Nctm

Application no. 75317/17
Dragnea v. Romania

THE OBSERVATIONS OF LIVIU NICOLAE DRAGNEA, THE APPLICANT, TO THE WRITTEN OBSERVATIONS OF ROMANIA SUBMITTED ON 6 DECEMBER 2018

A. GENERAL OVERVIEW

1. On 6 December 2018, the Government Agent before the European Court for Human Rights within the Ministry of Foreign Affairs, submitted Romania's Observations on the application Dragnea v. Romania. This submission addressed the admissibility of the applicant's request and its merits.

2. This reply to Romania's submission will recall the procedure before the national tribunals, the appeal to the European Court of Human Rights and the clear breach of Article 6 of the Convention. In particular, this submission will show that Romania's submission does not fully address the applicant's complaint, contains errors as to dates and errors as to the national procedure and the procedure before this Court as follows:

- the original charge against Dragnea (electoral fraud under the electoral law in calling for a high turnout in a referendum) was changed in the course of the proceedings against him to the disclosure to third parties, in breach of data protection law, of names on the electoral register;
- the electoral register is publicly available information and thus its disclosure cannot be a breach of data protection law;
- the suspended jail sentence of 1 year was increased by the appellate court to 2 years merely on the basis that Dragnea did not admit his guilt;
- the court of appeal took from 22 April 2016 till 2 February 2017 to issue its written judgement in breach of a 30-day rule in Romanian law for the issuance of the written reasoning;
- breach of the 30-day rule is an issue before this Court and was so before that national court;
- the written reasons underlying the judgement were only issued in 2017 as a result of the repeated application of Dragnea to enforce the 30-day rule;

- two judges were prevented from signing the written judgement due to bad case management which the CSM had asked the legislator to address;
- the Romanian CSM (the Superior Council of Magistracy) agrees that retirement of judges can only be an issue of impossibility if proper case management provisions are implemented;
- the recommendations of the CSM are not only in relation non-collegial but also to collegiate judicial panels;
- the CSM considers that reasonable and balanced justice required the early completion of judicial debates including the provision of written reasoning of judgements;
- the writing of the written reasons by an assistant magistrate is not authorised under Romanian law;
- the ruling of this Court in *Cerovsek and Bozicnik v Slovenia* is therefore at issue;
- claims by Romania in its pleadings do not reflect the facts;
- Romania is in breach of Article 6 of the European Convention of Human Rights.

B. ON THE MERITS

3. The Romanian National Anti-Corruption Directorate (DNA) opened an investigation into electoral fraud following a referendum for the removal from office of the then President, Traian Băsescu (a politician not aligned to the Social Democratic Party led by Liviu Dragnea). 87.5% of those voting, voted in favour of the removal. 7.4 million Romanians participated in the referendum and expressed their option to remove Traian Băsescu from office – more than the votes obtained by all the parliamentary parties put together. Despite this, the Constitutional Court invalidated the referendum on the grounds that less than 50% of the total number of eligible voters participated.

4. The political orientation of the DNA is manifest from the very manner in which the charges against Dragnea were formulated. The accusation was that "he used his authority and influence in order to obtain for the Social Democrat Party an undue non-monetary advantage, that is to determine, by illicit means, 50%+1 of the voters to be present and vote at the referendum, a formal condition which would have determined the Constitutional Court to validate the referendum."

5. The idea of the investigation against Dragnea was fraud in relation to the referendum. However, the actual charge was in relation to corruption. Article 13 of the Law 78/2000 on prevention, finding and sanctioning of corruption, reads as follows:

"The action of the person holding a leading office in a party, syndicate or management or in a non-profit legal entity to use his influence or authority to obtain for him or for money, assets or undue advantages, is punishable with imprisonment from one to 5 years."

6. The use of this Article created the circumstances to give the DNA jurisdiction. If the charge concerned electoral crimes only, as it would have been normal under normal (non-political) circumstances, the DNA would not have had the competence to undertake the preliminary investigation– regular prosecutors would have been competent.

7. A second problem with the approach taken by the DNA concerns the substance of Article 13. The law provides that the undue advantages which attract the criminal responsibility are: "money, assets or undue advantages". This clearly shows that the legislator was concerned with the **materiality** of the undue advantages ("money, assets"). It is nowhere in the spirit of this legal provision to include "non-monetary" benefits (meaning benefits that cannot be evaluated in money) and even less an intangible benefit such "vote attendance" in favour of a political party.

8. The third abuse concerns the issue of ensuring a vote attendance of 50%+1. Such a charge would be unconceivable in any consolidated democratic system. On the contrary, democracy is based on the fact that major decisions are taken by participation in votes, not by absence. **Vote attendance legitimates a democratic decision, so in this sense it cannot be a crime.** In addition, the Law of political parties in Romania provides that political parties must stimulate citizens to attend the vote during electoral scrutiny (Law 14/2003, Article 2). Moreover, the Constitutional Court itself underlines in its decision on the organization of referendums that political parties have a civic obligation to stimulate citizen to attend voting in order to legitimize the electoral process as much as possible. For that matter, even the reasoning of the first court that had judged this case underlines, where DNA thesis is repelled, that "there is no legal provision against encouraging citizens to attend voting, even on the day of the referendum".

9. The Court of First Instance rejected the arguments of the DNA prosecutors whereby they tried to prove the illicit manner in which Dragnea had obtained this alleged undue advantage consisting of vote attendance. Hence, the court found that the informatics system whereby the Social Democratic Party monitored vote attendance did not breach any legal provisions. Also, the court underlined that the call by Dragnea, at the time the general secretary of PSD and coordinator of the referendum campaign, that Social Democratic Party encouraging activists to, in turn, encourage voters to participate in the referendum was not in breach of any legal provision. The judges held that the messages inviting the citizens to participate in the voting are not an action related to the electoral campaign that took place

after the end of the legal campaign period. "The law only forbids [after the end of the electoral campaign 48 hours before voting] the indication on how to vote" (Reasoning of the First instance court).

10. Given the difficulties in finding a breach of Article 13 of Law 78/2000, **the first instance Court did not base its findings on the invitation to participate in the referendum, but for a completely different crime, namely breach of data protection law**. On this basis the Court condemned an invitation addressed to the PSD activists to "illegally extract, use and disclose to third party the personal data of the citizens enlisted in the electoral rolls and who had not voted". In the Court's opinion, this invitation "is deemed to violate the legal guarantee which protects the fundamental rights and freedoms of the person when personal data are processed" (translation of the reasoning of the Court of First Instance).

11. On the substance, however, there can be no crime under data protection rules in relation to publicly available information or for having invited the party's activists to "illegally extract, use and disclose to third parties the personal data of the citizens enlisted in the electoral rolls". **The data referred to by the Court are not regulated by the data protection legislation as electrical rolls are public.** Moreover, it is mandatory that the electoral rolls are displayed during voting so that every citizen can check if he was registered on these rolls. At the same time all citizens can see who else is entitled to vote. Additionally, the law imposes on all polling stations the obligation to make the rolls permanently available to the political parties, upon their request. **Thus, "to illegally extract, use and disclose to third parties" of public data cannot be a crime.**

12. The Appeal Court (HCCJ) did not address Dragnea's objections to the findings of the Court of First Instance. On the contrary, it merely increased the sentence from 1 to 2 years, suspended. The only argument justifying this increased sentence was that Dragnea insisted that he was not guilty: "Without disregarding the personal circumstances favour of the intimate accused appellant, such as lack of criminal record, presence in court whenever requested and his position in society, the 5-judge Panel notes that these circumstances are diminished by the attitude of denial, despite evidence, of his criminal activity and of the existing elements which can involve his criminal responsibility". In conclusion, in the opinion of the Appeal Court, the exercise of the right to defence while claiming to be innocent in relation to all the charges represent an aggravating circumstance justifying an increased sanction.

13. Romania's submission does not show that both before the Court of First Instance and during the appeal to the HCCJ, Dragnea was sentenced for acts for which he was never investigated during preliminary investigations or during the debate before the judge, respectively for an action stipulated by Law no. 677/2001 restated, on the processing of

personal data and protection of private life. These acts were not part of the indictment; hence his right to defence, stipulated by the Constitution of Romania, the Criminal Code and the Criminal Procedure Code, as well as by the Convention for the Protection of Human Rights has been violated from the very beginning.

14. More specifically, from the reasoning of the Court of First Instance it can be seen that Dragnea was sentenced for having breached the provisions of Law no. 677/2001 by asking the PSD activists to bring out as many people as possible on voting day and in doing so they had checked the permanent electoral rolls, supposedly violating the personal character of the personal data registered in the electoral rolls despite the fact that the electoral roles are available to political parties and published on the day of voting at the entrance to each polling station.

15. It should be noted that on 23 June 2016 shortly after the issuance of the Appeal Court judgement (HCCJ), the President of the Panel hearing of the appeal Ms. Lidia Stanciu, who was also President of the HCCJ at the time and who had applied to retire (see below), was appointed as a judge at the Constitutional Court. The announcement was by the President of the Republic (one of the prerogatives of the President).

16. In addition, Dragnea had publicly indicated his intention to appeal to the European Court of Justice and to this Court. The delay in the issuance of the written ruling from April 2016 to Febrauarty 2017 impeded this objective despite two applications to the Court for the issuance of the written reasoning of the Court.

17. It is against this background, and the ongoing political tensions in Romania whereby there is open conflict between the President of the Republic and Dragnea, that this Court must evaluate whether the procedures followed in Romania were in breach of Dragnea's rights under the Convention.

C. FAILURE TO RESPECT THE 30-DAY RULE

18. Romania argues in Paragraph 37 of its submission (as well as, in passing, in paragraph 7) that the issue of the non-respect of the 30-day rule is not an issue before this Court. This is simply not correct. Please see page 5 of the application.

19. There was no valid reason for the appeal court not to respect the rule. Lawyers for Dragnea made a number of applications to the Appeal Court to obtain the written reasoning of the Court. This was first requested on 22 April 2016, the day that the sentence was announced,

subsequently when the announcement that the President of the section hearing the case was to be appointed to the Constitutional Court (June 2016) and again on the announced retirement of Judge Zglimbea. The requests were rejected.

20. The judgment of the Appeal Court was handed down on 22 April 2016. The written reasoning was not made available until 2 February 2017. Romania does not give any justification for this delay. For this reason alone, Romania must be condemned for the non-respect of its own procedural rules. Reference is made to paragraph 45 of Romania's submission for a confirmation of this rule by the Constitutional Court.

21. In addition, paragraph 20 of Romania's submission does not accurately reflect developments. Not only did two judges retire but one judge, the President of the sanction hearing the appeal, was appointed to the Constitutional Court.

22. Paragraph 46 of Romania's submission makes reference to the Constitutional Court ruling from January 2018 concerning the possibility of others signing written reasonings where it is impossible for those judges who did examine the evidence to sign. As will be seen below, those circumstances do not apply in this case and certainly in relation to one of the judges who did not leave the Court till after the expiry of the 30 days from the delivery of the oral sentence. In this sense impossibility cannot apply to them (irrespective of whether retirement is or is not an issue of impossibility – see section E below).

D. MATTERS ON THE DRAFTING AND SIGNING OF COURT JUDGEMENTS DECISION NO. 33/2018 OF THE CONSTITUTIONAL COURT

23. Romania states that the decision of the Appeal Court was drafted by an assistant magistrate and not by one of the Judges who heard the evidence and conducted the proceedings. Romana does not give any evidence to back up this assertion. For this reason alone, this argument must be rejected. There is no evidence that the assistant magistrate actually attended the hearings at which evidence was discussed, at which witnesses spoke and the accused were heard. This is not only a breach of Article 406 of the Code of Criminal Procedure but it is also a breach of Article 51(3) of the Courts internal rules 5/2013. Romania does not give any evidence as to when the assistant magistrate was assigned to draft the written reasoning of the judgment or by whom.

24. Decision no. 33/2018 of the Constitutional Court confirms that not only have the provisions of Article 406 paragraph 4 of the Criminal Procedure Code been breached, but also the provisions of Article 406 paragraphs 1 and 2. Even if the President of the court had correctly delegated the attributions as per the provisions of Article 71 of Interior functioning

regulation of ICCJ, this is an internal Regulation and is not the law. Consequently, the Appeal Court judges who delivered, drafted and sign the court judgement acted in breach of the law.

25. **Hence, the sections of the Decision stating clearly and unequivocally that only judges, and not assistant magistrates, are allowed to draft court judgements are:**

*„169. As per the provisions of Article 406 — **Writing and signing the judgement from the Criminal procedure code, the judgement is written by one of the judges who participated in the examination of the case, no later than 30 days after pronouncement, and is signed by all the members of the panel and by the registrar.** As per the provisions of Article 426 — Writing and signing the judgement from the Civil procedure code, the judgement is written by the judge who solved the case. If the panel includes judiciary assistants, as per the provisions of Article para. (1) of the Law no. 304/2004, the president can designated one of them to draft the judgement. If one of the judges or assistants is in minority during deliberations, he will draft his separate opinion, including the reasons, the solution he proposed and his signature. Also, the judge who agrees with the solution, but for different reasons, will draft his concurring opinion separately. In all cases, the judgement will be signed by the panel members and by the registrar. Hence, the two procedural norms stipulate that it is the responsibility of the judge who solved the case to draft the judgement, in case of panels containing several judges, legally constituted and **any member of the panel can be compelled to draft the judgement**.*

***170**. The judgement whereby a court resolves on the merits must have an introductory part, the reasoning and an operative part. The reasoning includes the grounds for which the decision was given in that manner. **As per the provisions of Articles 403 para. (1) of the Criminal procedure code, the reasoning must include, inter alia, a reasoning of the solution to the criminal action, by analysing evidence that served as grounds for settling the criminal action and those that had been repelled, and a reasoning of the solution to the civil action, as well as an analysis of any facts that supported the solution reached in the case. In case of conviction,** as per the provisions of Article 403 para. (2) of the code, **the reasoning must show each fact attributed to the defendant by the court, the form and the degree of culpability, mitigating or aggravating circumstances, recidivism, the duration deducted from the pronounced sentence, and the documents supporting the duration deducted.** As per the provisions of Article 425 para. (1) point b) of the Civil procedure code, the reasoning shall include the object of the claim and a summary of the parties arguments, the facts held by the court based on the administered*

evidence, the factual and legal reasons of the verdict and also the reasons for which the claim was approved as well as those for which it was repelled.

176. Given the herein arguments, the Constitutional Court holds that ***the writing of the judgement****, the final and adjudication act of a court, by which the litigation between parties is settled as res judicata,* ***is the result of the deliberations****, held in secret, in which only judges who are members of the panel that has hold the hearings participate Only those judges may rule on issues of facts and law lodged for trial and give a solution. As follows, the law expressly provides that the judgement is written by one of the judges who participated in the settling of the case. Furthermore, the writing of the judgement is inevitably connected to its reasoning, as the latter is, as aforementioned, an obligation of the judge of the trial, deriving for Article 6 of the Convention. All these aspects safeguard the right of the parties to a fair trial, judged by an independent and impartial court, subject only to law.*

177. So, where the judge who did not attend the debates and the deliberations is the one drafting/reasoning the court judgement, the safeguards offered by the Constitution and the law to protect the right to a fair trial, to ensure an impartial justice, in the name of the law, remain purely declarative, with no efficiency and useless. In other words, all the legal provisions on the independence of justice, criminal or civil procedure rules, the need for a reasoned act of justice have no legal effects of the court judgement that "tells the law is drafted by a person who is not a judge of that case, who is an outsider to the court procedure, to the deliberation action who determined the verdict and implicitly to the act of justice itself.

178. The reasoning of the court judgement is an inherent function of the sitting judge; it is the expression of his independence and cannot be transferred to a third party. The reasoning is not only the premises of a good understanding of the decision, but also a guarantee that it is accepted by the litigant, who accepts the act of justice convinced that it is not arbitrary. It represents the essential element of the court judgement, a strong guarantee of the impartiality of the judge and of the quality of justice, as well as a premises of the appropriate manner in which the upper court fulfils its attribution of judicial control in terms of legality and rationality. Hence, if the judgement were drafted/reasoned by another person than the sitting judge, the litigant would be deprived of these very guarantees."

E. MATTERS RELATED TO THE RETIREMENT OF THE JUDGDES WHO FAILED TO SIGN THE APPEAL REASONING

26. This Court must also address the failure of the two judges – *Livia Doina Stanciu and Luminita Livia Zglimbea* – to sign the written reasons for the judgement allegedly due to impossibility.

27. With regards to Magistrate *Livia Doina Stanciu*, CSM informed Government's agent that she submitted the retirement request to CSM on 13.06.2016, together with the retirement decision as of 14.04.2016. On 16.06.2016 CSM Plenum proposed to the President of Romania the removal from office by retirement of the magistrate, starting on 13.07.2016 and the President of Romania issued the Decree on removal from office, on the basis of retirement, starting on 13.07.2016. This is the same judge who was appointed to the Constitutional Court by the President of the Republic. The date of retirement was greater than 30 days from the date of the oral presentation of the judgment.

28. With regards to Magistrate *Luminita Livia Zglimbea*, CSM informed Government's agent on the fact that she submitted the retirement request to CSM on 10.02.2016, together with the retirement decision as of 17.12.2015. On 16.02.2016, CSM Plenum proposed to the President of Romania the removal from office by retirement of the magistrate starting with 01.05.2016 and the President of Romania issued the Decree on removal from office, following retirement, starting with 01.05.2016. The date of retirement was known before the oral presentation of the judgement and the actual retirement was 9 days after the 22 April 2016.

29. Article 406 Criminal Procedure Code, which provides:

> *Art. 406 "Writing and signing the judgement (1) The judgement is written within 30 days from pronouncement. (2) The judgement is written by one of the judges who participated in the examination of the case, within 30 days from pronouncement, and is signed by all the members of the panel and by the registrar. (3) The operative part of the judgement must be the same as the minutes. (4) **Where any of the members of the panel is hindered from signing, the judgement is signed by the president of the panel.** If the president of the panel is also hindered from signing, the judgement is signed by the president of the court. When the hindrance concerns the registrar, the judgement is signed by the chief-registrar. In all cases, the cause of the hindrance is mentioned in the judgement."* were accurately applied.

30. The two judges were not hindered from signing – due to illness, accident, demise or prolonged absence. Both they and the presidency of Appeal Court were aware of the fact that the two judges had the intention to retire, a fact which is clearly proved by the retirement decisions – 14.04.2016 for Magistrate Livia Stanciu and 17.12.2015 for Magistrate Luminita Zglimbea; 8 days BEFORE THE DELIVERY OF THE ORAL JUDGEMENT in the first case and 5 months BEFORE THE DELIVERY OF THE ORAL JUDGEMENT in the second case. Hence, it is obvious that at least in the case of the President of the panel, Ms. Livia Stanciu, she should have been responsible to reason her decision as she had anyway the physical time necessary for her to fulfil her legal obligations as provided by law within 30 days as of the delivery of the verdict; under the circumstances, she had enough time (82 days) between the date of the delivery– 22.04.2016 and the date she was removed from office – 13.07.2016, to draft and personally sign the reasoning.

31. Romania does not address this issue in its submission. In **Cerovsek and Bozicnik v. Slovenia (Application 68939/2012 and 68949/2012) this Court held:**

> *"44. **As to the question whether Judge A.K.'s retirement, which was allegedly the reason for her failure to provide written grounds, gave rise to exceptional circumstances which justified a departure from the standard domestic procedure, the Court observes that the date of her retirement must have been known to Judge A.K. in advance. It should therefore in principle have been possible to take measures either for her to finish the applicants' cases alone or to involve another judge at an early stage in the proceedings.** Moreover, it notes that the case was not a particularly complex one and that the applicants gave notice of their intention to appeal as soon as the verdict was pronounced (see paragraph 12 above). That means that Judge A.K. was immediately aware that she would have to provide written grounds. The Court therefore cannot agree with the Government that there were good reasons to depart from the procedure to which the accused were entitled under domestic law. **Furthermore, it is particularly striking that despite a statutory time-limit of thirty days, the written grounds were not provided for about three years after the pronouncement of the verdicts, during which time the case files were lost and had to be reconstituted** (see paragraphs 13 and 23 above). Those factors raise further concerns about the way the applicants' cases were handled by the domestic courts.*
>
> *45. The Court appreciates that in some cases there might be administrative or procedural factors that render a judge's continued participation in the case impossible (see Cutean, cited above, § 61, and Mellors v. the United Kingdom (dec.), no. 57836/00, 30 January 2003). However, it notes, first, that it follows from the considerations in the above paragraph that no such factors arose in the*

present case. Secondly, even if they had arisen, the Court notes that ***the only way to compensate for Judge A.K.'s inability to produce reasons justifying the applicants' conviction would have been to order a retrial, by, for instance, the second-instance court remitting the cases to the first-instance court for a new hearing*** *(see paragraph 26 above)...*

32. In conclusion, this Court considered that the applicants' right to a fair trial was breached because of the failure of the judge who conducted their trial to provide written grounds for her verdict and because of the absence of any appropriate measures compensating for that deficiency.

33. The case cited clearly shows that the ECtHR considers that even though it seems acceptable for a judge that had not attended the debates of the case to sign in the name of another judge, this was only justified in case of demise or prolonged absence (illness, accident).

34. The Appeal Court should have taken measures from the very moment it found out about the first retirement, respectively 17.12.2015, and should have ruled consequently or resumed the hearings in the case and sent the case to a panel which was not to be split by removal from office of two judges, fact which generated the challenged situation, respectively the signing of the Decision by a different magistrate than the ones that had actually attended the debates.

F. COLLEGIATE AND SINGLE JUDGE PANELS

35. *Cerovsek and Bozicnik v. Slovenia* concerned a single judge panel whereas the Appeal Court in this case was made up of five judges, three of whom signed the written reasons which in turn were written by an associate magistrate who did not partake in the gathering of the evidence, the hearing of the witnesses or the hearing of Dragnea. To what extent does the continued involvement of a part of the panel of judges in a case address the concerns of this Court in the *Cerovsek* case.

36. In *Cerovsek* the written reasoning was re-constructed from the file 3 years after the handing down of the judgment and written by a judge different the single judge that had conducted the hearing. That being said it is clear from *Cerovsek* that this Court was concerned not merely with the temporal distance between the oral judgment and written reasons but also with the need to have the reasons written by someone who had in fact participated in the conduct of the procedure before the Court and had an intimate knowledge of the facts, the law and the considerations reached by the college of judges. This is the core of the *Cerovsek* ruling. The Court was concerned that the full range of the views of the panel in relation to

these core issues, the facts as understood by the judges and the application of the law to those facts, should be available in the writing of the written reasoning. The absence of two judges automatically defeats this objective.

37. The core similarity between this case and that of *Cerovsek* is that the written reasons were not written by a Judge who fully participated in the procedure before the Appeal Court.

38. The end of paragraph 31 of Romania's submission concerns of the views of the Superior Council of Magistrates (CSM) that arrangements must always be made, in the case of retirement, for written reasons to be given before the judge leaves to start their retirement. In this section of its Submission, Romania refers to the long standing demand by the magistrates to the government that judges be relieved of new work and be given time before retiring so as to clear any backlog in the issuance of written reasons. Romania's submission shows that this request was first made in 2011 and was based on the concern of the Superior Council of Magistrates that failure to do so could be a breach not only of Romanian constitutional law but also the European Convention of Human Rights.

39. In the last bullet point of paragraph 31, Romania claims that the CSM was only concerned with the situation of the retirement of single judge panels. However, this is not correct. In a letter dated 08.11.2018 to Romania's agent in this case, the President of the CMS clearly states (in point 3 of the letter on page 3) that it was concerned not only with single judge panels but also with collegiate panels. See Annex 1 to these observations. We invite this Court to read the views of Romania's Constitutional Court in Decision no 33 of 23 January 2018 on the same matter. The views of that Court match those of this Court. In paragraph 169 of that judgment the Court states that assistant magistrates can only draft the written reasons in labour cases on the basis of Law no 304 of 2004.

40. The issue of retirement is also addressed in more detail in Section G of the submission and in particular paragraphs 51 to 54. What this section of the Submission shows is that there is a void in the law in this regard. This void means that the rights of persons subject to the law can be violated if the steps are not taken to properly manage the retirement of judges, whatever the make up of the panel hearing the action.

F. THE DECISION NO. 685/2018 OF THE CONSTITUTIONAL COURT ON HE ILLEGAL FORMATION OF ICCJ (the Appeal Court in this case) AS OF 2014.

41. Constitutional Court decision No.685 as of 7 November 2018 concerned a constitutional law conflict between the Parliament of Romania, on the one side, and the High Court of Cassation and Justice (HCCJ and the Appeal Court in these pleadings). The ruling was

published in the Official Gazette no. 1.021 as of 29.11.2018. This judgement shows that as of 2014, the HCCJ was in breach of essential legal provisions set out in the law. The Court found that in the formation of judicial panels the HCCJ followed its own procedures rather than those of the law.

42. The Court found that ever since 2014, HCCJ has not applied the spirit and the text of the law, but, on the contrary, has knowingly violated it and has determined litigants to be judged by ILLEGALLY FORMED panels, a deliberate action of HCCJ Executive College, as selected by HCCJ presidency so that litigants were "CONDEMNED WITHOUT EVIDENCE", we quote from the reasoning of the Decision of the Constitutional Court to show that, in fact, Dragnea WAS JUDGED BY TWO PANELS OF THE HIGH COURT OF CASSATION AND JUSTICE– 3-JUDGE PANEL AND 5-JUDGE PANEL, which were both illegally formed. Key elements of the Constitutional Court's ruling include:

172. The above prove that, as of 1 February 2014 up to the present, the position of the Executive College of the High Court of Cassation and Justice was also adopted in practice, by the case law of 5-judge Panels and as stated in the point of view of the supreme court ,appended in the file, as no one challenged the legal formation of the 5-judge Panel hence the exception of the illegal formation of the panel was not raised not even ex officio that the legal system would eventually auto controls itself, the panels remained vested as such with judging cases and delivering court judgements.

173. The Constitutional Court emphasized in its case-law that "the regard for a state of law is not limited to this component, but implies that public authorities have constitutional behaviour and practice generated by legal and constitutional order, seen as an ensemble of principles which are the basis of the social, political, legal relations of a society. In other words, this legal and constitutional order has a more extended significance than the positive norms enacted by the legislator; they are the constitutional culture specific to a national community. Hence, a loyal collaboration means, beyond the regard for the law, mutual regard for the state authorities/ institutions, as an expression of assimilated, assumed and promoted constitutional values, in order to create balance between the powers of the state. So, the constitutional loyalty can be characterized as an principle-like value intrinsic to the Fundamental law while the loyal collaboration between the state authorities/ institutions has a fundamental role for the implementation of the Constitution" [Decision no. 611 as of 3 October 2017, published in the Official Gazette of Romania, Part I, no. 877 as of 7 November 2017, paragraph 107].

174. On the contrary, the atypical position of the supreme court vis-à-vis the Parliament between 1 February 2014 and the present date shows disregard both for the obligation to comply with the law, stipulated by Article 1 para. (5) of the Constitution as well as for the standards of the state of law, more precisely of constitutional loyalty – an intrinsic element thereof – that the supreme court must show.

175. In conclusion, the Court notes that, by the Resolutions no.3 /2014 and no. 89/2018 of the Executive College, the High Court of Cassation and Justice amended law enacted by the Parliament by way of an administrative act, which shows a contravening position of the legislative policy. It results that, under these circumstances, the Executive College, of the High Court of Cassation and Justice took upon itself an attribution resulting out of the jurisdictional role of the supreme court, which is materialised through the panels, the only ones entitled to decide on their legal formation. Hence, by its administrative practice, the Executive College, of the High Court of Cassation and Justice, illegally influenced the legal practice of the 5-judge Panels on the aspect of their legal formation since the 5-judge Panel implicitly accepted an illegal formation breaching themselves the provisions of Law no. 304/2004, between 1 February 2014 and the present date.

187. Hence, the organic norms on the formation of the court are meant to ensure the public trust in the act of justice. This is why "Justice must not only be done, it must also be seen to be done "– Decision as of 26 October 1984, given in the case of De Cubber v. Belgium, paragraph 26.

188. Considering the above, the text of Article 32 of the Law no. 304/2004 is a safeguard of the objective fairness of the court, part of the right to a fair trial. These safeguards also include the random manner in which cases are allocated by the informatics system, as well as the formation of the panel according to the law. Hence, the random allocation of cases, a norm of judicial organization at principle level, was enacted by the Articles 11 and 53 of the Law no. 304/2004, aiming to offer an additional safeguard to the functional independence of the judge and the fairness of the act of justice, the main allocation method being based on the informatics system [see also Decision no. 5103 as of 1 November 2011, given by the High Court of Cassation and Justice – Section for administrative and fiscal litigation]. Consequently, starting with the enactment date of the provisions of Article 32 of the Law no. 304/2004, as amended by the Law no. 255/2013 and by the Law no. 207/2018 (respectively between 1 February up to the present), the resolutions of the Executive College of the High Court of Cassation and Justice should also have been an expression of this safeguard on the random formation of the panel

and remove any possibility to avoid selection of all panel members by draw and thusly avoiding to validate the introduction of a "by law" judge holding a management position with the High Court of Cassation and Justice as member of the 5-judge Panel and who becomes this way the president of the Panel. High Court of Cassation and Justice is also kept by this obligation in the virtue of the loyalty its must have with regards to the constitutional principles and CEDO [ECtHR] case-law.

***189.** By adopting a contrary attitude, the Executive College of the High Court of Cassation and Justice sustained the issues related to the presidency of the 5-judge Panels, as well other organizational matters as opposed to compliance with the norms of random formation of these panels, by draw, - as a safeguard of the objective standards ensuring the fairness of the panels and, thereby, the right to a fair trial. In this context, the Court holds that by imposing the participation of the members by law in the 5-judge Panels, by way of administrative acts, latent pressure can be put on the members of the panel, consisting of submission of the judges to their judicial superiors or, at least, of a hesitation/lack of will of the judges to contradict those [see on this analysis parameter, CEDO Decision as of 22 December 2009, given in the case of Parlov-TkalciÄ7 v. Croatia, paragraph 91].*

***190.** At the same time, the Court holds that the Executive College of the High Court of Cassation and Justice taking over an attribution in the field of iuris dictio transformed this administrative entity into a jurisdictional one since the Executive College decided on the legal formation of the court; this impaired on the essential component of the right to a fair trial, that is the fairness of the court.*

***191.** Not in the least, it must be said that using the notion of court defined by law, another condition of the right to a fair trial, in addition to its independent and fair character, is deemed to ensure that, in a democratic society, judicial organization is not at whim of the executive power and it is regulated by law enacted by the Parliament. The organization of the legal system is not at the discretion of the judicial power, not even in the states that apply coded law, without this meaning that the courts do not have a certain margin to interpret the relevant national legislation. CEDO stated that, in principle, a violation by a court of the national legal provisions on defining the structure and competence of the judicial bodies is contrary to the provisions of Article 6 paragraph 1 of the Convention [see Decision as of 5 October 2010, given in the case of DMD GROUP, A.S. v. Slovakia, paragraphs 60 and 61].*

192. Consequently, the manner to designate the members of the 5-judge Panels, specifically by a mechanism that eluates the law, with the participation of "members by law" – who are not mentioned by the legal provision – in conjunction with the refusal to apply the new law demonstrates that, currently, the court is not legally formed and raise a point on the independence and objective fairness of these panels.

193. The Court states that, in this manner the provisions of Article 21 para. (3) of the Constitution were breached as compared to the standards of independence and objective fairness that must characterize any court of law. At the same time, the Court holds that a court of law cannot be qualified as being defined by the law in a formation resulted from interpretation and, consequently, this safeguard of the right to a fair trial is also breached, respectively the court defined by the law.

43. The Decision of the Constitutional Court shows that the allocation of judges to multiple judge panels by the Appeal Court was unconstitutional, that the allocation of the writing of the written reasons to an assistant magistrate was also illegal, and finally, the fact that the judgement was signed by a judge who did not attend the examination of the case, the debates and the deliberations, outside the 30-day period, show a clear breach of Article 6 of the European Convention on Human Rights.

44. Dragnea's application is fully admissible and this Court is requested to grant the application as set out in the application and as evidenced in this pleading.

G. JUST SATISFACTION UNDER ARTICLE 41

45. The failure of Romania to respect the human rights of Dragnea, a prominent figure in the political and social life of Romania has caused him damage that can hardly be remedied by an award of damages. Dragnea is the leader of the Social Democratic Party which, at the last parliamentary election, won the nearly 40% of the vote. If he had not been illegally convicted of breach of data protection rules he was in a strong position to be elected prime minister of the country.

46. The concept of just satisfaction can hardly measure of this loss and the loss to reputation and esteem. That being said, and in the light of the practice of this Court, Dragnea seeks compensation in just satisfaction of €15,000.

47. Dragnea does not submit any specific document to this end. Currently Dragnea holds the post of President of the Parliament which is an indication of the likelihood of his election by the Parliament to the post of Prime Minister if the illegal conviction was not in place. Romania law prevents convicted felons from holding the post of Prime Minister.

For Liviu Nicolae Dragnea

Bernard O'Connor
Brussels(with input and translations from colleagues in Romania)

ANNEX 1

Translation from Romanian

Logo ROMANIA 1909 Superior Council of Magistracy

"The Superior Council of Magistracy is the guarantor of the independence of justice (art. 133 par. 1 of the Constitution, as republished)"

Logo 100 ROMANIA

1918-2018 SARBATORIM IMPREUNA (WE CELEBRATE TOGETHER)

No. 22378/2018

08.11.2018

To the attention of Mrs. Catrinel BRUMAR,

Governmental Agent for the European Court of Human Rights within

the Ministry of Foreign Affairs

Dear Mrs. Government Agent,

Following your letter no. L1/12720/9163R/AG/3 as of 29 October 2018, by means of which, in the context of the case *Dragnea versus Romania*, registered on the docket of the European Court of Human Rights, you requested to the Superior Council of Magistracy a series of documents and information, we communicate you the following:

1. With respect to the Point of view no. 21317/1154/2011 drawn up by the Legislation, Documentation and Administrative Litigations Division within the Superior Council of Magistracy, we mention that we hereby analyzed the proposals formulated by the Judicial Inspection for the amendment of the civil and criminal procedural provisions regarding the drafting of the judgments. The point of view indicated above was analyzed in the meeting as of 2 November 2011 of the Commission no. 1 – "*Independence of justice and interinstitutional cooperation*" within the Superior Council of Magistracy. The Commission appropriated the proposals aimed at the amendment of the legal provisions regarding the drafting of the judgments, as well as the proposal to amend art. 65 par. (5) of Law no. 303/2004 on the statute of judges and prosecutors, as republished, subsequently amended and supplemented, and decided to send the paper to the Plenum of the Council for the analysis of these proposals. Moreover, the Commission appropriated the proposal of the Legislation, Documentation and Administrative Litigations Division aimed at the introduction of par. (21) at art. 104 of the Regulation of internal order of law courts and decided to communicate it to the Commission no. 3 – "*Streamlining the judicial activity and performance of law courts and prosecutor's offices*", in order to be analyzed together with the other proposals for amending this regulation.

The mentioned point of view is attached to this letter in certified copy.

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2. During the meeting as of 22 November 2011, the Plenum of the Superior Council of Magistracy analyzed the mentioned paper and decided to notify the minister of justice in the sense of amending and supplementing the legal provisions regarding the drafting of judgments.

The Plenum considered necessary to amend the civil and criminal procedural provisions, respectively art. 264 par. (1) of the Civil Procedural Code of 1865, art. 420 of Law no. 134/2010 on the Civil Procedural Code, art. 310 par. (2) of the Criminal Procedural Code of 1968 and art. 406 of Law no. 135/2010 on the Criminal Procedural Code, in the sense of regulating a term between 1 month and 3 months in which to pronounce the judgment and which should include also the considerations.

This legislative amendment is also justified by the streamlining of the work, the browsing through the entire file being performed once. Moreover, the delivery of the judgment, as a rule, within a time period as of the date of completion of the judicial debates was necessary for a reasonable and balanced judicial act, the risk of judicial errors caused by the reduced pronouncement term being low. It was considered that the motivation performed at the same time with the pronouncement of the solution represented an additional guarantee for the legality and substantiation thereof, and also that the solutions would be better argued, justified by all the evidence in the file, thus the occurrence of errors being avoided.

In addition, the Plenum decided to notify the minister of justice regarding the proposal to amend and supplement Law no. 303/2004 on the statute of judges and prosecutors, as republished, subsequently amended and supplemented, as follows:

Art. 65 par. (5) is amended and shall have the following content:

"(5) *In case the judge or prosecutor requests the dismissal from office by resignation or retirement, the Superior Council of Magistracy may establish a term of maximum 60 days as of which the resignation or retirement should become effective, if the presence of the judge or prosecutor is necessary.*"

To this purpose, it was considered that both in the case of resignation and of retirement, the incident legal norms must regulate a procedure at the end of which both parties of the work relation should not be affected. Thus, although it is necessary to directly and immediately enforce the unilateral will of the judge, this fact should not affect the activity of the court where the magistrate works.

With respect to establishing a guarantee so that the judge should benefit from the necessary time to motivate the judgments, the Plenum of the Superior Council of Magistracy considered necessary to amend and supplement the Regulation of internal order of law courts, approved by the Decision of the Plenum of the Superior Council of Magistracy no. 387/2005, as subsequently amended and supplemented, as follows:

After paragraph 20 of article 104 of Section III of Chapter III, a new paragraph is introduced, respectively paragraph 21, with the following content:

"(21) *During the time period between the date when the Plenum of the Superior Council of Magistracy decided to send to the President of Romania the proposal of dismissal from office of a judge, by retirement or resignation, and the date of dismissal from office, the magistrate is exempted from the judicial activity and any other attributions it has in court, except for the motivation of judgments.*"

Moreover, the Plenum of the Superior Council of Magistracy decided to communicate the proposal of the Legislation, Documentation and Administrative Litigations Division aimed at introducing par. (21) at art. 104 of the above-mentioned regulation to the Commission no. 3 "*Streamlining the judicial activity and performance of law courts and prosecutor's offices*", in order to be analyzed together with the other proposals for amending this regulation.

The settled agenda of the meeting of the Plenum of the Superior Council of Magistracy as of 22 November 2011 can be found on the web page of the Council (*http://old.csm1909.ro/csm/linkuri/12_12_2011_45790_ro.pdf*), an excerpt regarding the mentioned point of view being attached to this letter. Moreover, the letter no. 21317/1154/29.12.2011 sent to the Ministry of Justice was attached.

3. With respect to the request to assess the application of the above-mentioned point of view to the activity of collegial panels, we mention that the proposals formulated in paper no. 21317/1154/2011 and appropriated by the Plenum of the Superior Council of Magistracy made no distinction between the drafting of the judgments pronounced by the collegial panels and the ones of the non-collegial panels, although the initial notification of the Judicial Inspection referred to the impossibility to draft the judgments in the case of non-collegial panels.

In terms of applying the above-mentioned point of view to the de facto situation in the invoked case, the Superior Council of Magistracy does not have the constitutional and legal competence to analyze the modality in which the existing provisions of the laws in force, even the *de lege ferenda* proposals apply in the actual cases that made the object of litigations registered on the docket of law courts. An interpretation to the contrary would equivalate to an interference in the activity of the legal courts.

Thus, according to the fundamental law, the role of the Superior Council of Magistracy is to guarantee the independence of justice, a context in which the constitutional and legal provisions, respectively art. 133 and art. 134 of the Constitution of Romania, as republished, as well as art. 35 – 53 od Law no. 317/2004 on the Superior Council of Magistracy, as republished, subsequently amended and supplemented, stipulate that the area of competence of the Council does not include the approach of certain issues that are not related to the career of judges and prosecutors, respectively the organization of courts and prosecutor's offices, and that there are attributions also in the area of disciplinary liability of magistrates.

In compliance with the provisions of art. 126 par. (1) of the Constitution of Romania, as republished, the justice is carried out only by means of the High Court of Cassation and Justice and by means of the other law courts set by law, and according to art. 124 par. (3) of the fundamental law, the judges are independent and are subject only to the law.

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Consequently, the interpretation and application of the law for settling lawsuits on the docket of law courts are the exclusive attribute of the courts, the control of the legality and substantiation of the judgments being possible only by the means of appeal provided by the law.

4. Regarding the request to communicate information regarding the dismissal from office by retirement of judges Livia Doina Stanciu and Luminita-Livia Zglimbea, we mention the following:

On 13 June 2016 the application for retirement of judge *Livia Doina Stanciu* was registered at the Superior Council of Magistracy, together with the retirement decision no. 238457/14.04.2016 issued by the House of Pensions Sector 2 Bucharest. By the Decision of the Plenum of the Superior Council of Magistracy no. 702/16.06.2016, the Plenum proposed to the President of Romania the dismissal from office by retirement starting with 13.07.2016 of judge Livia Doina Stanciu, the president of the High Court of Cassation and Justice. By the Decree of the President of Romania no. 614/23.06.2016, published in the Official Gazette of Romania, Part. I, no. 468/23.06.2016, her dismissal from office, following retirement, starting with 13.07.2016 was ordered.

On 10.02.2016 the application for retirement of judge *Luminita-Livia Zglimbea* was registered at the Superior Council of Magistracy, together with the retirement decision no. 233958/17.12.2015 issued by the House of Pensions Sector 4 Bucharest. By the Decision of the Plenum of the Superior Council of Magistracy no. 159/16.02.2016, the Plenum proposed to the President of Romania the dismissal from office by retirement starting with 01.05.2016 of judge Luminita-Livia Zglimbea, a judge within the High Court of Cassation and Justice. By the Decree of the President of Romania no. 272/01.03.2016, published in the Official Gazette of Romania, Part. I, no. 158/01.03.2016, her dismissal from office, following retirement, starting with 01.05.2016 was ordered.

5. With respect to the request to communicate any other relevant information for preparing the Government defence in this case, the following must be mentioned:

At the level of the Superior Council of Magistracy, the practice for settling the requests for dismissal from office by retirement formulated by judges is to request in advance from the court data regarding the number of judgments which the respective judge still has to draft.

Thus, on 2 May 2017, the Commission no. 1 "*Legislation and interinstitutional cooperation*" within the Superior Council of Magistracy decided, among others, that in all the notes drawn up at the level of the Human Resources and Organization Division within the Superior Council of Magistracy, mention should be made regarding the number of judgments not yet motivated by the judge that requests the dismissal from office.

Further, it must also be mentioned, with relevance to the subject, ***the Constitutional Court Decision no. 33 of 23 January 2018 regarding the exception of unconstitutionality of the***

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provisions of the Law for the amendment and supplementation of Law no. 304/2004 on judicial organization [1]. We draw up below the relevant paragraphs:

"162.The judgment, stricto sensu, represents the final and act of disposition of the court that settles with res judicata authority the litigation between the parties (quod iudex sentit) or by means of which the court relieve itself of competence itself; lato sensu, however, the judgment is also aimed, beside the final judgment act (sentence, decision and in certain cases even conclusion), also at the measures ordered during the settlement of the case by means of the sitting conclusions. The court shall report below its analysis to the judgment, stricto sensu.

163. The meaning of art. 124 par. (1) of the Constitution is that the law courts that enforce justice, according to art. 126 par. (1) of the Constitution, must comply with the substantive or procedural law, which governs all the social relations subject to judgment. The constitutional provision lays down the principle of legality of the act of justice and must be correlated with the provision of art. 16 par. (2) of the Constitution that provides that "No one is above the law" and with the provision of art. 124 par. (3) of the Constitution, that provides other two constitutional principles: independence of the judge and its submission only to the law. These provisions substantiate the activity of the courts of law, on one hand, and set their position with respect to the law, on the other hand. It is unanimously accepted that the attributions of the judge imply the identification of the incident norm, the analysis of its content and a necessary application thereof to the judicial facts it established. Thus, in its activity of justice enforcement, the judge interprets the law, achieving a balance between its spirit and letter, between the drafting demands and the purpose pursued by the legislator, and applies it to the conflicting relation subject to judgment, settling it by means of a judgment, grounded on a legal reasoning, that sets the judicious solution applicable to the de facto situation that generated the conflict.

164. Considering this finality, the Constitution lays down the principle according to which "Justice is enforced in the name of the law", eliminating any other sources that could represent a ground for arbitrariness or injustice. Achieving justice cannot be a subjective act, pro causa, of the judge, but an objective, impartial one derived by relating the de facto situation to the law and by the judge submission to the law. Deviation from these rigors, based on subjectivity reasons, may be sanctioned by the means of appeal provided by the law against the judgment.

165. Enforcing justice, in the name of the law, entails that the act of justice arises from the legal norms and its enforcing power derives also from the law. In other words, the judgment represents an act of law enforcement for the settlement of a conflict of rights or interests, representing the modality to restore the rule of law and to strengthen the trust of the citizens in the authority of the state. The judgment, having res judicata authority, responds to the need for legal certainty, the parties being liable to submit to the mandatory effects of the jurisdictional act, without having the possibility to raise again the issue already established by the judgment. Thus, the judgment falls within the area of public authority acts, being invested with a specific efficiency by the constitutional normative order. Due to this fact, the judgment – indicating precisely the result of the judicial activity – undoubtedly represents the most important act of justice (see to this

[1] Published in the Official Gazette no. 146 of 15.02.2018

purpose also Decision no. 972 of 21 November 2012, published in the Official Gazette of Romania, Part I, no. 800 of 28 November 2012).

166. The settlement of a case is performed following the deliberation of the judge or judges that make up the panel and following the pronouncement of the judgment, after the debates have been concluded in the case.

167. In the deliberation only the members of the panel before which the debate has been held participate. The deliberation is performed in secret and represents the procedural act by which the panel checks and assesses the substantive and procedural evidence of the case, in view of adopting the solution that shall settle the conflict of law. The object of the deliberation is represented by the de facto and de jure aspects subject to judgment. In criminal law, according to art. 393 par. (2) and (3) of the Criminal Procedural Code, the deliberation carries on the existence of the deed and guilt of the defendant, on the establishment of the punishment, on the establishment of the educational measure or security measure, if necessary, as well as on the reduction of the duration of the preventive measures by deprivation of liberty and medical hospitalization, respectively on the reparation of the damage caused by the offence, on the preventive and assurance measures, on the material means of proof, legal costs, as well as on any other issue regarding the fair settlement of the case. In civil law, according to art. 397 par. (1) of the Civil Procedural Code, the court is liable to pronounce on all the claims subject to judgment, not being able to grant more or other than requested, if the law does not provide otherwise.

168. The adoption of the judgment (art. 394 of the Criminal Procedural Code and art. 398 of the Civil Procedural Code) must be the result of the agreement between the members of the panel and, in case the unanimity cannot be reached, the judgment is adopted by the majority of the members of the panel. In case the majority cannot be met, the judgment of the case is resumed in dissenting panel and, if during the deliberation the court considers that a certain circumstance must be clarified and the judicial inquiry or the debates must be resumed [art. 395 par. (1) of the Criminal Procedural Code] or finds it necessary to administer new evidence or clarifications (art. 400 of the Civil Procedural Code), it restores the case to the docket.

169. According to art. 406 – Drafting and signing the judgment based on the Criminal Procedural Code, the judgment is drafted by one of the judges that participated in the settlement of the case, within maximum 30 days as of the pronouncement and is signed by all the members of the panel and by the registrar. According to art. 426 - Drafting and signing the judgment based on the Civil Procedural Code, the judgment is drafted by the judge that settled the trial. In the hypothesis of the labor litigations in which the panel includes judicial assistants, based on art. 55 par. (1) of Law no. 304/2004, the president may appoint one of them to draft the judgment. In case one of the judges or judicial assistants is under minority upon the deliberation, it may draft its separate opinion, that shall include the presentation of the considerations, the proposed solution and its signature. Moreover, the judge that agrees with the solution, but due to different considerations, shall separately drat the concurring opinion. In all cases, the judgment shall be signed by the members of the panel and by the registrar. Thus, the two procedural norms provide the liability of the judge that settled the trial to draft the judgment, in the case of collegial panels.

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having the composition provided by the law, the drafting obligation being held by any of the members of the panel.

170. The judgment by means of which the court settles the merits of the case must include an introductory part, a presentation/considerations and the operative part. The presentation or the considerations of the judgment represent the motivation of the judgment. According to art. 403 par. (1) of the Criminal Procedural Code, the presentation must include among others the motivation of the solution with respect to the criminal side, by analyzing the evidence that served as basis for the settlement of the criminal side of the case and of the evidence that has been removed, and the motivation of the solution with respect to the civil side of the case, as well as the analysis of any de facto elements underlying the solution pronounced in the case and the indication of the legal grounds that justify the solutions pronounced in the case. In case of conviction, based on art. 403 par. (2) of the code, the presentation must include the deed, respectively each deed for which the court considers the defendant is guilty, the type and degree of guilt, the aggravating or mitigating circumstances, the state of relapse, the time deducted from the pronounced sentence and the acts from which the period that is to be deducted results. According to art. 425 par. (1) lett. b) of the Civil Procedural Code, the considerations of the judgment shall indicate the object of the claim and the short statements of the parties, the presentation of the de facto situation held by the court based on the evidence administered, the de facto and de jure grounds on which the solution is substantiated, indicating both the grounds for which the claims of the parties were admitted and the ones for which these were dismissed.

171. The motivation of a judgment must be clear and precise, must refer to the evidence administered in the case and be in compliance with it, must de facto and de jure respond to all the incident aspects in the case, must logically and convincingly lead to the solution in the operative part. The judgment of the court must include, as a guarantee of the fair nature of the judicial procedure and compliance with the right to defense of the parties, the de facto and de jure grounds that formed the opinion of the court, as well as the ones for which the claims/defense of the parties were dismissed. The considerations of the judgment, representing the explanation of the solution in the operative part, the necessary support thereof, are integrated into the operative part and also fall within the res judicata authority, in relation to the parts of the file and the object of the case.

172. In compliance with the jurisprudence of the European Court of Human Rights, the extent of the motivation depends on the diversity of the means which a party may raise in court, as well as on the legal provisions, customs, doctrine principles and different practices regarding the presentation and drafting of sentences and judgments in various states (Judgment of 15 February 2007, pronounced in Case Boldea versus Romania, paragraph 29). In order to respond to the requirements of the fair trial, the motivation should point out that the judge really examined the essential aspects presented.

173. The obligation to motivate the judgments represents a condition of the fair trial, a requirement of art. 21 par. (3) of the Constitution of Romania and art. 6 par. (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms. Thus, as held in the jurisprudence of the European Court of Human Rights, in Judgment of 28 April 2005, pronounced in Case Albina versus Romania, paragraph 30, the right to a fair trial, guaranteed by art. 6 paragraph 1 of the

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European Convention for the Protection of Human Rights and Fundamental Freedoms, "includes among others the right of the parties to present the observations they deem relevant for their case. Since the Convention is not intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective" (Judgment Artico versus Italy, 13 May 1980, series A, no. 37, p. 16, paragraph 33), this right can only be considered effective if these observations are really "heard", thus actually examined by the notified court. In other words, art. 6 implies especially due to the "court" the obligation to proceed to an actual examination of the means, arguments and evidence elements of the parties, at least to consider their relevance [Judgment Perez versus France (GC), Claim no. 47.287/99, paragraph 80, CEDH 2004-I, and Judgment van der Hurk versus Holland, of 19 April 1994, series A, no. 288, p. 19, paragraph 59]". Moreover, it is held in the practice of the European Court of Human Rights that the obligation of the court to respond by motivation to the arguments presented by the parties is justified, since "only by the pronouncement of a motivated judgment, a correct administration of justice may be achieved" (Judgment of 27 September 2011, pronounced in Case Hirvisaari versus Finland, paragraph 30).

174. In addition, in Judgment of 9 December 1994, pronounced in Case Ruiz Torija versus Spain, paragraph 29, the European court stated that "the question whether a court has breached its motivation obligation arising from art. 6 of the Convention can only be analyzed in the light of the circumstances of the case".

175. Finally, by Judgment of 7 March 2017, pronounced in the Case Cerovsek and Bozicnik versus Slovenia, the European Court held that the judges that did not participate in the trial cannot motivate and sign the judgment, because they cannot offer the guarantee of an adequate administration of the act of justice. "In the present case, the Court is called upon to determine whether the applicants had a fair trial despite the fact that the reasons for the verdicts, that is their conviction and sentence, were not given by the judge who had pronounced them but by other judges, who had not participated in the trial" (paragraph 38). "In addition, the Court is mindful of the two judges' lack of involvement in the evidence-gathering process. It observes that Judges D.K.M and M.B. did not participate in the trials in any way and drew up their grounds solely on the basis of the written case files" (paragraph 42). "As to the question whether Judge A.K.'s retirement, which was allegedly the reason for her failure to provide written grounds, gave rise to exceptional circumstances which justified a departure from the standard domestic procedure, the Court observes that the date of her retirement must have been known to Judge A.K. in advance. It should therefore in principle have been possible to take measures either for her to finish the applicants' cases alone or to involve another judge at an early stage in the proceedings. [...] The Court therefore cannot agree with the Government that there were good reasons to depart from the procedure to which the accused were entitled under domestic law. Furthermore, it is particularly striking that despite a statutory time-limit of thirty days, the written grounds were not provided for about three years after the pronouncement of the verdicts, during which time the case files were lost and had to be reconstituted" (paragraph 44). "In conclusion, the Court considers that the applicants' right to a fair trial was breached because of the failure of the judge who conducted their trial to provide written grounds for her verdict and because of the absence of any appropriate measures compensating for that deficiency" (paragraph 47).

176. Taking into account these arguments, the Constitutional Court retains that drafting the judgment, the final and act of disposition of the court that settles with res judicata authority the litigation between the parties, is the result of the deliberation activity, performed in secret, in

which only the judges that are members of the panel before which the debate was held participate. They are the only ones who can pronounce on the de facto and de jure aspects subject to judgment, settling them. Consequently, the law expressly provides that the judgment is drafted by one of the judges that participated in the settlement of the case. Moreover, the drafting of a judgment is inherently related to its motivation, this last aspect representing as indicated above an obligation of the judge of the case that arises from the provisions of art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. All these aspects represent guarantees of the right of the parties to a fair trial, judged by an independent and impartial court that is subject only to the law.

177. However, in case the judge that participated in the debates and deliberations is not the one who drafts/motivates the judgment, the guarantees established by the Constitution and by the law for the protection of the right to a fair trial, for assuring an impartial justice, enforced in the name of the law, remain declarative, ineffective and useless instruments. In other words, the entire regulation regarding the independence of justice, the criminal or civil procedural rules related to the settlement of cases, the need to perform a motivated act of justice, lacks legal effects if the judgment by means of which "the right is laid down" is drafted by a person that does not fulfill the capacity of judge of the case, which is therefore alien to the jurisdictional procedure, to the deliberative act that led to the adopted solution and implicitly to the act of justice in itself.

178. The motivation of the judgment is an act inherent to the position of judge of the case, represents the expression of its independence and cannot be transferred to a third party. The motivation does not represent only the premise for a good understanding of the judgment but also the guarantee of its acceptance by the justifier, that shall submit to the act of justice, being confident that it is not an arbitrary act. It represents an essential element of the judgment, a strong guarantee of the impartiality of the judge and of the quality of the act of justice, as well as a premise for the adequate enforcement by the higher court of the attributions of judicial control of the legality and substantiation. However, if the judgment were drafted/motivated by a person other than the judge of the case, the justifier would thus be deprived of such guarantees.

179. Consequently, the Court acknowledges that the criticized legal provisions that stipulate the appointment of certain persons, former judges that ceased their activity due to not-imputable reasons, for drawing up draft judgments are unconstitutional, being contrary to the provisions of art. 21 par. (3), art. 124 and art. 126 par. (1) of the Constitution."

Sincerely,

President,

Judge Simona Camelia Marcu

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