



Litigating change: training lawyers on the EU rule of law acquis – LightT

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TRAINING NEEDS ASSESSEMENT REPORT – [Romania]

Authors

Silvia Antoaneta Berbec, president of the Association Pro Refugiu, lawyer in the Bucharest Bar

Elena Lazar, associate professor PhD at the Faculty of Law of the University of Bucharest, lawyer in the Bucharest Bar



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1. INTRO AND RESEARCH METHODOLOGY

Association Pro Refugiu is a non-governmental organisation, established in 2011 in Bucharest, Romania, which acts to promote and protect human rights, access to justice and it provides legal, social and psychological assistance services for victims of crime.

This research report was developed within the project Litigating change: training lawyers on the EU rule of law acquis - LighT, which Association Pro Refugiu implements in partnership with the Center for European Constitutional Law (Greece), Kozminski University (Poland), Center for the Study of Democracy (Bulgaria), Center for Social Sciences, Hungarian Academy of Sciences Center of Excellence.

The objective of this report is to establish a clear evidence base on the training needs of Romanian lawyers on the topic of the rule of law, taking into account the national context.

The development of this report is based on the quantitative and qualitative research carried out in the period March 2023 - June 2023, combining the documentary analysis - carried out by collecting data from online sources, sending requests for information to the bars from different regions of the country - with data collected through interviews and focus group.

In order to collect data, requests for information were sent to 34 bar associations from different counties, 10 interviews were conducted with lawyers and 1 focus group with 7 participants, these being representatives of the bar associations, the National Institute for the Training of Lawyers, the National Institute of Magistracy, the Ombudsman institution and civil society organisations. The persons interviewed and the entities were selected to obtain concrete information from different regions of the country.

Although the interviews and requests for information did not cover the entire country, the representativeness and diversity of the sources constitute a strong indicator of the state of affairs at national level.

2. EXECUTIVE SUMMARY

There is insufficient training of the Romanian lawyers taking into account the key areas of the rule of law (justice reforms, independence of justice, anti-corruption, media freedom and pluralism, other institutional issues related to checks and balances). In the initial and continuous training of lawyers, there isn't a training module or programme that addresses in an in-depth manner all key areas linked to the rule of law topic. Certain aspects are addressed in a much too general way in the training of junior lawyers, and with regard to senior lawyers there is only a small, sporadic numbers of events that are organised by the bars in cooperation with the National Institute for the Training of Lawyers, civil society organisations and other stakeholders from the legal field.

From the information provided by the bars and the National Institute for the Training of Lawyers, it appears that junior lawyers have in the training programme within the institute, for a period of 2 years, certain subjects in which they study in addition to national legislation also aspects concerning European legislation and jurisprudence. For example, in the European law module, there are 3 disciplines that address aspects such as the principles of the rule of law. At the course European law and human rights are debated topics concerning the access to justice, the right to a fair trial, the freedom of expression. Comparing the data provided by these entities with those of the National Institute of Magistracy, we can conclude that more attention is paid to the training of judges and prosecutors on the rule of law topic. The National Institute of Magistracy constantly organises seminars and other events that are meant to meet the current needs of magistrates, the initial and continuing training addressing in detail a varied range of subjects, in addition to those of judicial practice, aspects related to the field of judicial management, ethics, judgecraft, the use of digital tools, the fight against extremism, violence and harassment of journalists.

3. NATIONAL CONTEXT

In Romania, over 30.000 lawyers are registered in the bars. Currently, a number of 42 legally established bar associations exist, one in each county, the Bucharest Bar having the largest number of lawyers (over 10.000 lawyers).

The National Institute for the Training of Lawyers has competencies in the initial and continuous training in order to ensure the qualified exercise of the professional competences of lawyers. In addition to the central structure in Bucharest, the institute has 6 territorial centers in the cities of Brasov, Cluj-Napoca, Craiova, Galati, Iasi and Timisoara. The Romanian legislation concerning the profession of lawyer consists of Law no. 51/1995 for the organisation and practice of the lawyer's profession¹, the Statute of lawyers², the Decision no. 268/17.06.2017, whereby the National Association of the Romanian Bars approved the Code of Ethics of Romanian lawyers³.

The independence of lawyers is necessary to ensure trust in the justice system. It is the essence of the profession of lawyer, being a fundamental principle linked to the organisation and exercise of this profession. According to the principle of independence, the lawyer must respect the law, the statute and the code of ethics. Lawyers must not be subjected to external pressures and interferences when exercising their profession. However, in practice there have been situations when professionals from the field of justice were subjected to pressure, an aspect that affected the independence of the profession and the justice system as a whole.

3.1 Key themes

For Romania, the key areas of the rule of law are: the justice system, the anti-corruption framework, media pluralism and other institutional issues related to checks and balances. Effective justice systems seem to be essential for upholding the rule of law. Independence, quality and efficiency constitute the defined parameters of an effective justice system, independent of the national legal system and tradition in which it is anchored.

¹ Law no. 51/1995 for the organization and practice of the lawyer's profession, available on <https://www.unbr.ro/law-for-the-organization-and-practice-of-the-lawyers-profession-no-51-1995/>

² Statute of lawyers, available on <https://www.unbr.ro/statutul-profesiei-de-avocat/>

³ Decision no. 268/17.06.2017, available on <https://www.unbr.ro/publicam-hotararea-consiliului-unbr-nr-26817-iunie-2017-prin-care-se-aproba-codul-deontologic-al-avocatului-roman-prevazut-in-anexa/>

Romania has made progress concerning the justice reform and the fight against high-level corruption, but further efforts need be made to ensure the pluralism and independence of the mass media, the need to have effective public consultations before the adoption of laws, according to the latest report on the rule of law in the European Union, published in 2022 by the European Commission⁴. Also, there is only an average level of perception regarding the independence of justice, among the general public.

As such, the fight against corruption is an essential element for ensuring the rule of law functioning in Romania, since corruption undermines the functioning of the state and of its authorities and represents a key enabler of organised crime. Effective anti-corruption frameworks, transparency and integrity in the exercise of state power can strengthen the trust in public authorities. Fighting corruption needs to be supported also by incentives that can be used to prevent, detect and sanction corruption.

It is true that Romania has a comprehensive national anti-corruption strategic framework based on the large participation of national actors, but ongoing uncertainty about amendments of the Criminal Code and Criminal Procedure Code and other laws, often throw the fight against corruption at risk. Institutional checks are at the core of the rule of law. The Criminal Code and Criminal Procedural code suffer changes too often, so the law would be unpredictable and thus not in accordance with ECHR standards and these changes are often in favour of offenders that commit financial crimes, adding difficulties to the fight against corruption.

Consequently, for an effective justice system, checks and balances rely on a transparent, accountable, and democratic process for enacting laws (laws that do not lack predictability or clarity), on the separation of powers, the constitutional and judicial review of laws, a transparent and high-quality public administration as well as effective independent authorities.

For example, through the decision of the Constitutional Court of Romania no. 297/2018⁵ published in the Official Gazette of Romania at 25.06.2018 on the exception of

⁴ European Commission, 2022 Rule of Law Report Country Chapter on the rule of law situation in Romania, available on https://commission.europa.eu/system/files/2022/07/52_1_194026_coun_chap_romania_en.pdf

⁵ Decision no. 297 of 26 April 2018 on the plea of unconstitutionality of the provisions of Article 155(1) of the Penal Code, Of. M. no 518 of 25 June 2018

unconstitutionality of the provisions of Article 155 paragraph 1 of the Criminal Code, the Court admitted the unconstitutionality exception invoked and found that the legislative solution which provided for interrupting the course of the limitation period of criminal liability by performing "any procedural act in question", in the provisions of Art. 155 para. (1) of the Criminal Code, is unconstitutional."

However, on 09.06.2022 the Decision of the Constitutional Court of Romania no.358/2022 on the exception of unconstitutionality of the provisions of art. 155 para.1 of the Criminal Code was published in the Official Gazette of Romania and from that moment has taken effect. Through this decision, the Court admitted the exception of unconstitutionality invoked and interpreted the effect of the Decision of the Constitutional Court of Romania no. 297/2018. According to the text of the CCR decision on the interruption of the statute of limitations for criminal liability, the "special statute of limitations" has ceased to exist since the publication of CCR Decision 297/2018 because "in the absence of active intervention by the legislature, which is mandatory under Article 147 of the Constitution, during the period between the date of publication of that decision and the entry into force of a legislative act clarifying the rule, by expressly regulating the cases capable of interrupting the limitation period for criminal liability, the active substance of the legislation does not contain any case allowing the interruption of the limitation period".

Parliament's failure to legislate in this area has given rise to a non-uniform practice, which has been observed since 2019

As such, through Decision no. 358/2022 of the Constitutional Court⁶, it has established that the provisions of Article 155 par. (1) of the Criminal Code are unconstitutional. The Court noted that, due to the legislator's silence, the identification of cases of interruption of the limitation period of criminal liability remained an operation carried out by the judicial body. As such, the lacking of clarity and predictability, has determined the application of the criticized provisions to similar situations in a different manner. Thus, the lack of intervention by the legislator has determined the need for the judicial body to replace it, which represents a violation of the provisions of Article 1 par. (3) and (5) of the

⁶ Decision no. 358 of 26 May 2022 on the plea of unconstitutionality of the provisions of Article 155(2) of the Penal Code, Of. M. no 565 of 9 June 2022

Constitution of Romania, which establishes the rule of law nature of the Romanian state, as well as the supremacy of the Constitution.

Following the decision of the Constitutional Court of Romania no.358/2022, the legislator intervened by means of EO no.71/2022⁷ published in the Official Gazette on 30.05.2022, by which the Romanian Government amended Article 155 paragraph 1 of the Criminal Code and established the following: the course of the limitation period of criminal liability is interrupted by the performance of any procedural act in the case which, according to the law, must be communicated to the suspect or defendant.

The European Commission, in the Report⁸ to the European Parliament and the Council of 22.11.2022 (COM (2022) 664 final), also held that *“the lack of a legislative response to the Constitutional Court ruling on the statute of limitation has had a major impact on ongoing cases. This is particularly true in the case of corruption cases (beyond corruption cases, according to an estimate provided by the specialised prosecution office handling terrorism and organised crime, in the area handled by DIICOT (Directorate for Investigating Organized Crime and Terrorism - note of the referring court) a total of 605 ongoing cases, with a total estimated financial damage of over €1 billion, would be affected. Estimates from the General Prosecutor’s office on other crimes were not available)”*.

In terms of freedom of expression, while it is recognised by the Constitution, and access to the journalistic profession at least in theory unrestricted, most issues stem from the implementation of the legal framework. For example, some of these issues seemed to be more pressing during the COVID-19 pandemic. The state of emergency established in Romania included a series of measures in the field, derived from the general obligation of public institutions and authorities, as well as private operators to contribute to the public information campaign on the measures adopted and the activities carried out at the national level, in connection with the COVID 19 pandemic. Article 54 para. (3), (4) and (5) of Decree no. 195/2020 established the obligation of hosting service providers and content providers that, at the motivated decision of the National Authority for Administration and Regulation in Communications (ANCOM), to immediately interrupt, with informing users, the transmission in an electronic communications network or the

⁷ EMERGENCY ORDINANCE no 71 of 30 May 2022 for amending Art. 155 para. (1) of Law no. 286/2009 on the Criminal Code, published in the Of. M. no 531 of 30 May 2022

⁸ COM (2022) 664 final

storage of content, by its elimination at source, if that content promotes fake news about the evolution of COVID-19 and protection and prevention measures. This provision from para. (3) and (4) concerns only media platforms, not traditional media. However, para. (2) concerns traditional media outlets, but the provision is vague. The power of ANCOM to interrupt the transmission is available only for hosting service and content providers. However, neither this decree, establishing the state of emergency nor the one regarding its extension (Decree no. 240/2020⁹) mentioned the freedom of expression among the rights whose exercise is to be restricted during that period, contrary to the primary regulatory norm (The constitution and GEO 1/1999) according to which the decree establishing the state of siege or the state of emergency must provide for the fundamental rights and freedoms whose exercise is restricted [art. 14 lit. d) of the Government Emergency Ordinance no. 1/1999¹⁰].

In terms of pressure put on judges, one of the questions concerns the need to misapply the solutions of the national Constitutional and Supreme Court, especially in the specific national context, in which non-compliance with their decisions can trigger the disciplinary liability of the judge of the case. The issue at stake was whether to apply a decision of the CJEU or a decision of the CCR or Supreme Court of Romania by the judges from lower courts and risk a disciplinary sanction.

Consequently, in 2022, Romania changed the legislation on the status of judges, under the pressure of the European Commission and attempting to apply the decisions of the CJEU, among others, expressly repealing the disciplinary offense that concerned the non-compliance with the decisions of the Constitutional Court or the decisions issued by the High Court of Cassation and Justice in the settlement of appeals in the interest of the law. As such, according to the Minister of Justice at that time, "to provide in a law that a judge is liable to disciplinary sanction if he does not apply a (binding) decision of the CCR is equivalent to providing that a judge is liable to disciplinary sanction if he does not apply an (equally binding) legal provision or other binding source of law (a decision of the Court

⁹ Decree no 195 of 16 March 2020 on the establishment of a state of emergency on the territory of Romania, Published in the Of. M. no 212 of 16 March 2020

¹⁰ Government Emergency Ordinance no. 1/1999, published in the Of. M. no. 22 of January 21, 1999

of Justice of the European Union or a decision of the European Court of Human Rights, for example)"¹¹.

The above is the normative and jurisprudential basis on which the subject was included in both the Rule of Law Report, published on 13 July 2022, which states: In view of the case law of the Constitutional Court and, in particular, the fact that failure to comply with Constitutional Court decisions constitutes a disciplinary offence under national law, a Romanian court referred a request for a preliminary ruling to the CJEU, in the context of which the Court of Justice ruled that national courts must be able to examine the compatibility of national provisions with Union law, regardless of whether or not they have been declared constitutional by a decision of the national Constitutional Court. The Court also stated that European Union law precludes any national rules or practices which would render a national judge liable to disciplinary action for failure to comply with decisions of the Constitutional Court which are contrary to European Union law. In order to respond to these concerns, in the context of the legislative procedure for drafting new laws in the field of justice, it has been proposed to repeal the provision on the disciplinary offence of disregarding a decision of the Constitutional Court (pages 28-29).

3.2 Key practical challenges

Analysing the Council of Bars and Law Societies of Europe Contribution for the 2022 and the 2023 Rule of Law Reports¹² written based on the information transmitted by the bars, it results that during this period there were no cases reported which would undermine the independence of the Romanian Bars and independence of lawyers, and there were no major developments in the justice system of Romania influencing the functioning and independence of the Bars and lawyers. However, in 2021 the National Association of the Romanian Bars (NARB) has underlined a series of problems that affected the independence of lawyers in Romania, and these aspects were notified to the Council of Bars and Law Societies of Europe (CCBE). In the CCBE Contribution for the Rule of Law

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¹² Council of Bars and Law Societies of Europe Contribution for the 2022 Rule of Law Report, CCBE Contribution for the 2023 Rule of Law Report, available on <https://www.ccbe.eu/actions/rule-of-law/>

Report 2021¹³ it is presented that the Romanian Bars have reported that lawyers have been associated with their clients leading to unjust attacks on lawyers in the performance of their professional duties. Bars informed the CCBE about the challenges concerning professional secrecy which are detrimental for the profession and for ensuring the fundamental rights of citizens. The NARB reported its concerns towards the serious violation of lawyers' rights in Romania. The NARB, through several widely publicised cases¹⁴, has revealed practices within the criminal proceedings which violate the free exercise of the legal profession and the principles of the rule of law. These practices were referring in particular to:

- Identification of lawyers with their clients and, by extension, with the political affiliations of their clients or the crimes they are accused of (usually in the media or more often in the eyes of the prosecutor- they tend to associate the lawyer with the political orientation of the client, especially when the client is a well-known political figure or another influential person).
- Accusing lawyers for “crimes of opinion”, for the legal reasoning they took into account in support of their client's interests and for actions performed within the normal exercise of the profession.
- Violation of professional secrecy by summoning lawyers to hearings as witnesses, in cases against their clients and by abusive searches of their professional premises, from where documents are taken whether those documents are related or not to the investigation.
- The violation of the principle of equality of arms using the practice that became systemic of transmitting the case file to the prosecution office in order for it to assess the possibility of formulating and motivating the appeal, in the context in which this right is not equally recognised for the defence; also, there are no guarantees regarding the preservation of the integrity of the evidence in the file.

¹³ Council of Bars and Law Societies of Europe Contribution for the Rule of Law Report 2021 available on https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/ROL/RoL_Position_papers/EN_RoL_20210326_CCBE-contribution-for-the-RoL-Report-2021.pdf

¹⁴ National Association of the Romanian Bars, *UNBR considers unacceptable the repression of a criminal nature against the lawyer for the consultations and support given as a representative*, 20 December 2020, available on <https://www.unbr.ro/unbr-considera-inacceptabila-represiunea-de-natura-penala-asupra-avocatului-pentru-consultatiile-si-sustinerile-facute-in-calitate-de-reprezentant-discrepanta-radicala-intre-cele-doua-hotarari-judec/>

- Accusing lawyers who have invoked final and irrevocable court decisions in the exercise of their profession before the authorities, decisions with which the prosecutors did not agree.
- The delayed reasoning of court decisions, so that the convicted person cannot exercise the remedies provided by law within a reasonable time and are prevented from appealing in front of international courts.

Legal aid is a vital tool to ensure respect for the fundamental right of access to justice and it is of paramount importance for the protection of citizens' rights in a democratic society. In the cases provided by the law¹⁵, the bar associations provide legal assistance in the following forms:

- In criminal cases, in which defence is mandatory according to the provisions of the Criminal Procedural Code.
- In any cases other than criminal ones, as a way of granting public judicial aid, under the conditions of the law.
- Judicial assistance through a lawyer, granted at the request of local public administration bodies.

In exceptional cases, if the rights of the person without material and financial means would be prejudiced, she/he can benefit from free legal assistance from lawyers.

Within each bar, there is a judicial assistance service department. From the data provided by the bar associations, in Romania there is no exact record of the number of lawyers who provided (free) legal assistance in cases concerning key-areas related to the rule of law. Within the legal assistance service department, there is only a record of lawyers registered according to the criteria provided in the registration form, namely criminal courts, civil and criminal cases, judicial cooperation in criminal matters, military courts.

¹⁵ Regulation – Framework for the organisation, operation and duties of legal assistance services of bar associations, available on <https://www.baroul-bucuresti.ro/stire/regulamentul-cadru-pentru-organizarea-functionarea-si-atributiile-serviciilor-de-asistenta-judiciara-ale-barourilor>

In practice, another problem lies in the fact that specialisation is not relevant since there aren't many lawyers specialized willing to do legal aid. Furthermore, legal aid beneficiaries cannot request the lawyer of their choice.

Based on discussions, interviews with lawyers, we managed to identify the fact they do not fully know or understand actually what the RoL litigation means or implies, so that they can make use of the available instruments to protect their rights and their client rights.

4. TRAINING NEEDS

For this research, the Association Pro Refugiu sent requests for information to a total of 34 bars associations. Information was provided by Bucharest Bar, Cluj Bar, Ilfov Bar, Harghita Bar and Sibiu Bar. For the period 2021-2023, the Bucharest, Ilfov and Sibiu bar associations did not organised events dedicated to lawyers on topics related to the rule of law, the judicial system, independence of justice, the fight against corruption, pluralism and freedom of mass-media, the role of lawyers in protecting the rule of law. Between 19-20.11.2022, the Harghita Bar organised in partnership with the Brasov Bar a conference attended by 49 lawyers, the event theme being "From legal controversies to good practices between magistrates and lawyers". The event was mainly focused on aspects of national legislation, but it also covered European law, with reference to the practice of the Court of Justice of the European Union and the European Court of Human Rights. The Cluj Bar states that although in the period 2021-2023 it did not organised events having as thematic the European Union law and jurisprudence, the rule of law, nevertheless, annually, in October, in partnership with the National Institute for the Training of Lawyers and in coordination with the National Association of the Romanian Bars, the European Lawyers Day is organised under the auspices of the CCBE.

Even if in report on the rule of law in the European Union, published in 2022 by the European Commission, it is underlined that there is an increase in acts of harassment and violence against Romanian journalists compared to previous years¹⁶, there is not a sufficient training for lawyers about how they can protect the rights of journalists and

¹⁶ European Commission, 2022 Rule of Law Report Country Chapter on the rule of law situation in Romania, page 23, available on https://commission.europa.eu/system/files/2022-07/52_1_194026_coun_chap_romania_en.pdf

other mass-media representatives, strategic lawsuits against public participation (SLAPP). Over the years there was no constant practice among the bar associations or the National Institute for the Training of Lawyers to organise trainings or other events on this topic for junior and/or senior lawyers. From publicly available information, it appears that in the spring of 2023, the Center for Independent Journalism organised three courses for lawyers who want to defend journalists, NGOs and human rights defenders in SLAPP litigation. At these trainings attended 55 lawyers from Bucharest Bar and other local bars associations. The three trainings were carried out within the PATFox project (Pioneering Anti-SLAPP Training for Freedom of Expression), co-financed by the European Commission. The trainings focused on the legislative framework in Romania and the anti-SLAPP legislative proposal at the European level, legal actions against public participation in Romania, as well as concrete recommendations for lawyers¹⁷.

4.1 Training needs at the introductory level

After analysing and assessing the interviews held with lawyer (from junior lawyers to experienced ones with more than 10 years of experience), we came to the conclusion that most of them do not know what the concept of rule of law is or what this concept even includes. Therefore, the first point to start with to our view, should consist in explaining what RoL is, what implies and how lawyers can contribute, what means and instruments they have to ensure the prevalence of the RoL and how to recognize when there are breaches of the rights protected by the rule of law.

Through the use of case studies, interactive exercises and experience sharing, participants will expand their rule of law knowledge and skills to be better equipped to face the challenges of effective rule of law.

4.2 Training needs at the advanced level

In terms of training needs of lawyers already engaged in RoL litigation, after analysing the interviews, the experienced lawyers, although they had knowledge what rule of law means and comprises, apart from invoking before national courts the jurisprudence of the

¹⁷ Center for Independent Journalism, The PATFox project: 55 lawyers trained to defend the press in SLAPP cases following trainings organized by the CIJ, available on <https://cji.ro/patfox-traininguri-organizate-de-cji/>

ECHR and CJEU, they did not know how to make use of other available instruments, such as complaints before ECHR or the use of preliminary questions. So a practical training on how litigation on RoL issues can be made use of also before European Courts, explaining them the procedure step by step.

The training of experienced lawyers should go beyond the traditional parameters of rule of law approaches, which prioritize the role of the state, the law and technical solutions and draw upon a multitude of complementary fields of practice to offer examples of creative approaches to promoting the rule of law and effectively litigate on it. It should enable practitioners to develop an effective system for monitoring and evaluating rule of law aspects and to build upon already existing core competencies.

4.3 Training needs of trainers

The Romanian trainers must enhance their skills and become more familiar with the innovative training methodologies, E tools and E-Learning. The initial and continuous training programmes that are used by the National Institute for Training of Lawyers and the local bars do not cover the rule of law topic in a comprehensive manner. Training of trainers on EU law is not a constant practice in Romania.

5. CONCLUSIONS

Within the local and national courses, trainings and other events organised by the Bar Associations and the National Institute for the Training of Lawyers, a more detailed approach to the key areas of the rule of law is necessary. The aspects of European law and jurisprudence must be deepened by the Romanian lawyers, because many times the discussions tend to be mostly about national legislation and practice. Apart from events for the training of lawyers, there should be implemented a continuous training of them by the Institute for the preparation and perfecting of lawyers. Although the subject of RoL is tackled tangentially during the classes of European Human Rights and EU law at the Institute, it is done only superficially. It is of utmost importance to be familiar with the European jurisprudence and to use it as an instrument in RoL litigation since national courts ensure that the rights and obligations provided under EU law are enforced

effectively. As re-affirmed by the CJEU, the very existence of effective judicial review to ensure compliance with EU law is of the essence for the rule of law. Furthermore, the case-law of the European Court of Human Rights also provides for key standards to be respected to safeguard judicial independence.

It should become a constant practice to organise trainings for lawyers on the subject of strategic lawsuits against public participation (SLAPP). Currently, this is not done by the bar associations or the National Institute for the Training of Lawyers. Initial and continuous training programmes and courses on this topic must be developed at national level, because it is not enough to implement only sporadic events. SLAPP are a growing threat to freedom of expression across the European Union. And Romania is not an exception.

Greater attention should be paid to the training of trainers. All trainers need to be constantly up-to-date with the recent novelties in the field of EU law and the jurisprudence of the European courts. All trainers should be willing to follow training themselves and to constantly share good practices with their peers in terms of planning, delivery and evaluation of judicial training for lawyers.

Annexes

- I. Interview guide (if differentiated from the common guide)
- II. Focus group guide (if differentiated from the common guide)