The notary, "out-of-court magistrate" with regard to the European judge of Human Rights

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Undoubtedly, the judgment of the European Court of Human Rights (ECtHR) *Ana Ionita v. Romania* of March 21st 2017 marked the beginning of the creation of a European status for notaries. The European judge quite clearly called the notary an "out-of-court magistrate". As a result, notaries are aligned with other judicial professions, yet their special status is recognised. This European recognition influences the notaries' right to freedom of expression which is at issue in this case, but it equally serves to underline the incongruity of the egregious "interprofessionality" swept in by the so-called "Macron's law", which implies that conformity to the European Convention of Human Rights is now called into question.

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A commentary on the *Ana Ionita v. Romania* judgment of March 21st 2017
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The close relationship between notaries[1] and judges is traditionally highlighted[2], but it should be noted that, since the law of *25 Ventôse an XI*, which established the organisation of modern notaries, their authority does not come from the judicial authority, as before, but by direct delegation of authority from the State[3]. However, the idea that the notary is an "out-of-court magistrate" is making a comeback, albeit in inverted commas to disguise its provocative audacity, due to an unusual digression by the post-Ceausescu Romania. In fact, the *Ana Ionita v. Romania* judgment of March 21st 2017, now definitive, of the European Court of Human Rights (ECtHR), is of interest to notaries of all the member states of the Council of Europe as it has largely disregarded the specific context of that case.

[1] Notaries in Romania are civil law notaries, like in France. The notaries are independent private professionals and impartial public office-holders, who have received a delegation of authority from the State to authenticate legal documents. They are subject to State supervision.
[2] J-F. Sagaut et M. Latina, *Déontologie notariale*, Defrénois, Lextenso Editions, 2ème éd., 2014, n°7.
[3] Ch.-B.-M. Toullier, *Le droit civil français suivant l'ordre du Code civil, vol. 6, suite du livre 3. Des différentes manières dont on acquiert la propriété. Titre III. Des contrats et obligations conventionnelles*, Warée oncle et Warée fils aîné (Paris), 1824-1828, p. 224, n°211, note 1.

At the beginning of 2006, a notary, Ms Ana Ionita, was subject to disciplinary sanctions for irregularities in her work and failure to pay professional tax. In July 2006, as she still had not paid the tax, she was suspended from her duties by order of the Ministry of Justice, until payment of the amounts due. After almost a month, she paid the sums claimed and she was reinstated. She was overwhelmed by a feeling of deep resentment for this painful professional experience. As a consequence, she put all her energy into making it known at both the judicial (by an unsuccessful legal action to invalidate the order of the Ministry of Justice) and public media level. This was not a good idea. In the heat of a televised debate, as she justified her intention to go on a hunger strike because of her disagreement with the professional tax levied by the UNNPR and the Chamber of Notaries of Bacau, of which she was a member, she made repeated personal attacks against the president of the Chamber of Notaries. She strongly accused him of being a member of the Nomenklatura, and guilty of all conceivable family, administrative and political abuses. After this embarrassing media showdown, at the beginning of 2007, the UNNPR ordered Ms Ionita's suspension from her duties as notary for a period of four months. After unsuccessful litigations before the national courts to challenge the decision, Ms Ana Ionita, whose wrath had not subsided, referred the matter to the ECtHR and complained that there had been a breach of her right to freedom of expression under Article 10 of the Convention. Acting unanimously, the fourth chamber of the ECtHR declared that her complaint was admissible, but after deliberation the ECtHR judged she was not victim of a breach of Article 10.

The ECtHR delivered a judgment in the Ana Ionita case regarding a conflict between the right to freedom of expression and the rights which, like the right to protect one's reputation[4], are guaranteed by Article 8 of the Convention, as are many judgments since that of the famous Grand Chamber of the ECtHR *Von Hannover v. Germany* (n°2) of 7 February 2012[5]. We could place this case in a long line of other cases. However, the main interest of the judgment would then be hidden, because the solution established in terms of conflict of fundamental rights in this very specific political case is determined by an unprecedented recognition of a European status for notaries.

The recognition of a European status for notaries (1) will be studied first and then its influence on relations between human rights and notaries (2).

1. The recognition of a European status for notaries

The notary already alerted the ECtHR to this situation in the *Estima Jorge v. Portugal* judgment of 21 April 1998 which stated the notarial deed is a writ of execution whose enforcement is, like a judgment, relevant to Article 6§1 of the Convention. Compared to the other judicial professions, it was like a poor cousin without a real European professional status. The *Ana Ionita v. Romania* judgment seems to be appropriate to fill this gap by aligning the notary profession with other judicial professions (A) and, at the same time, recognising its specific features (B).

A. The alignment with other judicial professions

The specific status of the bailiff was brought to the attention of the ECtHR through the *Pini and Bertani v. Romania* judgment of 22 June 2004[6]. In fact, this judgment recognised that, in working to ensure the proper administration of justice, they represent a vital component of the rule of law which is based on supremacy of law and the principle of legal certainty and therefore, the State must take the necessary measures to allow them to carry out their assignment and to prevent the

[4] *Cf.* judgment *Petrina v. Romania* of 14 October 2008.
[5] Req. n°40660/08.
[6] Req. n°78028/01.

loss of the guaranties offered to the public during the judicial phase[7]. Public confidence in the proper administration of justice, without which there is no real rule of law, is the implied criterion of the valuation of the bailiffs' profession. With regard to lawyers, there is no doubt, since the *Casado Coca v. Spain* case of 24 February 1994[8], that they hold a special status which gives them a central position in the administration of justice as intermediaries between the public and the courts and means that they have a key role in ensuring public confidence in the courts. Explicitly taken into account by the judge in order to justify the special European status of the lawyers' profession, this public confidence, without which there is no rule of law or democratic society, relied even more on judges. This is the restatement of the Grand Chamber judgment in the *Baka v. Hungary* case of 23 June 2016[9]. Indeed, the Court reiterates[10] that it has on many occasions emphasised the special role in society of the judiciary which, as the guarantor of justice, a fundamental value in a state governed by the rule of law, must enjoy public confidence if it is to be successful in carrying out its duties[11]. It reiterates that, for this reason, judicial authorities, in their adjudicatory function, are required to exercise maximum discretion with regard to the cases with which they deal with in order to preserve their image as impartial judges. Like previous judgments, the *Baka* case attempts to reconcile the requirements inherent to this specific professional status with the right to freedom of expression in order to preserve this freedom for the judges.

The *Ana Ionita* case is also related to the exercise of the right to freedom of expression, so it is not surprising that it gave the Strasbourg Court the opportunity to make this statement about the professional status of notaries. Thus, in paragraph 47 of the judgment of March 21st 2017, it asserts "… although they are independent professionals, notaries have official powers as a public authority granted by the State, such powers confer to the notarial deeds they draw up a guarantee of its authenticity, (so…) it could be necessary to protect the professional order from damaging attacks to preserve public confidence over them". It's important to note that the Court grants a key role to public confidence to recognise the status of the judicial profession. For the ECtHR, public confidence should be common to all judicial professions including notaries. Nonetheless, the original contribution of the judgment *Ana Ionita v. Romania* highlights the difference between the profession of public notary and the other judicial professions.

B. The specific nature of the notarial profession

In paragraph 47 and undoubtedly essential, the Court gives notification, closely linked with the requirements of the preservation of the public confidence in notaries, that rules for their conduct arise clearly from their specific role as "out-of-court magistrates", an expression in inverted commas, but explicit and completely reflecting their hybrid nature as independent professionals and public notaries. This reference to notaries as "out-of-court magistrates" marked a significant turning point in the jurisprudence of the ECtHR, compared to the previous decisions which had already ruled on the organization of the profession. These pertinent decisions were *O.V.R. v. Russia* of 3 April 2001 and *National Notaries Chamber v. Albania* of 6 May 2008[12]. Recognizing that the object of the Order of Notaries is to regulate and promote the profession, the ECtHR stated that it was outside the scope of Article 11 of the Convention, because, as established by legislation, it remains part of the structures of the State, in remarkable contrast to trade unions. As can be seen, these decisions were related more to the organization of the profession than to the status of the notary. They transferred to the Order of Notaries the solution relevant to all

[7] §§183 and 187.
[8] Req. n°15450/89.
[9] Req. 20261/12.
[10] §164.
[11] *Cf. Morice v. France*, Req. n°29369/10, Gr. Ch. 23 April 2015 §128.
[12] *National Notaries Chamber v. Albania*, déc., n°17029/05, 6 May 2008.

professional orders exercising important public law functions for the protection of the public and they avoided all alignment of the notary's status with judges' status.

Now, specifically referred to as "out-of-court magistrate", by the European human rights judge, the notary has a different status from that of the lawyer, the bailiff and the judge. Unlike notaries, lawyers are not public officers, they do not have official powers as a public authority received from the State and no jurists would declare them judge of anything. The bailiffs are indeed public officers, but they only take action to enforce the judgment of the Courts in general and the notarial deeds in particular (both are enforceable titles). As "out-of-court magistrates", the notaries are less likely to be considered judges, compared in France to the administrative or judicial judges, but more likely than in the Court of Justice of the European Union (CJEU) which recently stated in its *Leopoldine Gertraud Piringer* judgment of 9 March 2017, and this should be likened to the *Ana Ionita v. Romania* judgment.

The CJEU has just stated, for the first time, that Article 56 of the Treaty on the Functioning of the European Union (TFEU), under which freedom to provide services is enshrined, doesn't preclude legislation of a Member State under which authentication of signatures appended to the instruments necessary for the creation or transfer of rights to property is reserved to notaries, and consequently excluding the possibility of recognition in that Member State of such authentication carried out, in accordance with his or her national law, by a lawyer established in another Member State[13]. More specifically, the judgment stated that national law is definitively a restriction on the freedom to provide services[14], but such a restriction is justified by an overriding reason in the public interest. As such, it first notes that "the land register is of crucial importance especially in certain Member States which operate a system of civil-law notaries, particularly in property transactions", and also "maintaining the land register thus constitutes an essential component of the preventive administration of justice in the sense that it seeks to ensure proper application of the law and legal certainty of documents concluded between individuals, which are matters coming within the scope of the tasks and responsibilities of the State". Second, referring to the terms of its famous judgment of 24 May 2011[15], the court notes that reservation of authentication of signatures appended to the instruments necessary filed at the land registry serves the public interest, in the same way notarial activities pursue objectives in the public interest. Furthermore, it justifies the reservation of such activity to notaries by notably highlighting that they constitute "a particular category of professionals in which there is public confidence and over which the State exercises particular control". The CJEU does not state notaries are judges[16], nor "out-of-court magistrates"[17], because it thinks in terms of activities much more than status. But, by characterizing their activities from the point of view of public confidence, which it linked before to the impartiality of the notary[18], and the preventive administration of justice which is not conceivable without a guarantee of its authenticity, the CJEU used the main components which permitted the ECtHR to qualify notaries as "out-of-court magistrates". The two judgments rendered in Luxembourg and Strasbourg, within a few days of each other, do not conflict, but exhibit a difference of degree. This is another reason to study the impact of recognising the European status on relations between human rights and public notaries.

2. The impact of recognising the European status on the relation between human rights and notaries

[13] C. Nourissat, *Quand la Cour de justice reconnaît les activités réservées des notaires…*, Def., 2017, n°10, p. 649, n°7.
[14] CJUE, 9 mars 2017, *aff.* n°C-342/15, *Léopoldine Gertraud Piringer*, pt 52.
[15] *Ibid.,* pt 60 qui reprend CJUE, 24 mai 2011, *aff.* n°C-53/08, *Commission/Autriche*, pt 96.
[16] C. Nourissat, *Le notaire n'est pas une juridiction au sens des règlements européens de coopération judiciaire civile*, JCP éd. N, 2017, n°21, p. 33.
[17] C. Nourissat, *Quand la Cour de justice reconnaît les activités réservées des notaires…*, *op.cit.*, n°8.
[18] CJUE, 1er octobre 2015, *aff.* n°C-32/14, *ERSTE Bank*, pt 54. The judgment also refers to the preventive role of the notary, not. pt 55 et 57, v. M. Combet, *Les activités notariales et les clauses abusives*, JCP éd. N, 2016, n°1, p. 37 et M. Roccati, *Justice et clauses abusives : le rôle du notaire en question (européenne)*, www.gdr-elsj.eu, 23 oct. 2015.

Human rights which can be affected by the recognition of an "out-of-court magistrate" status are those which can be exercised by a notary (A) and those the public seek to exercise before him (B).

A. The notary's human rights

As public confidence in a good administration of justice is the very heart of the judicial professions' European status, it is mainly the exercise of the right to freedom of expression of its members that is quite specific. In fact, public confidence would be more dangerously affected if the judicial professions could express themselves as freely as journalists, or in fact anybody. Despite the lenient statements expressed by the famous *Kyprianou v. Chypre* of 15 December 2005[19] and *Mor v. France* of 15 December 2011[20] judgments or more recently *Morice v. France* of 23 April 2015[21], a lawyer has to remember that, when he expresses himself in the courtroom or through the media, the dignity and majesty of justice are at stake (Cf. *Rodriguez Ravelo v. Spain* of 12 January 2016[22]). Regarding judges, it has been established since the Grand Chamber's judgment *Wille v. Liechtenstein* of 20 October 1999[23] that it can be expected of him that he should show restraint in exercising his freedom of expression in cases where the authority and impartiality of the judicial power are likely to be called into question. The term "out-of-court magistrate" has also been adopted to restrain the freedom of expression for notaries. Above all, the judgment *Ana Ionita v. Romania* of 31 March 2017 refers to the notary's freedom of speech. Thus, the limits to notaries' freedom of speech have to be carefully considered.

In this respect, it should be particularly noted that the Court, like for lawyers and judges, does not sacrifice the freedom of speech of the notary on the altar of public confidence. In fact, it admits "with satisfaction that national jurisdictions had balanced the interests (*Ana Ionita*'s and Order of notaries' interests), without imposing on the claimant an absolute ban to criticize notarial activities"[24]. As a matter of principle, the freedom of expression of the notary is protected, so it has to be identified in what way it can be limited by specific duties of the "out-of-court magistrate". To succeed, it has to refer to the structure of *Ana Ionita*'s judgment which, very classically, put the disciplinary sanction imposed to the indiscrete member of the notary chamber of Bacau to the three-steps test of legality, legitimacy and necessity in a democratic society.

In recognising the suspension from her duties as notary for a period of four months ruled by the Romanian law (n°36/1995) and the Romanian ethical code of public notaries, the Strasbourg's Court acknowledged undisputably that the interference in the right of freedom of expression of the claimant was legal. This first point is not a matter giving rise to discussions, except to emphasise that, in France, such a disciplinary sanction would satisfy the legacy test. In fact, it is governed by Article 32 et seq. of the writ n°45-1418 of 28th June 1945 on the discipline of notaries and some ministerial officiers. There will be more to say about the legitimacy test.

The Court considered that the interference pursued, "with no doubt", one of the objectives listed in Article 10 §2 of the Convention, namely "the protection of reputation or rights of others". "Others" were in this case the public notaries' national order, that is to say a legal entity whose reputation is protected on the grounds of freedom of expression as a natural person since the judgment *Uj v. Hungary* of 19 July 2011[25]. Thus, there is nothing original to emphasize here.

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[19] Req. n°73797/01.
[20] Req. n°28198/09.
[21] Op. cit.
[22] Req. n°48074/10.
[23] Req. n°28396/95.
[24] §45.
[25] Req. n°23954/10.

Suffice it to say that the right to freedom of expression of notaries could be of course legitimately limited to protect the reputation or rights of a fellow colleague. However, it has to be underlined that the Court believed it was necessary to add that the disputed interference in *Ana Ionita*'s right of freedom of expression pursued the legitimate objective to protect public confidence towards the professional order's executive bodies. This point is unusual. It adds the legitimate ground of protection of public confidence to the listing of Article 10 §2, in contradiction to the rule, referred to in §37, that this listing must be strictly interpreted. Perhaps, it is an exception in order to provide a better legal framework for freedom of expression for the members of judicial professions by the introduction of an autonomous exception. Perhaps, and more probably, it is a derivation of the guaranty of the "authority and impartiality of the judiciary", which ended the listing of Article 10§2, that the Court would not be comfortable to use in the case of the "out-of-court magistrate".

Lastly, with regard to the test of necessity in a democratic society, the Court distinguishes between the control of proportionality itself and the relevant and sufficient reasons put forward by the domestic authorities[26] in support of the interference complained of. Regarding the proportionality and strictly speaking, in order to admit that the Romanian authorities have struck a fair balance between one's right to freedom of expression and the right to reputation of others', the Court observed primarily that the four months' sanction of suspension was not the most severe because national law allows the exclusion of the profession.

In order to make sure that the reasons put forward by the domestic authorities are relevant and sufficient, the Court developed a denser argument which doesn't refer exclusively to paragraph 47, a keystone of the *Ana Ionita*'s judgment already examined from all perspectives. Three others components are used to support the relevant and sufficient reasons put forward to justify the sanction.

First, the Court considers that Ana Ionita's comments are not relevant to any public interest debate regarding general interest questions about the order of notaries. This assertion exercises decisive influence, because in case of public debate interests, it leaves little room for limitations to freedom of expression (cf in particular the Grand Chamber's judgment *Verein Gegen Tierfabriken Schweiz v. Switzerland* n°2 of 30 June 2009[27]). Nevertheless, it is surprising because the question of professional tax that Ms Ana Ionita spoke about on the television show was linked with the organisation of the profession which is connected to the general interest.

Second, the Court gives due attention to the severity and the tone of the unsubstantiated personal attacks aimed at the executives of the notaries' order, to infer that they should have been more factually based than is usually required for a value judgment which, unlike the facts ascribed to any individual, cannot be precisely proven (on the main difference between facts and value judgments, v. judgment *De Haes and Gisels v. Belgium* of 24 February 1997[28]). The consequence of this observation is to hide the very specific context in which *Ana Ionita*'s case developed. The claimant argued against the president of the notaries' chamber that he was strongly involved in the functioning of the totalitarian regime which took place in Romania for 45 years. Yet, the question, known as "lustration", of the exclusion from some professions of overzealous collaborators in the old communist regimes, has given rise to a large and paradoxical body of case law in the ECtHR[29]. Undoubtedly, the claimant complained in such an expedient way, but perhaps the question regarding the president of the notaries' chamber was not so absurd

[26] Cf. F. Sudre, JCP 2017, éd. G, 289.
[27] Req. n°32772/02.
[28] Req. n°19983/92.
[29] Cf. Sudre and alii, *Les grands arrêts de la Cour européenne des Droits de l'Homme*, PUF, 8ème éd., 2017, p. 514.

in the interest of the profession and was intended to advise the other European member States where the risk of access to the profession of old communist activists is very limited…

Third, in order to sustain the relevant and sufficient reasons put forward to justify the sanction, the Court emphasized that the serious charges had been formulated during a televised show whose effects are more immediate and stronger than the written press. Undoubtedly, in comparison with the famous *Fuentes Bobo v. Spain* judgment of 29 February 2000[30], it is a particularly unfavourable development for the freedom of expression of the notaries who, in fact, rarely express themselves on air on television and radio shows… In this judgment, the Court admitted that it has to be more lenient towards the comments made during a vigorous live debate with journalists. Unless Ms Ionita had thought through the personal attacks against her adversaries before her participation in the televised show (Comp. judgment *De Diego Nafria v. Spain* of 14 March 2002[31]), the right to a more spontaneous freedom of expression intended to take into account the particular context of the speech in the audiovisual media seems to have been refused for the notary.

Thus, the new European rank of "out-of-court magistrate" ascribed to the notary has involved a clear restraint in the exercise of one's right to freedom of expression, however protected this may be. It has to be verified whether a similar negative influence is liable to occur towards other human rights derived from the Convention to the notary (i.e. right to a fair trial provided by Article 6§1 of the Convention, protection of property provided by Article 1 of the Protocol of the Convention…). But, as they are not relevant in *Ana Ionita*'s case, the examination of these points has been delayed, just to focus on the right to freedom of expression. The conclusion cannot be that these other rights of the notaries are less important or that there is no restraint in their exercise.

B. The human rights exercised before the notary

While not pretending to assimilate the notaries to the judicial or administrative judges, it remains true that characterizing the notaries as "out-of-court magistrates" may give rise, by the transposition of the right to a fair trial under Article 6 of the Convention, to a "right to a fair notary", as well as a "right of access to a notary". The consequence of such an alignment of the preventive "out-of-court magistrates" with the judges has already been examined in a previous article[32]. But, as the ECtHR now recognizes the specific nature of the notary's profession, few clarifications are allowed to be made to add to these last observations. Obviously, the recognition of "out-of-court magistrates" by the ECtHR, by affording a right to a fair notary which involves the respect of the independency and impartiality of the notary, represents a European barrier to the creeping development of the "single law profession" which is emerging as lawyers merge with other law professions. The reference to "out-of-court magistrates" highlights very effectively the incompatibility between the two professions[33]. How is it possible to put lawyers and "out-of-court magistrates" together in the same profession? The impartiality is vital for notaries[34], as it is for judges, while the lawyer has to defend the interests of his client : the lawyer is "logically

[30] Req. 39293/98.
[31] Req. n°46833/99.
[32] J-P. Marguénaud, C. Dauchez and B. Dauchez, *La légitimation du notariat par le droit européen des droits de l'Homme*, JCP éd. N, 2017, n°18, p. 51, Etude 1147, n°14 et s. A translation of this article is available (https://hal.archives-ouvertes.fr/hal-01483911/document, *The legitimation of civil law notaries by the law of the European convention on human rights*).
[33] On the incompatibility of the two professions in Europe (except in Germany), J. Pertek, *La prestation de services ne permet pas aux avocats d'empiéter sur une activité légitimement réservée aux notaires*, JCP éd. G, 2017, n°16, p. 774.
[34] J.-Fr. Sagaut et M. Latina, *op. cit.,* p. 50, n°109.

unfair"[35]. As has already been illustrated in an adage inspired from the *Consorts Richet et le Ber v. France* judgment of 18 November 2010: "One cannot be both judge and judged"[36].

The recognition of "out-of-court magistrates" requires a strong review of the pluri-professionality introduced by the law n°2015-990 of 6 August 2015, called "Macron's law", and the n°2016-394 writ of 31 March 2016, implemented by three decrees of 5 May 2017. It has already led to the creation of some pluri-professional companies gathering several legal and accounting professions together. So, lawyers and notaries can now practice their professions together in the same company. But, the pluri-professionality has to respect the impartiality of the notary[37], because the applicable rules of ethics of each professional in the same structure must be kept in place[38]. So, after the *Ana Ionita v. Romania* judgment of 21 March 2017, there are legitimate grounds for questioning the validity of notarial deeds written by a notary for a client of his lawyer partner. The notary, if he accepted to write such a deed, would certainly be placed in a situation "which might suggest that his neutrality has been undermined"[39].

Pursuant to Article 6 §1 of the Convention of the ECtHR, the Court of cassation (French Supreme Court) has recently[40] demonstrated its attachment to the impartiality of the bailiff, public officers in charge of the enforcement of the decisions of the judges and the notarial deeds. The Court of cassation overturned a decision which had rejected a plea for annulment of a writ delivered on behalf of the bailiff's chamber by a bailiff who was also treasurer and member of the board in charge of the asset management and the financial interests of the chamber, because these qualities "cast reasonable doubt upon his impartiality and his independence". The writ delivered on behalf of the chamber by a bailiff, who is "associated" to its activities, is also void. It should be the same for a notarial deed written by a notary on behalf of the client of his associate. Moreover, under "Macron's law", there are serious reasons to doubt the conformity of the pluri-professional companies, because when several notaries are partners in the same company, the legal person is integrated into the profession : it is the public officer, holder of the office, and practices itself the profession ; the natural persons who are partners are not much more than "under-officers". A notary, legal person, can be at the same time, under the new "Macron's law", a lawyer… This is a serious contradiction. There is now a situation that leads to confusion over the impartiality of the notary and undermines public confidence in the profession. As such, this inter-professionality allows for the creation of "a single profession" by an alternative path through a legal person.

Therefore, banks or insurance companies should never be allowed to take shares in "out-of-law magistrates" companies. No jurist could imagine that banks and insurances could take shares in State courts. It should be the same for public notary companies whose independence and impartiality must be protected. The power of the State must be separate from financial interests. Remember that notarial deeds are enforceable. So, it is essential that automatically enforceable notarial deeds are written by an impartial public officer, like a judgment which is rendered by an impartial judge. Generally speaking, the protection of impartiality is the main stake in order to preserve public confidence in the profession and the State represented by the notary. At the present time, when the restoration of confidence in public action is currently under discussion, it is worth recalling that public confidence in the proper administration of justice, curative and

[35] B. Beignier, B. Blanchard et J. Villacèque, *Droit et déontologie de la profession d'avocat*, LGDJ, 2008, n°159, p. 205.
[36] J.-P. Marguénaud et B. Dauchez, *Nul ne peut être notaire et partie : émergence d'un nouvel adage européen. Réflexions autour de CEDH, 18 nov. 2010*, JCP éd. N, 2011, n°27, 1209.
[37] C. Dauchez, *Le collaborateur du notaire, acteur du nouvel ordre économique notarial*, in Dossier *Quel avenir pour le notariat après la loi Macron,* colloque, JCP éd. N, 2017, n°10, 1128, n°10-11.
[38] Cons. const., 5 août 2015, n°2015-715 DC, § 118 à 125.
[39] J.-Fr. Sagaut et M. Latina, *op. cit*.
[40] *Cass. 1ère civ., 1er juin 2016, n°15-11.417 : JurisData n°2016-010718.*

preventive, relies on the impartiality of judges and "out-of-court magistrates" made available to the public by the State.

In addition to the right to a fair notary, which could be invoked by citizens, the *Ana Ionita v. Romania* judgment suggests a potential alignment of the internal organisation of the profession with the one currently retained for the judges. It may be questioned if the notary profession no longer takes the Superior Council of the Magistracy (CSM) as an example, which decided to integrate some members outside of the profession in the disciplinary bodies, for example, judges to settle the disputes between notaries and their clients or between notaries. The profession could also be inspired by the initiative taken in 2006 by the CSM[41] to tackle the ongoing criticism of corporatism and to preventively inform the judges, to publish a compilation of all the disciplinary decisions while the disciplinary procedure was until this time secret. This initiative could have damaged the profession because the public and the media could have drawn some negative general consequences from particular cases. It did not arise and the initiative has even been welcomed. The corporatism criticism is a current one towards the notary profession. It is to be stepped up with the progress in transparency requirement in civil society. Also, the publication in a collection of the disciplinary decisions rendered against the notaries, as well as the decisions taken by the notaries' chamber, as authority of conciliation, in regard to the relation between the notaries and between the notaries and their clients, could contribute to promote the ethical requirements of the profession. The notary's status as an independent and impartial "out-of-court magistrate" certainly justifies the closure of the profession to other interests, but if the notaries are heard on that point, they should insist on the ethical opening of the profession.

Public confidence towards the profession could only be reinforced in this way, especially as this opening would be spontaneous and would not be made under the pressure of the public authorities. The French notaries would show that the profession is faithful to the trust given to it by the ECtHR in its *Ana Ionita v. Romania* judgment of 21 March 2017, which recognises them as "out-of-court magistrates".

[41] M. Le Pogam, *Le conseil supérieur de la magistrature*, LexisNexis, 2014, n°72.