutors may be members of examination commissions or for the preparation of draft legislative enactments, domestic or international documents. (3) Judges and prosecutors may be members of scientific and academic societies, but also of any non-profit private legal entities*".

General incompatibilities operate between such limits, consisting in the prohibition of plurality between the office of judge or prosecutor and other capacities or activities that, by their nature, do not comply with the restrictions of the professional status or of the activity consisting in the delivery of justice.

This approach was also present in the administrative practice of the Superior Council of Magistracy, in fulfilling duties deriving from its constitutional role, as guarantor of justice independence, in a manner meant to ensure the predictability of interpretation and reasonable guidance in the conduct of a diligent magistrate.

Thus, Decision no. 698/22 June 2015 of the Superior Council of Magistracy Plenum decided that "*any activity involving a task, an assignment from another person, with a view to fulfilling a specific duty, generally falls under the concept of public or private office*", and several decisions have ascertained the incompatibility between the office of judge and *remunerated activities*, except for the higher education system, not connected to justice or examination commissions outside the judicial system (decisions no. 440/2015, 82/2016, 788/2015, 1185/2015, 1498/2016).

Within the appraisal margin allowed by law, the Superior Council of Magistracy interpreted the provisions of Article 5 paragraph (1) of Law no. 303/2004 within the meaning that such provisions allow, together with the discharge of offices held in the higher education system and training forming part of the initial and lifelong education at the level of the National Institute of Magistracy and the National School of Clerks, and work similar to academic activity, in training institutions pertaining to other legal professions.

Furthermore, Decision no. 261/2008 of the Superior Council of Magistracy Plenum determined that it is possible to take part, as *experts in programs with foreign financing for justice*, for judges, prosecutors, clerks and judicial specialty personnel assimilated to magistrates.

At the same time, *Decision no. 1184 of 10 November 2015 of the Superior Council of Magistracy Plenum* stipulated that the office of judge is compatible with the capacity as member in the in the Group of experts concerning the policy of the European Union in criminal matters, deeming that, if judges and prosecutors may perform academic activities in the higher education system, they may fulfill training offices in the National Institute of Magistracy and the National School of Clerks, but also in programs or projects where their work is not considerably different from the work supplied in the National Institute of Magistracy or the National School of Clerks.

The assertion of the appellant judge, within the meaning that the decisions in principle are subject to absolute nullity because they add to the constitutional regulation and exceed the legal competence of the Superior Council of Magistracy, cannot be admitted, as they are enacted in fulfilling administrative duties related to the management of magistrates' careers, aimed at unifying the practice of the Superior Council of Magistracy for the interpretation of Article 5 paragraph (1) of Law no. 303/2004 and complying with the principle of legal security.

The systematic, literal and logical-legal examination on the content of the above-mentioned enactments leads to the conclusion that the need for uniform interpretation, through decisions of the Superior Council of Magistracy Plenum, in relation to the content of the concept of *office* is also justified by the circumstance that the assumption in Article 5 paragraph (1) of Law no. 303/2004 contains a wide range of activities which, in the dynamic of the social and legal life, magistrates have to conduct in observance of the reference constitutional text and, consequently, the status of incompatibility and prohibitions imposed on them.

The interpretation and legal provisions examined and assumption of the appellant-defendant, according whereto the prohibition set forth by Article 5 paragraph (1) of Law no. 303/2004 refers to *plurality of officers exercised on an organized and regular basis*, and is contradicted by the meaning assigned to the concept of incompatibility at European level, for instance, Permit no. 3/2002 of the Consultative Council of European Judges setting forth certain prohibitions against the performance of certain activities by the magistrates.

In the written conclusions submitted to the case file, the appellant-intervening party pointed to the reference in the impugned decision to paper no. 18743/1154/2011, within the meaning that in the session dated 12 July 2011, the Superior Council of Magistracy allegedly decided that a magistrate performing a training activity in a (*trading)* company does not result in incompatibility.

The information posted on the website of the Superior Council of Magistracy, (http://old.csml909.ro/csm/linkuri/25_07_2011_42672_ro.pdf) item 40 on the agenda settled during the session dated 12 July 2011 (*"The standpoint of the Directorate for legislation, documenting and litigation no. 18318/1154/2011 on a magistrate performing a training activity in a*

trading company") reveals that the Plenum of the Council decided, on the contrary, the following:

"*Ruling. In respect of the motion submitted by Mr. ..., judge with ..., in consideration of the fact that the delivered letter does not reveal the organization and operation of the institution conducting training for admission to the National Institute of Magistracy or the legal grounds based on which such training is implemented, merely specifying that it is a trading company, not certified as a learning institution and not integrated in the education system of any rank, having a commercial nature, the Superior Council of Magistracy Plenum deemed that, insofar as the activity performed by a magistrate exceeds the activities referred to in the specialized directorate, the provisions governing incompatibility become applicable*".

It is true that the practice of the Superior Council of Magistracy conducted over time revealed a penchant for restrictive interpretation as to the scope of incompatibility, correlated with an extensive interpretation of the legal provisions governing the activities allowed for judges and prosecutors, but the decisive element in this approach is the connection between allowed activities with justice, with the other legal professions, but also their performance in a manner similar to higher education or training organized in the National Institute of Magistracy and the National School of Clerks.

Furthermore, each of the situations under review had certain particulars which required specific approaches.

What still needs to be examined through the impugned decision, the Division for Judges in disciplinary matters correctly interpreted the legal provisions and placed on the summary of facts as deriving from evidence the appropriate legal meaning, based on the constitutional provisions governing the status of incompatibility of judges and prosecutors and on the wording of applicable legislative texts, where the rule is to prohibit the plurality of offices, subject to the exceptions provisioned by law.

On the merits, having regard to the wording of the disciplinary misconduct at issue, provided under Article 99 letter (b) of Law no. 303/2004, as supplemented by the other legal provisions specified above and as reasoned by the instruments issued for the clarification and interpretation of the Plenum of Superior Council, as part of the control exercised by means of final appeal, it may be ascertained that the Division for Judges in disciplinary matters had grounds to hold this misconduct in charge of Judge Camelia Bogdan, because, contrary to the arguments raised by the authors of final appeals, the constituent elements of that misconduct were cumulatively fulfilled.

- ***Objective side***

The material element of the disciplinary misconduct brought before the court needs to be examined starting from the content of the concept of (public or private) *office*, the supply of which is prohibited for the magistrate, subject to the exceptions provisioned by law, results in incompatibility, in light of the judge's role and status in the society.

As deriving from the considerations set forth above, the requirement to comply with the independence and impartiality of justice through all its actors justifies the extended meaning

of that concept, which substantiates the prohibition stipulated in Article 125 paragraph (3) of the Constitution.

Therefore, it is necessary to ascertain that, as part of the activities which may be classified as "*offices*", within the meaning of that term, regard shall also be had to duties, obligations, powers, roles, missions, synonyms whereby it is defined, in terminology terms, for the word "*office*".

This confirms the accuracy of the rationale of the disciplinary court, which validated the *lato sensu* interpretation of that concept by the Superior Council of Magistracy Plenum and analyzed the offences held in charge of the judge, in light of the principle decisions issued by that authority.

The participation of the appellant-defendant, as lecturer, in the Training Program "*Implementation and Enforcement of the Future Joint Agricultural Policy. Prevention of Fraud and Corruption with a view to Protecting the Financial Interests of the European Union"* organized in the UMP - CESAR project "*Supply of consultancy services for the organization of training for A.P.I.A. personnel*" reveals, on the one hand, the nature as duty, power, role (semantically assimilated to the concept of *office*) prohibited to magistrates, likely to result in incompatibility.

What is relevant in that respect is, first of all, the method for selecting the judge in supplying that activity, a selection which was not transparent and customary, by any authority forming part of the judicial system (the Superior Council of Magistracy, court of law, the National Institute of Magistracy or the National School of Clerks), the training sessions being held by a consortium of companies specializing in consultancy services, in particular the consortium comprising S.C. Gama Proconsult S R L. and S.C. FDI Top Consult S.R.L.

What is also significant in terms of infringing the principle of judge's independence, is the undisputed fact that the appellant-defendant undertook to perform the work at issue by means of a private agreement, a services contract, and became subordinated, in exchange for a remuneration, to contractual obligations undertaken to a profit-oriented trading company, more specifically S.C. FDI Top Consult S.R.L. (which, according to the letter of interest submitted for participation in the awarding procedure for the consultancy services contract is a "*Romanian company specializing in integrated consultancy and management services for business development in the territory of Romania*").

These issues deriving from documentary evidence submitted in this case, recorded in the Assessment Report prepared by the National Agency for Integrity:

"*The selection of lecturers in the training program was exclusively performed by SC FDI Top Consult SRL, in order to upon a contract with that company and holding obligations to it, not to UMP.*

As for the method used by SC FDI Top Consult SRL in the selection of lecturers for training sessions, the training themes covered two separate objects, the future Joint Agricultural Policy (PAC), and for preventing fraud and corruption in view of protecting the financial interests of the European Union.

……

Given for the section preventing fraud and corruption, there are no experts or practitioners in that field (the legal field), a specialist was sought for in the market. Considering that the company does not have a methodology or procedure in place to identify experts necessary in various procedures, experts will be approach with which previous cooperation was concluded, or, as in the case at hand, recommendations will be requested from partners, collaborators, etc.

Thus, following the searches and recommendations received, the company identified two experts which met the qualification requirements, in particular Stefanescu Violeta (specialized lecturer in the field) and ***Bogdan Camelia****.*

Both experts were requested to submit their resumes and availability to take part in the training. ***Bogdan Camelia*** *was the one who provided a timely answer to the inquiry and delivered her resume on 02 July 2014, which is why she was included in the letter of interest, submitted on 03 July 2014.*

……

Thus, on 16 July 2014, the date when Agreement no. 1290 was concluded, SC FDI Top Consult SRL delivered to the assessed person, by email, invitation no. 16.07.1/16 July 2014 to join the project team starting from 20 July 2014, as lecturer in the section "Preventing Fraud and Corruption with a view to Protecting the Financial Interests of the European Union" and, on 17 July 2014 Contract no. 17.07.3/17 July 2017 would be concluded".

The private law nature of the legal relationship in which the appellant-judge became involved and the entire factual context exclude the applicability of Government Decision no. 215/2012 approving the National Anti-Corruption Strategy 2012-2015, the List of Preventive Anti-Corruption Measures and Assessment Indicators, but also the National Plan of Action to implement the National Anti-Corruption Strategy 2012-2015, a multidisciplinary document containing several fundamental values and principles of public anti-corruption policies, but also specific goals in charge of public entities representing the executive, legislative and judicial powers and the local public administration.

On the other hand, the specific method and circumstances under which the particular activity was performed, as deriving from the evidence submitted to the case file, attest that the conditions were not fulfilled to apply the plea referring to activities performed as part of *programs benefiting from foreign financing for justice*.

The fact that the object of the services supplied consisted of the delivery, in the form of training, of information concerning a general matter of law, of current interest (*preventing fraud and corruption in view of protecting the financial interest of the European Union*), which could be subject to judicial censure in the case of illicit conduct, is not similar to the activities for justice able to prevent the status of incompatibility, insofar as the program was not dedicated to justice, but concerned Joint Agricultural Policy, the addressees and beneficiaries of such training were civil servants within A.P.I.A., and the documents submitted to the second appeal file reveal that, from the 248 attendees of the professional training, only 6 were legal advisors, legal professionals. The added value brought by the

pluridisciplinarity in such a program may be provided, for instance, by means of the activities allowed under Article 11 of Law no. 303/2004.

The Agency for Payments and Interventions in Agriculture (A.P.I.A.) and the line ministry are *administrative authorities in the area of executive power*, and the circumstance that the public administration, in a material meaning, consists in the activity performed as public power in view of organizing the enforcement and specifically enforcing the law does not amount, in itself, to an argument for placing the supply of services within and in favor thereof for justice, in general.

In the factual context of our case, not even the topics of professional training sessions, which formed the object of the services supplied can be a reason for exoneration from disciplinary liability, but it has to be taken into account upon exercising judicial control on the penalty calculation method.

The existence or inexistence of the capacity of TAIEX expert in the reference period is irrelevant in the disciplinary field, insofar as the work performed by the appellant-defendant does not fall under the activity allowed by Article 5 paragraph (1) of Law no. 303/2004, as interpreted in the administrative practice of the Superior Council of Magistracy and in disciplinary case-law.

The case-law argument invoked in the final appeal, concerning the cancellation of the assessment report prepared by the National Agency for Integrity in respect of another judge, is not likely to lead, in itself, to the conclusion that the objective side of the disciplinary misconduct subject to review is not fulfilled, because the considerations of Decision no. 2356 dated 22 June 2017, rendered by the High Court of Cassation and Justice – the Administrative and Fiscal Litigation Division (a singular court decision identified in the analyzed field) reveal that a certain summary of facts was noted, detailing certain particularities, not found in the case at hand.

In the above-mentioned decision, reference was made to the administrative practice of the Superior Council of Magistracy in respect of the training and professional improvement of other legal professions and it was decided that there is no breach of the legal status of incompatibility by the judge who was part in that file, in consideration of the fact that the academic activity conducted by her in professional training and improvement programs was dedicated to the members of the National Council for Solving Complaints, an *independent body with administrative-jurisdictional activity,* set up with a view to settling complaints in the field of public procurement, meant to "promote better quality in the settlement of disputes concerning public procurement, but also to lower the workload of courts of law".

As regards the case-law of the European Court of Human Rights, underlying the defense built in favor of the appellant-defendant by the appellant-intervening party the Association the Judges Forum, within the meaning of infringing Article 6 paragraph (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms in respect of the principle of legal security, the High Court notes, on the one hand, that the decision dated 16 April 2013, published in Official Gazette of Romania no. 471/ 30 June 2013, in the case *Bernd v. Romania* (referred to by the party as *Siegle v. Romania*), has ascertained that two conflicting

irrevocable court decisions were rendered, in relation to the same person (Siegle Bernd), in reliance upon the same law and factual elements. On the other hand, the cases *Stanciulescu v. Romania* and *Ilie Serban v. Romania* has ascertained that, in the plaintiffs' cases, rulings contrary to the consolidated unitary case-law of the supreme court for several years were issued; ECHR did not exclude the possibility for a case-law revival relying on a new interpretation of the law, but has ascertained that the rulings issued un the dispute cannot be qualified as such, because the supreme court did not explain in any way the change in its position and later reverted to its constant case-law.

However, the case at hand meets none of the above-mentioned assumptions, because the envisaged decision refers to someone else, relies on a factual basis that is similar, but not identical and, as specified above, is singular in the case-law issued so far by the High Court of Cassation and Justice.

In light of all of the considerations herein above, the correct determination of the objective side of the disciplinary misconduct provisioned for in Article 99 letter (b) of Law no. 303/2004 may be ascertained.

Not to reiterate the arguments for which the thesis concerning the exclusive competence of the National Agency for Integrity was dismissed, also in this context, mention is to be made that the Division for Judges placed correct evidentiary relevance on the findings made by the above-mentioned authority, in respect of this case, initially specified in letter no. 10626/14 July 2014 and, afterwards, in assessment report no. 21350/GI 1/20 May 2016.

In accordance with Article 261 of the Civil Procedure Code, the court reviews the submitted evidence, on a separated basis and as a whole, and freely appraises upon them, depending on the judge's belief, save where the law determines their evidentiary power.

However, in the disciplinary procedure conducted within the coordinates laid down by Law no. 303/2004 and Law no. 317/2004, the assessment report prepared by the National Agency for Integrity in enforcing Law no. 176/2010 does not have a pre-determined evidentiary value, but the value of an authenticated document to be appraised in the set of submitted evidence.

The disciplinary court has correctly ascertained that it is not bound by the conclusions of the assessment report, this approach also being justified, besides the considerations pertaining to the legal frame, by the circumstance that, in light of its specific powers and goals, the National Agency for Integrity was not concerned about the disciplinary implications of the involvement of the assessed judge in a private law relationship, by means of a services contract where it had the capacity of provider, concluded with a trading company.

As for the legal effects and legal frame for complaints, the legal importance of an assessment report prepared in reliance upon Article 22 paragraph (4) of Law no. 176/2010, ascertaining the lack of incompatibility elements, is different from that of the report issued in accordance with Article 21 paragraph (1) of Law 176/2010, according whereto, if, submission of a standpoint by the invited person, verbally or in writing, or, in the absence thereof, upon expiry of a 15-day timeframe after the confirmation that the information was received by the person subject to assessment, the integrity inspector still considers that there are elements

attesting to the existence of a conflict of interest or incompatibility, prepares an assessment report. This latter type of report may be challenged by the person subject to assessment, within 15 days after delivery, before the administrative litigation court, in reliance upon Article 22 paragraph (1) of the same law, and, once finalized, generates an obligation to notify the competent bodies to initiate the disciplinary procedure.

Although not referring to the legal case at hand, because the National Agency for Integrity did not issue a report ascertaining the incompatibility, mention is to be made that in this case as well the Judicial Inspection is the authority competent to conduct the disciplinary investigation of judges and prosecutors, in accordance with special regulations applicable thereto; the disciplinary penalty is not automatically imposed, as Article 25 paragraph (3) of Law no. 176/2010 contains two separate legislative assumptions, within the meaning that the offence of the person in relation to which incompatibility or conflict of interest was ascertained is the reason for her discharge from office, as the case may be, amounts to disciplinary misconduct and is penalized under the regulations governing that dignity, office or activity.

For all of the arguments above, the impugned decision will be maintained in this regard, with the observation that the considerations held in light of the provisions laid down in Article 5 paragraph (2), not decisive in the economy of this case, concerning not incompatibility, but conflict of interest, will be dismissed, because they exceed the content of the objective side of misconduct for which proceedings were initiated before the disciplinary court (infringement of the general status of incompatibilities).

- ***The subjective side***

Also in connection with the challenges brought against the *subjective side* of the disciplinary misconduct, the arguments relied upon are not likely to remove the legal classification made by the disciplinary court, which has correctly ascertained that, although the judge did not pursue the outcome of her offence, she did foresaw it and accepted the possibility to infringe the legal provisions governing incompatibilities and prohibitions.

Mention is to be made that the magistrate may not invoke her good faith by opposing to it an obligation of refrain, requiring prudence in selecting the activities which may be conducted outside those particular to the office of judge and the type of legal relationship concluded for that purpose, even if, in her belief, those activities were meant to valorize and share knowledge and experience in a sector of law.

Accepting her selection, as indicated herein above, intentionally undertaking contractual obligations to a profit-oriented private company, the fact that, while foreseeing the existence of a potential incompatibility, the judge failed to approach the professional body which, din in institutional terms, coordinates, guides and guarantees the independence of justice, but opted for an informal manner to approach the management, at the time, of the National Agency for Integrity, amount to as many issues which, proven beyond any doubt, reveal the cumulative existence of the intellective and volitional factor outlining the subjective side in the form of indirect intention.

It is true that there is an express obligation in place incumbent upon the magistrate to approach the Superior Council of Magistracy and subsequent administrative practice may not be held in the appellant's charge, contrary at least at the level of appearance, to that of another public authority. The considerations described above are not, however, able to delineate, in the opinion of a reasonable observer, the conduct of a diligent magistrate with a view to observing all professional requirements, what the disciplinary court obviously penalized in this case was precisely this action contrary to the status of the appellant.

- ***The prejudicing outcome and the requisite nexus***

The immediate and direct consequence of this conduct, which the appellants seek to ignore, consists in the erosion of trust and respect to the office of magistrate by undermining their independence, entailing the result of an impaired image and prestige of justice, as a public system and service.

Her arguments concerning the lack of any consequences from her infringing conduct are irrelevant, given that the disciplinary liability of the judge derives from the exigency judges should prove by their conduct, both in fulfilling their professional duties, and outside them, such exigency to be determined on an objective basis, and not in reliance upon unilateral assessment.

Consequently, it is found that the disciplinary court has correctly ascertained that the offence held in charge of Judge Camelia Bogdan, *namely her performing training activity in exchange for a remuneration in reliance upon an agreement concluded with a trading company, as part of a project developed under the future Joint Agricultural Policy*, falls under the regulatory scope of Article 99 letter (b) of Law no. 303/2004, and that the impugned decision correctly outlined: the existence of offences, unlawful conduct, harmful consequences and requisite nexus between the illicit action and the outcome, which attests to the legality of its classification in the disciplinary misconduct stipulated in the above-mentioned legal text.

- ***Judicial practice arguments***

The conclusion is also confirmed by the previous practice in disciplinary matters of the supreme court, the 5-judge panel noted, for instance, the incompatibility between the capacity as seconded judge and that of member in boards of directors, considering that a contrary standpoint of the National Agency for Integrity had been submitted to the case file (Decision no. 27/2 March 2015).

Furthermore, Decision no. 165/26 October 2015 has ascertained the incompatibility between the capacity of judge in Romania and judge in the EULEX Mission of Kosovo, whereas the judge failed to follow the legal procedure for secondment to an authority of the European Union, but concluded an individual contract with the EULEX Mission and, "with a view to valorizing a personal interest, even if derived from a professional interest, wilfully breached the legal frame governing the by-laws of this profession".

6.5. In respect of the calculation of penalty

As part of the legality censure, it was found, however, that there was a well-grounded nature of the challenges raised by the appellants by means of the ground for final appeal referring to the illegality in calculating the penalty, and the High Court noted that, in calculating the penalty, the legal provisions taken into account and the principle of proportionality between the severity of the misconduct and the magnitude of the disciplinary reaction were infringed.

In that respect, the High Court notes that, in accordance with Article 49 paragraph (6) of Law no. 317/2004, the Divisions of the Superior Council of Magistracy, should they find that the motion for the initiation of proceedings is ungrounded, will enforce one of the disciplinary penalties provisioned by law, having regard to the severity of the disciplinary misconduct by the judge or prosecutor and by her personal circumstances.

In accordance with Article 100 of Law no. 303/2004, the disciplinary penalties that may be imposed against judges and prosecutors, *proportionally with the severity of misconducts*, are as follows:

a) warning;

b) decreasing the gross monthly base remuneration by up to 20% for a period of up to 6 months;

c) disciplinary relocation for a period of up to one year to another court of law or to another prosecutor's office, located under the jurisdiction of another court of appeal or under the jurisdiction of another prosecutor's office attached to a court of appeal;

d) suspension from office for a period of up to 6 months;

e) expulsion from magistracy.

The disciplinary penalty consisting of "*expulsion from magistracy*" imposed against the appellant defendant is, therefore, the most severe of the disciplinary penalties which may be imposed against magistrates, as listed in the law.

In disagreement with the decision of the Division for judges in disciplinary matters, the High Court deems that the misconduct held in the case at hand, ascertained in relation to only one case of incompatibility, does not have a sufficiently severe nature to justify the enforcement of the most severe penalty, in disregard, on the one hand, the individuality of the attributable misconduct and, on the other hand, gradual sequence of penalties imposed as set out in the disciplinary case-law.

Thus, there is no relevance to the fact that, although, in the case at hand, the Judicial Inspection was called to review three disciplinary misconducts, the disciplinary proceedings were only ordered for one of them, a circumstance that cannot be disregarded in assessing the severity of the disciplinary liability held in charge of the appellant judge.

Furthermore, in accordance with Article 49 paragraph (6) of Law no. 317/2004, republished, in imposing the disciplinary penalty provisioned by law, another criterion to be taken into account by the disciplinary court, in addition to the severity, consists of the personal

circumstances of the magistrate, namely the entire context in which such misconducts were committed.

Thus, it was found that Judge Camelia Bogdan has worked in the magistracy for over 10 years and has outstanding professional training, has a PhD in the field of criminal law, held the office of associate trainer in the National School of Clerks, published many legal studies, took part in various training programs, is a graduate of a training organized by the World Bank concerning the recovery of the proceeds of crime and has never been subject to any other disciplinary penalty, which is of significance and should have been considered in calculating the penalty.

Consequently, the penalty should be reassessed, the calculation thereof should also take into account the circumstances in favor of appellant-defendant, as described by the evidence submitted in this case. All of the above leads to the conclusion that a penalty ought to have been imposed, located at the middle of the severity scale stipulated in Article 100 of Law no. 303/2004, not entailing the effect of expulsion from magistracy, with irremediable effects on her career, however, at the same time, to draw attention to the severity of the offence committed and its consequences, also having regard to the matters correctly held by the disciplinary court in connection with the conduct incompliant with the status of a judge and the manner in which the party acted in relation to her offence and its consequences.

In that respect, the previous case-law of the 5-judge panel within the High Court of Cassation and Justice was also taken into account, as this, by Decision no. 165/26 October 2015, having ascertained the incompatibility between the capacity of judge in Romania and judge in the EULEX Mission of Kosovo, replaced the penalty of expulsion from magistracy, enforced by the disciplinary court, with the penalty of disciplinary relocation of the judge to another court, for a period of 6 months.

Having regard to the substance of the challenges submitted in that respect, in light of Article 488 paragraph (1) item (8) of the Civil Procedure Code, the final appeals are well-grounded and will be admitted.

Therefore, the Court shall partially set aside the impugned decision, in respect of the penalty of expulsion from magistracy, to be replaced by the penalty consisting of disciplinary relocation for a period of 6 months, to Târgu Mureş Court of Appeals, starting from 15 January 2018, a penalty laid down under Article 100 letter (c) of Law no. 303/2004, republished, as subsequently amended and supplemented, and shall maintain the other rulings of the impugned decision.

FOR THESE REASONS,
IN THE NAME OF THE LAW,
HEREBY DECIDES:

By majority of votes:

The Court hereby admits the final appeals submitted by the defendant Bogdan Camelia and by the intervening party the Association the Forum of Romanian Judges against Judgment no. 1/J dated 8 February 2017, rendered by the Superior Council of Magistracy - the Division for Judges in disciplinary matters in file no. 14/J/2016.

The Court hereby partially sets aside the impugned decision, as regards the penalty of expulsion from magistracy, to be replaced by the penalty consisting of the disciplinary relocation for a period of 6 months, to Târgu Mureş Court of Appeals, starting from 15 January 2018, a penalty stipulated under Article 100 letter (c) of Law no. 303/2004, republished, as subsequently amended and supplemented.

The Court hereby maintains the other provisions of the impugned decision.

This decision shall be final.

This decision was rendered in public session, this day, 13 December 2017.

CHAIRPERSON
Judge Gabriela Elena Bogasiu,
Deputy Chairperson of the High Court of Cassation and Justice

JUDGES
Mihaela Tăbârcă
Mirela Poliţeanu

ASSISTANT MAGISTRATE
Niculina Vrâncuţ

Drawn up by NV/2 copies/12 January 2018

Subject to the dissenting opinion of Judge Rodica Susanu and Judge Cristian Daniel Oana, within the meaning that:

The Court hereby admits the final appeals submitted by the defendant Bogdan Camelia and by the intervening party the Association the Forum of Romanian Judges against Judgment no. 1/J dated 8 February 2017, rendered by the Superior Council of Magistracy - the Division for Judges in disciplinary matters in file no. 14/J/2016.

The Court hereby partially sets aside the impugned decision, within the meaning that it dismisses, as ungrounded, the disciplinary proceedings undertaken by the plaintiff the Judicial Inspection against the defendant Bogdan Camelia, a judge with the Bucharest Court of Appeals.

The Court hereby dismisses the motions for accessory intervention submitted for the interest of the plaintiff the Judicial Inspection by the Foundation for the Protection of Citizens against State Abuse (FACIAS) and the Association the Group for Political Investigation (GIP).

The Court hereby admits the motion for accessory intervention lodged for the interest of the defendant Bogdan Camelia by the Association the Forum of Romanian Judges.

The Court hereby maintains the other provisions of the impugned decision.

JUDGES
Rodica Susanu

Cristian Daniel Oana

The High Court of Cassation and Justice
The 5-judge panel in civil matters no. 1
File no. 869/1/2017
Civil Decision no. 336 dated 13 December 2017

Dissenting opinion

In disagreement with the majority of members in the panel, the undersigned judges Rodica Susanu and Cristian Daniel Oana believe that, in accordance with Article 497 of the Civil Procedure Code 2010 (herein after referred to the Civil Procedure Code), the Court ought to have admitted the final appeals submitted by the defendant Bogdan Camelia and by the intervening party the Association the Forum of Romanian Judges against Judgment no. 1/J dated 8 February 2017 rendered by the Superior Council of Magistracy - the Division for Judges in disciplinary matters in file no. 14/J/2016, partially set aside the impugned decision, dismiss as ungrounded the disciplinary proceedings undertaken by the plaintiff the Judicial Inspection against the defendant Bogdan Camelia, a judge with the Bucharest Court of Appeals, dismiss the motions for accessory intervention submitted for the interest of the plaintiff the Judicial Inspection by the Foundation for the Protection of Citizens against State Abuse (FACIAS) and by the Association the Group for Political Investigation (GIP), to admit the motions for accessory intervention lodged for the interest of the defendant Bogdan Camelia by the Association the Forum of Romanian Judges and maintain the other provisions of the impugned decision.

Considering that, in reliance upon Article 44 paragraph (1) of Law no. 317/2004, the Superior Council of Magistracy fulfils, through its divisions, the role of court of law in the field of disciplinary liability of judges and prosecutors, for having committed the offences provisioned for in Law no. 303/2004, Decision no. 1/J dated 8 February 2017 issued by the Division for Judges in disciplinary matters in file no. 14/J/2016, herein after referred to as the "Decision", the "Impugned decision" or the "Decision of the disciplinary court".

Accordingly, the Division for Judges in disciplinary matters within the Superior Council of Magistracy will be referred to as the "disciplinary court" or "court of first instance".

The considerations of the dissenting opinion will be structured as follows:

Item 1 will contain several clarifications concerning the subject-matter of the dissenting opinion and will stipulate the limits thereof, having regard to the majority opinion relating to the pleas for statute of limitation in connection with disciplinary liability and the illegal initiation of proceedings by the disciplinary court.

Item 2 will detail the merits of the final appeal, the grounds of illegality in connection with the Decision and will aim to clarify several key terms (concepts) to understand the disciplinary misconduct held in charge of the appellant Camelia Bogdan, namely incompatibility, conflict of interest, prohibition, public office and private office. Furthermore,

the Court shall debate on and specify the competence of public authorities in assessing the cases of incompatibility and conflict of interest.

The lack of strictness in defining and employing the legal concepts, but also the infringement of the rules of competence in issuing administrative instruments has led, in the end, to the illegality of the Decision and debating on the fundamental values for independent justice.

Item 3 will summarize the conclusions of this dissenting opinion.

1. Clarifications on the subject-matter of the dissenting opinion; standpoint concerning the pleas for statute of limitation in connection with disciplinary liability and illegal initiation of proceedings before the disciplinary court

By means of the impugned decision, the disciplinary court dismissed the pleas for statute of limitation in connection with the disciplinary liability and the illegal initiation of proceedings before the court and, trying the case on the merits, it admitted the disciplinary proceedings with all the consequences deriving from it for the other motions raised in this case.

The dissenting opinion refers, first of all, to the merits of the case and the consequences deriving from the admission of the disciplinary proceedings.

Furthermore, although agreeing to the dismissal of both pleas, the following clarifications should be made:

The plea for statute of limitation in connection with disciplinary liability was lawfully settled by the court of first instance; in that respect, there is no difference of opinion.

Conversely, what the appellant raised by way of plea concerning the illegal initiation of proceedings before the disciplinary court (within the limits debated in the final appeal, namely for the absence of an assessment report ascertaining the existence of incompatibility, drawn up by the National Agency for Integrity, this being the sole authority competent to assess incompatibility) is not, by its substance, a plea, and therefore a defense of the appellant, despite its mistaken designation, should have been debated on the merits of the final appeal, as ground for illegality of the Decision rendered by the disciplinary court because, as stated herein below, the defense falls under the quashing ground set out in Article 488 paragraph (1) item (8) of the Civil Procedure Code.

Indeed, the absence of an assessment report ascertaining the existence of incompatibility, drawn up by the National Agency for Integrity (ANI or the Agency), does not amount to a plea, because this does not result in a delay and does not stop the trial of the merits.

The trial of the merits involves the determination of rights and obligations of the parties in the legal relationship deriving from the performance of the disciplinary proceedings, namely ascertaining whether the conditions were fulfilled/not fulfilled to entail disciplinary liability, in reliance upon the substantive legal regulations applicable in this case.

The defense at issue refers to the failure to fulfill one of these conditions and thus joins the other defenses on the merits.

This is not a procedural plea, because it does not concern the rules for the composition or setting up the court, its competence or procedure and the pleas on the merits, because it does

not relate to the right to bring suit (despite being, on an erroneous basis, thus described by the defendant appellant).

The minority opinion, similarly to the majority one, as did the court of first instance, has no doubt that the Judicial Inspection holds a right to bring suit and it may initiate proceedings before the disciplinary court and therefore it agrees to have the plea of illegal initiation of proceedings dismissed.

However, it differs from the majority opinion and from the court of first instance by the fact that it will give relevance to the defense on the merits and, for the considerations to be detailed in the analysis of the second ground for illegality, it deems that it is well-grounded, within the limits and in the form specified therein.

2. In respect of the merits of the final appeal

2.1 Preliminary considerations referring to the grounds for illegality of the Decision of the disciplinary court

The appellant defendant Bogdan Camelia was penalized by expulsion from magistracy for having committed the disciplinary misconduct provisioned for in Article 99 paragraph (1) letter (b) of Law no. 303/2004 on the status of judges and prosecutors, in particular for "*having infringed the legal provisions governing incompatibility and prohibitions in connection with judges and prosecutors*".

The wording of the impugned judgment reveals that the legal provisions taken into account by the Superior Council of Magistracy (herein after referred to as the Superior Council of Magistracy), allegedly infringed by the appellant defendant, are as follows:

- Article 125 paragraph (3) of the Constitution of Romania, according to which "*The office of a judge shall be incompatible with any other public or private office, except for academic activities*".

- Article 5 paragraph (1) of Law no. 303/2004, according to which the "*The offices of judge, prosecutor, assistant magistrate and judicial assistant are incompatible with any other public and private offices, except for academic activities, but also training in the National Institute of Magistracy and the National School of Clerks*";

- Article 5 paragraph (2) of Law no. 303/2004, according to which "*Judges and prosecutors have an obligation to refrain from an activity relating to the act of justice in cases involving the existence of a conflict between their interest and the public interest relating to delivery of justice or defense of general interests of society, save for the cases where the conflict of interest was notified in writing to the management board of the court or the head of the prosecutor's office and considered that the existence of that conflict of interest does not hinder the impartial fulfillment of professional duties*".

- Article 101 of Law no. 161/2003 on certain measures to ensure transparency in the discharge of public dignities, public offices and in the business environment, according to which "*The office of judge and prosecutor is incompatible with any other public or private office, except for academic activities*",

- Article 21 paragraph (1) of the Code of Ethics for judges and prosecutors approved by Decision no. 328/2005 of the Superior Council of Magistracy Plenum, according to which "*Judges and prosecutors may not hold concurrently with that office any other public or private office, except for academic activities*";

- Article 7 of the Universal Charter of Judges, according to which judges may not hold any other public or private office, either remunerated or not remunerated, not fully compatible with the duties and status of judges.

In reliance upon the constitutional, legal and statutory texts detailed herein above, the court of first instance has defined incompatibility as being the "*the unconditional prohibition imposed on a public dignitary or civil servant to hold certain offices or capacities concurrently with that public dignity or office, because of an absolute presumption of conflict of interest deriving from holding such offices concurrently.*

In general terms, incompatibility of a judge consists in his impossibility to also hold, at the same time, other offices or services, and in a narrow meaning, in respect of a certain trial, incompatibility shall be the case expressly provided by law where a judge may not take place in that trial" (pages 32-33 of the Decision).

In that context, the minority opinion will detail the following grounds for illegality:

1 – erroneous enforcement of the above-mentioned legal provisions, because of the confusion between incompatibility, conflict of interest and prohibitions; the offences committed by the appellant defendant do not meet the constituent elements of incompatibility, conflict of interest or prohibition, within the meaning of the legal provisions referred to herein above;

2 – infringement of the provisions set out in Article 1 paragraph (3) of Law no. 176/2010 on integrity in discharging public offices and dignities, amending and supplementing Law no. 144/2007 on the setting up, organization and operation of the National Agency for Integrity, also amending and supplementing other legislative enactments, according to which *"Assessing declarations of assets, data and information, but also property changes occurred, interest and incompatibility in connection with the persons stipulated in paragraphs (1) and (2) shall take place in the National Agency for Integrity*, (...)"; the appellant defendant deemed that the infringement of the above-mentioned legal provisions may be raised by means of a procedural plea; although, as already indicated above, this approach is erroneous as the defense is not likely to prevent trial on the merits, the ground of illegality is well-grounded and able to result in the impugned decision being set aside.

Both grounds of illegality entail the Decision being set aside, in the context of the conditions provisioned for in Article 488 paragraph (1) item (8) of Civil Procedure Code, for erroneous enforcement of the rules of substantive law applicable in this case.

2.2 The first ground of illegality

2.2.1 Theoretical considerations; clarification of the concepts of incompatibility, conflict of interest, prohibition, public office and private office

At a constitutional level, the only limitation to the out of court activities conducted by judges and prosecutors is holding another public or private office, except for academic activities (Article 125 paragraph 3 of the Constitution).

This limitation needs to be construed in reference to the activities that may be performed by other citizens and, therefore, amounts to an exception.

The rule is that all activities undertaken in observance of the law are compatible (freedom of action is the rule in a democratic society), while incompatibility (restriction of that freedom) is the exception.

In the case of judges and prosecutors, the limitation enforced by incompatibility is in itself an exception, in particular academic activities.

Chapter II of Title I of Law no. 303/2004 reiterates and clarifies the instance of incompatibility governed by the Constitution (Article 5 paragraph (1)) and adds new restrictions to the office of judge or prosecutor, governing conflicts of interest (Article 5 paragraph (2)) and prohibitions (Article 7-10).

The regulatory manner itself reveals, as indicated herein below, that incompatibility, conflicts of interest and prohibitions are separate legal concepts.

Hence, incompatibility is a limitation of the out of court activity conducted by judges and prosecutors and involves the concurrent holding of the office of judge or prosecutor and another public or private office (except for the permitted ones).

Plurality of offices falls under the scope of incompatibility, which means that the party invoking incompatibility needs to specify the public or private office held concurrently with the office of judge or prosecutor.

The personal interest of judges or prosecutor is irrelevant for the existence of incompatibility (in several cases of plurality of offices, there is an obvious personal interest, however this is only a circumstance and not a condition for the existence of incompatibility because incompatibility exists even in the absence of personal interest).

Remark: in addition to the incompatibility deriving from the out of court activities, the codes of civil and criminal procedure govern the cases of incompatibility in the judicial activity (Article 41 and Article 42 of the Civil Procedure Code; Article 3 paragraph (3), Article 64 and Article 65 of the Criminal Procedure Code).

Failure by the judge or prosecutor to observe such legal provisions amounts to a disciplinary misconduct governed under Article 99 paragraph (1) letter (i) of Law no. 303/2004, not forming the object of trial because the Resolution issued by Judicial Inspection dated 16 June 2016 dismissed the initiation of proceedings *ex officio* and the related motion submitted by the respondent intervening party the Foundation for the Protection of Citizens against State Abuse (FACIAS), for having committed the disciplinary misconduct provisioned for in Article 99 letter (b), letter (i) the first sentence and letter (k) the first sentence of Law no. 303/2004 and, by means of the Note dated 23 June 2016 issued by the head of the Division of Judicial Inspection for judges within the Judicial Inspection, the proposal was lodged to

partially cancel the above-mentioned resolution, only as regards the disciplinary misconduct set forth under Article 99 letter (b) of Law no. 303/2004.

Therefore, the Judicial Inspection did not request to penalize the appellant defendant for having infringed the legal provisions governing incompatibility in the case of judicial activities, but only out of court activities.

This remark is relevant for two considerations:

- On the one hand, the arguments raised by the respondent intervening parties FACIAS and GIP partially rely on the confusion between incompatibility deriving from out of court activities and incompatibility in the judicial activity; for instance, a judge collecting a certain amount from one of the parties in the file, in reliance upon a contractual clause, in exchange for a service supplied, may be relevant exclusively in the case of the latter incompatibilities;

- The difference between the two types of incompatibilities will be decisive in understanding and differentiating between the competence of the National Agency for Integrity and the competence of the Judicial Inspection and of the Superior Council of Magistracy in investigating incompatibility.

Furthermore, unless expressly provided, the incompatibility set out in Article 5 paragraph (1) of Law no. 303/2004 will be exclusively envisaged.

In accordance with Article 70 of Law no. 161/2003, conflict of interest consists of the "*case where the person fulfilling public dignity or public office holds a personal interest of a property nature, which could influence the objective discharge of duties incumbent upon them in accordance with the Constitution and other legislative enactments*".

Conflict of interest is an instance of specific restriction, in one or several particular cases, to the judicial activity of judges and prosecutors because of the conflict between personal interest and the interest in delivery of justice or the general interest of the society.

In case of a conflict of interest, the judge or prosecutor will have to refrain from any activity relating to the act of justice in connection with which there is a personal interest in place (in accordance with Article 5 paragraph (2) of Law no. 303/2004), which means that it may conduct all other judicial activities for which there is no conflict.

Indeed, certain interests need to be declared by judges on an annual basis (in accordance with Article 1 item (7) and Article 4 of Law no. 176/2010), while the existence of such an interest (for instance, the capacity as member in a professional association) does not entail the general prohibition to hold the office of judge (in other words, does not entail incompatibility within the meaning of Article 5 paragraph (1) of Law no. 303/2003), but solely the obligation to refrain, where the interest for the delivery of justice or the general interest of the society conflicts with the personal interest thus declared.

This feature differentiates conflict of interest from incompatibility, as governed under Law no. 303/2003.

Another difference is as follows: the condition of plurality of offices, paramount for the existence of incompatibility in out of court activities, is irrelevant for the conflict of interest.

Should such a condition be ordinary, Article 5 paragraph (2) of Law no. 303/2003 would be redundant, because it would be meaningless to regulate conflict of interest in the case of incompatible judges and prosecutors.

Furthermore, only as regards the conflict of interest (but not also incompatibility or prohibitions) the judge or prosecutor has the ability to approach the management board, in accordance with Article 5 paragraph (2) of Law no. 303/2004.

The considerations herein above reveal that the party raising the case of conflict of interest will have to specify the particular case or instance in respect of which the personal interest is at conflict and, furthermore, to justify such conflict.

Prohibitions are express and specific limitations in the out of court activity of judges and prosecutors set forth by law in order to protect the interest and independence of justice.

Therefore, prohibitions are similar both to incompatibility governed by Article 5 paragraph (1) of Law no. 303/2004 (both of them relate to out of court activity), and to conflict of interest (they are specific limitations, concerning one or several particularly determined instances).

However, they differ both from incompatibility, because the condition referring to the plurality of offices is irrelevant, and from the conflict of interest, because the personal interest is irrelevant.

The law-maker expressly stipulates the out of court activities which, irrespective of the fulfillment of conditions particular to the public or private offices and irrespective of the existence of personal interest, are nevertheless prohibited to magistrates.

Unlike incompatibility and conflict of interest which, by their nature, can only be defined in general terms, prohibitions are expressly listed by law, and the party relying on such prohibition shall specify the text of law setting it up.

In other words, whereas the cases of incompatibility and conflict of interest are, in principle, unlimited in number and should be analyzed on a case by case basis in reference to the criteria consisting of plurality of offices and personal interest, as the case may be, prohibitions are, on the contrary, expressly defined and limited as number.

By way of example, the following activities amount to prohibitions for judges and prosecutors:

- Performance of activities by operative officers, including undercover, informers or collaborators of intelligence services (Article 7 paragraph (1) of Law no. 303/2004);

- Performance of trading activities, directly or through intermediaries or performance of arbitration activities in civil, commercial or other disputes (Article 8 paragraph (1) letters (a) and (b) of Law no. 303/2004);

- Public expression of an opinion concerning trials pending before the court or causes initiated before the prosecutor’s office or provision of written or verbal advice in litigious matters, even if such trials are pending before courts of law or prosecutor’s office other than those in which they work (Article 10 paragraphs (1) and (2) of Law no. 303/2004).

The provisions governing prohibitions are mainly contained in Articles 8 - 11 of Law no. 303/2004 and Articles 102 - Article 104 and Article 106 of Law no. 161/2003.

By way of conclusion, incompatibility, conflict of interest and prohibitions are separate legal concepts, subject to different conditions of existence.

As regards the meaning of the concept of office, the minority opinion starts from the remark that it was used both in the Constitution, and in laws and legislative enactments associated to laws, for instance: the office of President of Romania (Article 95 paragraph (1) of the Constitution), the office of Prime Minister (Article 102 paragraph (1) of the Constitution), the office of chairman of the Council for National Defense (Article 92 paragraph (1) of the Constitution), the office of member in the Government (Article 104 and Article 105 of the Constitution), the office of judge (Article 124 of the Constitution), the offices of local or county counsellor, mayor or chairperson of the county council (Article 25 of Law no. 215/2001), etc.

Furthermore, the concept of office is used in labor laws (*e.g.*, Article 17 paragraph (3) letter (d), Article 30, Article 34, Article 42, etc.).

In administrative law, this concept is defined in the case of public office fulfilled by civil servants (not precluding the existence of any other particular cases).

Thus, in accordance with Article 2 paragraph (1) of Law no. 188/1999 on the Status of civil servants "*The public office shall consist of the set of powers and duties, set forth in accordance with the law, for the purpose of fulfilling the public power prerogatives by central public administration, local public administration and self-standing administrative authorities*".

Therefore, in the case of civil servants, public office shall be defined by means of three elements, in particular:

- It is a set of powers and duties,

- set forth in accordance with the law, for the purpose of fulfilling the public power prerogatives,

- by central public administration, local public administration and self-standing administrative authorities.

By removing from the definition differences specific to the office held by civil servants, the *genus proximum* of the public office is reached, for the general concept of public office.

The first two elements (set of duties and powers set forth by law for the purpose of fulfilling the public power prerogatives) are sufficiently generic to be common to any public office.

The third element, generalized, will refer to any public authority, within the meaning of Article 2 paragraph (1) of Administrative Litigation Law no. 554/2004, in particular "*any governmental body or body of administrative and territorial units acting, by public power, with a view to satisfying a lawful public interest*".

Therefore, in general terms, public office is the set of powers and duties, set forth in accordance with the law, for the purpose of fulfilling the public power prerogatives by any

governmental body or body of administrative and territorial units acting, by public power, with a view to satisfying a lawful public interest.

As such, one of the features of the public office is that it is fulfilled on a continuous and permanent manner in light of the purpose for which it was set up (the office exists for as long as the purpose it serves is in existence); furthermore, it differs from other duties or activities deprived of public power prerogatives.

The holder of the public office may be identified in the society by means of the office it fulfills.

Accordingly, the private office will have all of the features referred to above that are not incompatible with its private nature, which means that it will be deprived of public power prerogatives and the fulfillment of public power; the other features, however, will be shared.

As such, private office may be defined as the set of duties and powers, determined in accordance with the law, in view a lawful public or private interest (the two types of interest are not, in principle, incompatible but, in a democratic society, harmonized), being discharged by a public or private legal entity (indeed, the public legal entity often pursues a lawful public interest, not relying on public power prerogatives and the discharge of public power).

Similarly to public offices, private offices are fulfilled on a continuous and permanent basis, in reference to the purpose for which it was set up and differs from other duties or activities which exceed or are not necessary in the achievement of that purpose.

In that respect, private offices are, for instance, the office as teacher in university or pre-university education system, the position as educator, doctor, attorney or legal counsel, legal advisor (when its holder does not fulfill public power prerogatives) and, in general, any occupation/profession/job governed by law for a public and/or private interest.

As regards the assimilation of private office to the occupation, profession or job, the minority opinion sets out from the observation of the manner in which the concept of labor laws is used.

Thus, although the Labor Code (Law no. 53/2003) fails to define the concept of office, it repeatedly uses it as synonymous to the concept of occupation (it derives from the object of regulation that private office is exclusively envisaged).

For instance, in accordance with Article 17 paragraph (3) of the Labor Code "*The person selected to be hired or the employee, as the case may be, will be informed of at least the following elements: (...) d) the office/occupation according to the specification in the Classification of occupations in Romania or other legislative enactments, but also the job description, indicating the duties of that job*" (in the same respect, Article 34 paragraph (3) of the Labor Code).

Additionally, Article 35 of the Labor Code, after setting forth, in paragraph 1, the rule of compatibility between various remunerated activities ("*Any employee has the right to work for other employers or for the same employer, in reliance upon individual employment contracts, and shall benefit from the appropriate salary payable for each of them*"),

stipulates, in paragraph (2), the case of exception ("*The cases stipulating by law incompatibilities for plurality of offices shall be excepted from the provisions of paragraph (1).*").

This latter text of law is also relevant in another respect: the right to the plurality of offices is the rule, while incompatibility is the exception.

Similarly to public office, private office will have to be distinguished from the plurality of activities allowed by law which any citizen may perform in a democratic society, in the absence of special legal regulation, without the consent of any authority and without this becoming the holder of a profession, occupation or job.

The holder of a private office, similarly to public office, may be identified in the society by means of the office they fulfill.

Laying down the incompatibility between the office of judge and prosecutor and any other public and private offices (save for academic, but also training activities in the National Institute of Magistracy and the National School of Clerks), Article 5 paragraph (1) of Law no. 303/2004 prohibits the plurality of offices.

The purpose is not to protect the image of justice (all of the above-mentioned offices are prestigious), but its independence, because public and private offices result, *inter alia*, in the obligation to achieve the purpose of those offices.

However, for the sake of justice, the office of judge has to be equidistant to all other lawful purposes in the society.

2.2.2 Enforcement of theoretical considerations in the case brought before the case

In the impugned decision, the Superior Council of Magistracy employs all these three concepts - incompatibility, conflict of interest and prohibitions – but specifies the legal frame of the offences committed by the appellant defendant in reference to the legal provisions only governing incompatibility and conflict of interest.

The term "prohibition" is used in the wording of the Decision with a generic meaning (in particular, "prohibited by law"), as deriving from the definition given by the Superior Council of Magistracy to incompatibility:

"*Incompatibility is the unconditional prohibition imposed on a public dignitary or civil servant to hold certain offices or capacities concurrently with that public dignity or office, because of an absolute presumption of conflict of interest deriving from holding such offices concurrently*".

The minority opinion accepts that the term "prohibition" may be used in that general meaning although, in the absence of additional clarification, it may create confusion with the particular meaning set forth in Articles 8 - 11 of Law no. 303/2004 and Articles 102 - Article 104 and Article 106 of Law no. 161/2003.

Conversely, it states that defining incompatibility in reference to the conflict of interest is illegal, because it creates a confusion between two separate legal concepts.

The joint effect of these ambiguities and errors is that the Decision was rendered with the erroneous enforcement of the rules of substantive law provisioned for in Article 5 paragraphs (1) and (2) of Law no. 303/2004, for the reasons to be detailed herein below, which entails the applicability of the quashing ground provisioned for in Article 488 paragraph (1) 8 of the Civil Procedure Code, as relied upon by the appellant.

Summary of facts:

In principle, the offences are undisputed and detailed in the description of the objective side of the disciplinary misconduct.

Thus, between 21 July 2014 and 02 August 2014, the appellant Camelia Bogdan provided training to the civil servants within the Agency for Payments and Intervention in Agriculture (APIA) as part of the program "*Implementation and Enforcement of the Future Joint Agricultural Policy. Prevention of Fraud and Corruption with a view to Protecting the Financial Interests of the European Union*" organized by the Management Unit of the Project "*Supplementation of the Financial Support granted by the European Union in view of Agriculture Restructuring in Romania*", within the Ministry of Agriculture and Rural Development (UMP – CESAR-MADR).

Consultancy services provided in training APIA personnel (260 people) were organized and supplied by the consortium comprising S.C. Gama Proconsuli SRL and SC FDI Top Consult SRL (the consortium having won the public procurement procedure) in reliance upon contract no. 1290/16 July 2014 concluded with UMP-CESAR- MADR.

On 17 July 2014, professional services contract no. 17073 was entered into by SC FDI Top Consult SRL, as beneficiary, and Bogdan Camelia, as services provider, having as its subject-matter the "*the supply of training services by the Provider in organizing the training sessions for 260 people in APIA in connection with the Prevention of Fraud and Corruption with a view to Protecting the Financial Interests of the European Union, as stipulated in contract no. 1290/16 July 2014 concluded between the Beneficiary and the Management Unit of the Project < Supplementation of the Financial Support granted by the European Union in view of Agriculture Restructuring in Romania >*". In exchange for the services thus supplied, the judge collected an amount of RON 10,048.

Prior to concluding the above-mentioned contract, in particular on 11 July 2014, the appellant requested the National Agency for Integrity (ANI or the Agency) to advise whether concurrently holding the office of magistrate and of trainer (lecturer) in the said project is likely to generate a case of incompatibility; the application was delivered by electronic mail to Mr. Horia Georgescu, chairman of ANI, and to Ms. Ioana Lazăr, an officer in that institution.

By means of letter no. 10626/14 July 2014, ANI returned a negative reply, namely that the case was not likely to entail the magistrate's incompatibility. Furthermore, it clarified that "*it is advisable to avoid any instance that would generate an infringement to the status of conflicts of interest if, by their decisions, magistrates hold a personal interest of a property nature, that could influence the objective fulfillment of their duties, incumbent upon them under the Constitution or other legislative enactments*".

During the disciplinary investigation, ANI drew up report no. 21350/G/l 1/20 May 2016 supporting the opinion contained in the above-mentioned letter and expressly notes that the appellant was not subject to incompatibility because the capacity as trainer falls under the scope of the assumption envisaged in Decision no. 261/2008 of the Superior Council of Magistracy, stating that magistrates may take part as experts in programs benefiting from foreign financing for justice.

The actions described above do not meet the constituent elements of disciplinary misconduct, as provisioned for in Article 99 paragraph (1) letter (b) of Law no. 303/2004 because they do not entail incompatibility, do not amount to conflict of interest and are not prohibited by law.

Thus, the appellant's offences do not result in incompatibility because her capacity as lecturer-trainer in a project conducted by UMP-CESAR-MADR over a period of approximately two weeks, does not amount to a public or private office, for the purpose of the law, as described in these considerations.

The reason is, first of all, that the capacity as lecturer/trainer held by the appellant does not amount to a set of duties and powers set forth in accordance with the law and fulfilled on a continuous and permanent basis in training civil servants within APIA; the rights and obligations of the appellant have exclusively derived from a contract, and her capacity as lecturer/trainer was limited as to time.

The time limitation does not concern the period in which the appellant held such capacity, but the duration of that capacity over time. Usually, someone holds a public or private office for a limited period of time, while the office as such is permanent, under the law, in reference to the purpose for which it was created.

Professional training for civil servants in APIA, in general, but also for "*preventing fraud and corruption with a view to protecting the financial interests of the European Union*", in particular, is continuous, lasts throughout the operation of the institution; however, the appellant did not hold a public or private office created by law for that purpose.

In holding the capacity as lecturer/trainer in the conditions described above, the appellant did not fulfill the public power prerogatives, nor the powers specific to a new occupation, profession or job and she, constantly identified herself in public only by her office as judge.

Besides, as deriving from the Decision itself, even the Superior Council of Magistracy Plenum has issued consistent administrative practice, within the meaning that activities similar to that supplied by the appellant are allowed by law, which implicitly means that they are not public or private offices; to that end, please note the following decisions and standpoints:

- Decision no. 261/13 March 2008 concerning the capacity as experts held by magistrates in programs benefiting from foreign financing for justice;

- Decision no. 316/29 April 2010 concerning the academic activity supplied by a magistrate in the Romanian Diplomatic Institute;

- Standpoint adopted by the Superior Council of Magistracy Plenum in the session dated 19 June 2008 (paper no. 17713/1154/2008) concerning the performance of activities as tenured

lecturer or workshop lecturer in the National Institute for the Education and Training of Lawyers;

- Decision no. 1184/10 November 2015 concerning judges taking part as experts in programs relating to the EU policy in criminal matters.

All of the decisions and standpoints above refer to cases where magistrates also conduct public activities other than judiciary, without thus acquiring new public or private offices.

This is paramount because, should the above decisions and standpoint refer to public or private offices, they would add to the law, in particular to Article 5 paragraph (1) of Law no. 303/2004, because it is obvious that they are not "*academic*" activities, but offices of "*training in the National Institute of Magistracy and the National School of Clerks*".

Therefore, the Decision issued by the disciplinary court obviously contradicts administrative practices of the Superior Council of Magistracy Plenum.

The minority opinion may not accept as complying with the minimum consistency standards the case where, on the one hand, the training activities conducted by a magistrate in the Romanian Diplomatic Institute or of the National Institute for the Education and Training of Lawyers does not amount to public or private offices and, on the other hand, training supplied over a few days to civil servants within APIA, in charge of verifying the expenditure of important national and European fund, would amount to a new public or private office, would result in incompatibility and would justify the penalty of expulsion from magistracy.

The decisions and standpoints of the Superior Council of Magistracy Plenum have set up an administrative practice which the disciplinary court is called to observe or, as the case may be, remove based on reasons, under the law.

All this practice favorable to the appellant was removed based on the reason that the judge omitted to submit a previous inquiry to the Superior Council of Magistracy Plenum, in order to receive a similar standpoint or decision.

Nevertheless, the Decision fails to point out any legal provision laying down an obligation in that respect.

However, no such legal provision is in place and, furthermore, should not be in a democratic society because they would impeach the independence of judges, independence that pertains inclusively to the judicial system of which she forms part.

In other words, a judge may approach the Superior Council of Magistracy Plenum for any doubt relating to incompatibility, but is not bound to do so, cannot be held accountable for not doing so and cannot be penalized for having infringed an inexistent obligation. The judge is liable for the incompatibility, and not for the absence of a preliminary consent by the Superior Council of Magistracy Plenum.

The decisions and standpoints of the Superior Council of Magistracy Plenum are an administrative practice created by the uncertainty which faced various judges and prosecutors over time, an administrative practice that is welcome, in the belief of the minority opinion, meant to clarify any ambiguities and prevent cases similar to the one at hand.

They may not be construed as something which they are not, *i.e.* administrative practice, and may not replace any express legal provisions compelling judges to ask the Superior Council of Magistracy Plenum what the lawful course of action is in out of court activity.

What is welcome as possibility would be, in the case at hand, an obligation, a direct infringement to the independence of judges and, therefore, in the interpretation made by the minority opinion, the law-maker omitted to issue provisions in that respect in a wilful and informed manner.

Besides, not even in the case of conflict of interest, Article 5 paragraph (2) of Law no. 303/2004 does not amount to an obligation to approach the management board of the court, but only an option, a legal possibility. The judge herself will appraise whether there is any conflict of interest in place, she is liable for her own appraisal, and may decide whether to refrain or not, as the case may be; furthermore, it may approach the management board in relation to that conflict and, should the board decide that there is no conflict in existence, the judge is no longer held by an obligation to refrain.

Just as the obligation to declare their interests and to avoid conflict of interest is obviously different from the possibility to approach the management board, similarly, the obligation to avoid incompatibility deriving from plurality of offices is different from the possibility to confer with the Superior Council of Magistracy Plenum.

Obligations may be exclusively laid down by law, while possibilities, precisely in light of their non-restrictive nature, may result in an administrative practice.

It goes without saying, for the same considerations, that the appellant did not have an obligation to approach ANI, but an option, a possibility at its discretion.

One of the personal circumstances which may explain this behavior and which the Superior Council of Magistracy surprisingly disregarded in its entirety, is that the appellant is a judge with the Bucharest Court of Appeals, the Criminal Division, and issued decisions in highly prominent cases, which divided public opinion, a proof in that respect being file no. 25497/3/2012** (referred to in the media as the "ICA File"), which originated the disciplinary investigation.

In this context, it may be understood why she approached an authority legally competent to examine magistrate's incompatibilities.

The court of first instance did not object to that competence, but unlawfully claims, as detailed herein below, that it is doubled by the competence of the Legal Inspection.

The lack of a legal obligation to consult other authorities in determining court or out of court activities originates in the concept of judges' independence.

Thus, independence means that the judge has full discretion to decide, under the law, on court or out of court activities being performed, without asking any other public authority and without waiting for its permission, and the corollary of that freedom subject to law resides in full and complete responsibility of choice.

Independence is not a right of judges, that may be exercised or not, but an obligation to obey the law exclusively, equidistant and separate from the other governmental authorities, but also from their own interests, propensities and passions.

The obligation of independence may result, in uncertain cases, in a particularly difficult task to which the law-maker provides an express solution, by the possibility to consult the management board of the court, in case of conflict of interest. Should the board decide that there is no conflict, the judge's liability ceases, strictly in respect to that specific situation.

A similar interpretation should be given to the administrative practice of the Superior Council of Magistracy Plenum or ANI.

One last remark relating to incompatibility, as understood in the Decision, derives from an extension of this concept beyond the plurality of offices.

The definition of incompatibility used by the disciplinary court in the Decision explicitly refers to "offices or capacities" and "offices or services, with which the office of judge allegedly comes into conflict.

However, neither the constitutional text, nor the legal texts governing incompatibility of judges employ the terms of "capacities" or "services", but exclusively refer to public or private offices.

This extension is illegal for several reasons.

First of all, as already stated above, freedom in fulfilling their activity is the rule, while incompatibility is the exception (Article 35 of the Labor Code explicitly lays down the relationship between rules and exceptions in the area of employment relationships).

However, the exception is subject to strict interpretation, which means that the concepts of public and private offices may be interpreted neither extensively, nor restrictively. Nevertheless, when in doubt, it shall inure upon the person subject to liability. Both rules of interpretation are favorable to the appellant, and the Decision of the court of first instance completely disregards them.

On the other hand, if "services" and "capacities" are not extensions of the concept of office, than they amount to supplements to the law, a consequence that is prohibited by the principle of power separation.

Second of all, the concepts of "services" and "capacities" are extremely ambiguous. Any out of court activity performed by the judge could be, at a certain point in time, a service or capacity. Such a line of interpretation directly and obviously infringes the independence of judges.

Consequently, considering that the appellant's actions – consisting in the conclusion of a contract and provision of training to civil servants within APIA, as lecturer/trainer, as part of the program "*Enforcement of the Future Joint Agricultural Program. Preventing Fraud and Corruption with a view to Protecting the Financial Interests of the European Union*" held by UMP-CESAR-MADR – do not amount to a public or private office, that there is no plurality of offices and that the existence of a plurality of offices is of substance for incompatibility,

the minority opinion believes that they do not meet the constituent elements of the disciplinary misconduct provisioned for in Article 99 paragraph (1) letter (b) of Law no. 303/2004 in conjunction with Article 5 paragraph (1) of Law no. 303/2004, Article 101 of Law no. 161/2003, Article 21 paragraph (1) of the Code of Ethics for judges and prosecutors approved by Decision no. 328/2005 of the Superior Council of Magistracy Plenum and Article 7 of the Universal Charter of Judges.

As for the alleged conflict of interest, the minority opinion maintains that the Decision fails to indicate either the activity or the out of court activities from which the appellant defendant should have refrained, or the substance of the conflict.

As already indicated above, conflict of interest is a limitation of court activity and a reason why judges are compelled to refrain from any activity relating to the act of justice in connection with which they hold a personal interest, however, they may undertake the other court activities, in relation to which they are not at conflict.

The omission is the consequence of confusion between incompatibility and conflict of interest. As deriving from the definition given by the disciplinary court in the wording of the impugned Decision, incompatibility is an unconditional prohibition imposed on a magistrate to hold any other public or private office, because of an absolute presumption of conflict of interest deriving from holding such offices concurrently.

This means that, in the explicit belief of the court of first instance, whenever there is incompatibility, there is automatically a conflict of interest, too, and incompatibility is prohibited by law precisely because of this conflict (presumed on an absolute basis).

However, while incompatibility is a limitation of out of court activity performed by magistrates, conflict of interest is a limitation of court activity; the two concepts exist in different circumstances.

Judges, just like any other citizen, have personal interests, and the mere existence thereof does not hinder them, as a matter of rule, in fulfilling their duties.

There are exceptions, where a personal interest is contrary to a particular judicial activity, taking place in one or several specific cases. In such instances, the legal solution requires the judge to refrain from performing that judicial activity and, if they have any doubt as to the existence of a conflict, they may approach the management board of the court of which they form part, in accordance with Article 5 paragraph (2) of Law no. 303/2004.

The Decision of the court of first instance is illegal, as it was issued in breach of the substantive law provisions contained in Article 5 paragraph (2) of Law no. 303/2004, because, although noting the existence of a conflict of interest and explicitly stating that the judge infringed her “obligation” to approach the management board of Bucharest Court of Appeals, it fails to point out the judicial activity from which the judge should have refrained.

Absent the indication of one of the terms of the conflict, there is no conflict of interest.

Consequently, the appellant’s actions do not meet the constituent elements of the disciplinary misconduct provisioned for in Article 99 paragraph (1) letter (b) in conjunction with Article 5 paragraph (2) of Law no. 303/2004.

Finally, her actions do not meet the constituent elements of any prohibition, either, in the particular meaning given to that concept in Title I, Chapter II of Law no. 303/2004.

It is true that the Decision fails to explicitly note the existence of any particular prohibition and fails to specify any legal ground in that respect, using this term in a general sense.

For the sake of clarity, so much needed in our context, the minority opinion finds that, for the considerations detailed in the case of prohibition and conflict of interest, the appellant's actions are not "prohibitions" within the meaning given by the Decision to that term, and do not meet the constituent elements of the disciplinary misconduct provisioned for in Article 99 paragraph (1) letter (b) of Law no. 303/2004 in conjunction with Article 5 paragraphs (1) and (2) of Law no. 303/2004, Article 101 of Law no. 161/2003, Article 21 paragraph (1) of the Code of Ethics for judges and prosecutors approved by Decision no. 328/2005 of the Superior Council of Magistracy Plenum and Article 7 of the Universal Charter of judges.

On a separate note, the minority opinion refers to certain circumstances which the impugned Decision considers relevant for the perpetration of the disciplinary misconduct, namely:

- as regards the application dated 11 July 2014, delivered to ANI by the appellant, the disciplinary court deemed that "*it is advisable to avoid any instance that would generate an infringement to the status of conflicts of interest if, by their decisions, magistrates hold a personal interest of a property nature, that could influence the objective fulfillment of their duties, incumbent upon them under the Constitution or other legislative enactments"*; it was stated that the familiarity in the appellant's address was aimed at returning a quick answer, circumventing the legal procedure of verifying the incompatibility, which was also proven by the celerity with which the reply was provided (the application was submitted on Friday, 11 July 2014, and the reply was received on Monday, 14 July 2014); furthermore, it was noted that the appellant failed to deliver to the Agency all relevant information (nevertheless, the Decision does not specify which information was relevant, but not provided);

- the appellant ignored the warning in the wording of the ANI letter, in particular that "*it is advisable to avoid any instance that would generate an infringement to the status of conflicts of interest if, by their decisions, magistrates hold a personal interest of a property nature, that could influence the objective fulfillment of their duties, incumbent upon them under the Constitution or other legislative enactments*".

- it was further considered relevant that the appellant received a "*considerable remuneration she received for her work, taking into account the fact that the amount collected exceeded both the salary of a judge of a court of appeals, in 2014, and the salary of an university assistant professor PhD in the School of Law*" (page 40, reiterated at pages 41-42 of the Decision);

- it was deemed that "*it is also relevant that the defendant chose to approach only the National Agency for Integrity, although this institution, in a similar case, decided that judge [Ms. G.P.] was in a status of incompatibility when she provided training in the field of public procurement, an activity for which she received remuneration, and assessment report no. 8562/G/II/2 March 2015 issued by the National Agency for Integrity was confirmed by civil*

judgment no, 2481/6 October 2015 rendered by Bucharest Court of Appeals – Eighth Administrative and Fiscal Litigation Division, not final";

- it has been ascertained that civil servants within APIA are not practitioners of law (the context being as follows: the critique was made against the appellant that she did not act carefully upon the thorough examination of the implications that may be entailed on the independence of the judicial system by her participation "*as lecturer-trainer in a program which concerned neither the training of practitioners of law, nor the judicial system as a whole*" page 39 of the Decision).

We will prove, herein below, that these circumstances are either irrelevant or rely on an erroneous interpretation of the law.

As regards the application dated 11 July 2014, delivered to ANI by the appellant, the formal, informal or familiar manner of address or the promptness with which she received a reply are totally unconnected with the disciplinary misconduct set forth in Article 99 paragraph (1) letter (b) of Law no. 303/2004.

As for the so-called "relevant information" not delivered to ANI, the Decision fails to specify which such information is.

In fact, the Agency had from the very beginning all information necessary to appraise whether the appellant's activity results in a status of incompatibility, replied accordingly and confirmed its reply by the report issued later.

The Decision suggests that the initial reply was given outside the legal procedure for incompatibility checks, while disregarding that, at the time, the actions had not been performed, and the Agency had only been sent an inquiry for clarification, and not an application for incompatibility check. ANI's reply merely contained a point of view.

The entire administrative practice of the Superior Council of Magistracy Plenum in issuing the decisions and standpoints referred to above is an identical situation, and the double standard employed by the disciplinary court in appraising on the activity of the two institutions is obvious.

As concerns the alleged disregard by the appellant of the warning contained in the ANI letter, the minority opinion finds that this assertion derives from a misinterpretation of the reply, because of a confusion between incompatibility and conflict of interest, which is the red thread in the entire Decision.

Thus, the first section of the ANI letter provides a reply to the question raised by the appellant and states that the out of court activity which she would perform as trainer/lecturer in the program "*Implementation and Enforcement of the Future Joint Agricultural Policy. Prevention of Fraud and Corruption with a view to Protecting the Financial Interests of the European Union*" and of the project "*Supplementing the Financial Support granted by the European Union for Agricultural Restructuring in Romania*" held by UMP-CESAR-MADR is not likely to generate a status of incompatibility.

The second section of the letter, its end, does not refer to incompatibility, but to conflict of interest, and explicitly states that "*it is advisable to avoid any instance that would generate*

an infringement to the status of conflicts of interest if, by their decisions, magistrates hold a personal interest of a property nature, that could influence the objective fulfillment of their duties, incumbent upon them under the Constitution or other legislative enactments".

It is obvious that, unlike the case of incompatibility, in connection with which ANI held all elements required to issue a decision, the existence of a potential conflict of interest could not be clarified, given that the Agency could not have known the judicial activity performed by the appellant at the time; therefore, it only provided a warning.

To claim that the appellant disregarded the warning means that the personal interest involved in her fulfilling the capacity as lecturer/trainer in the project organized by UMP-CESAR-MADR was in conflict with a judicial activity performed by the appellant. However, as already stated above, the Decision not only fails to justify the existence of a conflict of interest, but does not even identify the judicial activity which was allegedly conflicted.

In connection with the remuneration collected by the appellant for her work in the project, the Decision of the court of first instance makes another confusion, because it fails to indicate whether the mere collection of a remuneration is an element of incompatibility, conflict of interest or prohibition or merely its value (it is repeatedly emphasized in the Decision that the "*amount collected exceeded both the salary of a judge of a court of appeals, in 2014, and the salary of an university assistant professor PhD in the School of L*aw").

Whichever the case, the appraisal lacks legal support and the reaction to the value of the remuneration, in the absence of details or clarification, is difficult to understand.

In respect of the alleged non-uniform practice of ANI which, in a similar case, in the case of judge G.P., issued a different standpoint in connection with the latter's incompatibility, the minority opinion finds that the Decision fails to provide sufficient elements to ascertain that so-called "similar situation".

Assuming, however, that such practice is in existence, it could not have been known by the appellant because the assessment report drawn up in the case of judge G.P. is subsequent to the case at issue.

Furthermore, the alleged non-uniform practice of a public authority may certainly not be a critique against the appellant.

Finally, Assessment Report no. 8562/G/II/02 March 2015 issued by the Agency was cancelled by decision no. 2356/22 June 2017 rendered by the High Court of Cassation and Justice in file no. 1810/2/2015.

In regard to the civil servants within APIA, the minority opinion sets off from the remark that, in accordance with Article 2 paragraphs (1) and (2) of Law no. 188/1999 on the status of civil servants, public office "*shall consist of the set of powers and duties, set forth in accordance with the law, for the purpose of fulfilling the public power prerogatives*", while civil servants "*shall be the individuals appointed, in accordance with the law, to a public office*"; in accordance with paragraph (3) letter (a), the enforcement of laws and of the other legislative enactments is an activity conducted by civil servants, requiring the fulfillment of public power prerogatives.

This means that civil servants are, beyond any doubt, practitioners of law.

Under such circumstances, the assertion that the program did not concern the "*judicial system as a whole*" also lacks legal merits. Civil servants perform their activity in the service of justice, and their good professional education – both initial and lifelong training, throughout their entire career – is paramount for the good course of society and for observance of the citizens' rights and freedoms.

At any rate, the appellant's activity was at least as much in the interest of justice as the academic activity performed in the Romanian Diplomatic Institute referred to in Decision no. 316/29 April 2010 of the Superior Council of Magistracy Plenum, or the activity as tenured assistant professor or workshop lecturer in the National Institute for the Education and Training of Lawyers, referred to in the standpoint adopted by the Superior Council of Magistracy Plenum in its session dated 19 June 2008 (paper no. 17713/1154/2008).

2.3 The second ground for illegality

Generalities; the relationship between the procedure assessing incompatibility and conflicts of interest and the disciplinary procedure.

In accordance with Article 1 paragraph (3) of Law no. 176/2010 on integrity in the fulfillment of public offices and dignities, amending and supplementing Law no. 144/2007 on the setting up, organization and operation of the National Agency for Integrity, but also amending and supplementing other legislative enactments, within the meaning that "*Assessing declarations of assets, data and information, but also property changes occurred, interest and incompatibility in connection with the persons stipulated in paragraphs (1) and (2) shall take place in the National Agency for Integrity*, (...)".

Judges are referred to in Article 1 paragraph (1) item (7) of Law no. 176/2010.

Consequently, the assessment of interests and incompatibilities in connection with judges and prosecutors shall be conducted by the National Agency for Integrity (ANI).

Law no. 176/2010 governs the assessment procedure, but also the consequences upon finding a case of incompatibility or conflict of interest, in particular issuing am assessment report (Article 21 paragraph (1) of the law), which may be challenged in observance of Article 22 of the law before the administrative litigation court, and which, if it becomes final, shall be delivered, in the case of judges and prosecutors, to the Superior Council of Magistracy, and the latter shall enforce a disciplinary penalty (Article 26 paragraph (1) letter (e) of the same law).

In accordance with Article 22 paragraph (3) the first sentence of the law, "*If the assessment report on incompatibility was not challenged within the time frame stipulated in paragraph (1) before the administrative litigation court, the Agency shall initiate proceedings within 15 days before the bodies competent to undertake the disciplinary procedure*".

The obligation laid down in Article 26 paragraph (1) letter (e) of the same law, in charge of ANI, namely to deliver the assessment report to the Superior Council of Magistracy, needs to be interpreted in the context of the provisions of Article 22 paragraph (3), as a condition for initiating the disciplinary procedure.

At that point in time, the assessment procedure in connection with incompatibility or conflict of interest as governed by Law no. 176/2010 ceases, and the disciplinary procedure set out in Article 44 *et seqq*. of Law no. 317/2004 shall start or, as the case may be, continue by taking the ANI report into consideration.

The effects of the assessment report drawn up by the National Agency for Integrity in the disciplinary procedure conducted by the Judicial Inspection

The assessment report on incompatibility or conflict of interest is, for evidentiary purpose, an authenticated document, within the meaning of Article 269 paragraph (1) of the Civil Procedure Code; furthermore, by its nature, it is an administrative instrument of an individual nature, within the meaning of Article 2 paragraph (1) letter (c) of Law no. 554/2004.

As such, in the absence of special derogatory regulations, the report will take, in the disciplinary proceedings, in relation to all participants in that procedure, all legal effects specific to administrative instruments of an individual nature, which, *inter alia*, will have as consequence the circumstance that the summary of facts and legal classification assigned to it by that report can only be disputed by means of a plea for illegality, provisioned for in Article 4 of Law no. 554/2004, which is a procedure derogatory from general law on evidence, specific to administrative instruments of an individual nature.

However, such procedure to challenge the legality of the report was not initiated either before the disciplinary court, or in the final appeal, which means that Report no. 21350/G/11/20 May 2016 issued by ANI (the Report), concerning the appellant and the same actions as detailed in this case, continues to take legal effect.

The consequence is, first of all, an inconsistency and, therefore, severe disturbance of the rule of law because both the ANI Report, and the Decision of the disciplinary court are final and, at the same time, conflicting; the Report states that the appellant's actions do not result in a status of incompatibility, while the Decision maintains otherwise.

Moreover, while disregarding the effects of the Report and replacing them with its own appraisal conflicting with the former, the disciplinary court breached the provisions of Article 1 paragraph (3) of Law no. 176/2010 because it undertook an assessment on incompatibility and conflict of interest in connection with the appellant, outside the legal frame.

Within these limits and for these considerations, the minority opinion deems that the appellant's objections are well-grounded.

There is no doubt that the disciplinary investigation may be conducted by the Judicial Inspection in all the cases provisioned for in Law no. 303/2004 and that, in reliance upon the competences placed in its favor by Law no. 317/2004, but also with a view to fulfilling the purpose for which it was set up, the Judicial Inspection may request ANI to conduct an assessment as to the incompatibility or conflict of interest in relation to any judge, in accordance with the procedure provisioned for in Law no. 176/2010 and may challenge the outcome of that assessment, within the limits and in the framework of the legal procedures. On the other hand, it may not take the place of the Agency, may not conduct an assessment outside the legal frame and, when reviewing the same summary of facts as the Agency, may not disregard the effects of the report issued by ANI.

3. Conclusions

At a legal level, the Decision of the court of first instance is contrary to substantive law regulations contained in Article 5 paragraphs (1) and (2) of Law no. 303/2004, Article 101 of Law no. 161/2003, Article 21 paragraph (1) of the Code of Ethics for judges and prosecutors approved by Decision no. 328/2005 of the Superior Council of Magistracy Plenum, Article 7 of the Universal Charter of Judges and Article 1 paragraph (3) of Law no. 176/2010, which triggers the enforceability of the quashing ground set forth in Article 488 paragraph (1) item (8) of the Civil Procedure Code, with the following consequences:

- Admission of the final appeals submitted by the defendant Bogdan Camelia and by the intervening party the Association the Forum of Romanian Judges,

- Partial quashing of the impugned decision and dismissing as ungrounded the disciplinary proceedings conducted by the plaintiff the Judicial Inspection against the defendant Bogdan Camelia, a judge with Bucharest Court of Appeals,

- Dismissal of the motions for accessory intervention submitted for the interest of the plaintiff the Judicial Inspection by the Foundation for the Protection of Citizens against State Abuse (FAC1AS) and by the Association the Group for Political Investigations (GIP),

- Admission of the motions for accessory intervention lodged for the interest of the defendant Bogdan Camelia by the Association the Forum of Romanian Judges,

- Maintaining all other provisions of the impugned decision, in particular as concerns the resolution of pleas.

In respect of the values protected by the above-mentioned legal provisions, the Decision of the court of first instance is illegal because it questions both the independence of judges, and the balance between public authorities, meant to protect such independence.

This consequence, although less visible upon a strictly textual and, certainly, unintentional, perusal of the law, is still true.

In accordance with Article 1 of Law no. 317/2004, the Superior Council of Magistracy is the guarantor of the independence of justice. However, the core element of the independence of justice is the independence of judges, including from the Superior Council of Magistracy, its Divisions or the Judicial Inspection.

The following allegations in the wording of the Decision question that independence:

- extensive interpretation of the concepts of public and private office, despite being set forth by law a exception and, therefore, subject to strict interpretation; public and private offices are different from “capacities” and “services”; even if it were possible, an extensive interpretation ought to use accurate criteria, which did not happen in respect of the “capacities and services”; in general and as a matter of rule, any judge holds capacities and supplies services and, therefore, could be subject to disciplinary investigation sooner or later, which renders the office as such fragile and vulnerable and places it at the discretion of interpreter of ambiguous, inaccurate concepts; observance of law is replaced by dependence to its interpreter;

- the confusion between incompatibility, conflict of interest and prohibitions allows general and vague accusations: if there is no incompatibility, maybe there is conflict of interest or, at least, a prohibition; in this case as well, the confusion gives rise to dependence to the interpreter;

- it holds in charge of the appellant an obligation not stipulated by law, to consult the Superior Council of Magistracy Plenum when uncertain on a case of incompatibility; the minority opinion salutes the strong administrative practice of the Superior Council of Magistracy Plenum, of genuine support to judges and prosecutors and, implicitly, to the society aiming for an impartial system of justice; however, no matter how welcome it is, administrative practice cannot and should not give rise to a legal obligation; in order to protect the independence of judges, the law-maker avoided to stipulate such an obligation; legal possibility suffices;

- it prejudices the legal mechanism for the separation of competences and powers in assessing incompatibility and conflicts of interest which is meant, *inter alia*, to protect the independence of judges from the aggregation of power in a single authority.

Judges,

Rodica Susanu

Cristian Daniel Oana