COURT OF APPEAL BUCHAREST

SECTION II CRIMINAL

File no. 2485/300/2011

Hearing 07.03.2019

MADAM PRESIDENT,

The undersigned **OLĂNEANU NICOLAE CRISTINEL**, with residence in Bucharest, Calea Moşilor no.290, block 36, entrance 1, floor 4, apt. 10, district 2, and the correspondence address in the locality Voluntari, Intrarea Vârtejului no. 3 G, county Ilfov, în calitate de **appellant –** ***aggrieved person*** constituted ***civil party*** – In the case that forms the object of the above mentioned file, I formulate the following

WRITTEN CONCLUSIONS

regarding the merits and admissibility of the appeal declared against the criminal sentence no. 1193 of 23.12.2013, pronounced by the Court of Sector 2 Bucharest in the aforementioned file, and which aims at the wrongful acquittal of the defendants TURDEAN LIVIU and PÂNTEA PETRU IACOB for the crime of abuse while on duty, with the consequence of not resolving the civil action and the dismissal of the request to restore the situation prior to committing this offense.

Considering the reasons for appeal formulated in writing, the oral and written conclusions presented during the debates of 2015, after which the case was put back on the dockets, as well as in the report of the additional evidence administered by the court disposition after the resumption of the judicial investigation (financial accounting expertise and supplement to the expert report, witness statements) and the oral conclusions made in the meeting of 20.02.2019, we ask you to find that the appeal is fully founded and, as a consequence, that the decision of the substantive court is illegal and

unfounded by which the defendants were acquitted of the crime of abuse of office.

In support of these conclusions, please consider the following factual and legal considerations, which are essential for the legal and grounded settlement of the present case:

1. **<u>Concerning the criminal side of the case</u>**

All the evidence administered in this file, including those administered after the case has been brought back on the dockets, in an objective and corroborated evaluation, prove, above all doubt, the existence of the facts and guilt of the defendants TURDEAN LIVIU and PĂNTEA PETRU IACOB, which are related to the essentials features of the crime of abuse while on duty committed against the aggrieved person OLĂNEANU NICOLAE CRISTINEL.

1.1. Concerning the objective side of the crime of abuse while on duty

1.1.1. In this respect, the evidence administered in this case proves, without any denial, that the defendants Turdean Liviu and Pântea Petru Iacob constantly violated the provisions of art. 211 and art. 212 (in the form in force until 2004), respectively art. 216 and 217 (in the current form) of Law no. 31/1990, republ., but also art. 29 paragraph (4) of the SECOND DIRECTIVE of the Council of Europe of December 1976, which essentially provide for the following:

- The general meeting will be able to give shareholders the right to subscribe to the new shares only for grounded reasons.
- the convening of AGEA must include the reasons for the increase of the share capital, the persons to be assigned the new shares, the issuance value of the shares and the basis for fixing it
- The Board of Directors will make available to the extraordinary general meeting of shareholders a written report, specifying the reasons for limiting the right of preference or lifting the subscription right and explaining how to determine the issue value of the shares.
- "**The right of preemption cannot be limited or withdrawn by the statute or the constitutive act.** However, the General Assembly may decide on this. The

administrative or management body must submit to this meeting a written report, **motivating the limitation or withdrawal of the preemption right, justifying the proposed issue price** " (art. 29 paragraph 4 of the SECOND DIRECTIVE of the Council of Europe)

This conclusion, with undoubted value, is justified by the fact that in none of the minutes of the **Extraordinary General Meeting of Shareholders (EGMS) for the increase of the share capital from 2002-2009, the written report of the directors was not mentioned and was not submitted to the shareholders, that would show the reasons for limiting the right of ownership nor the justification for the issue price of the shares corresponding to each share capital increase, and is supported also by the fact that all the share capital increases were made by issuing shares at the nominal value of the shares from the date of privatization of the company (2.5 lei).**

The violation of these legal norms was also found by several judgments of the courts, of which we mention, as an example:

- Decision no. 522 / 06.11.2007 of the Bucharest Court of Appeal, which states the illegality of the right to subscribe, because "the right of subscription of shares has been violated for the increase of the registered capital established in favor of the shareholders of art. 216 of the same law "
- Decision no. 2390 / 02.07.2008 of the High Court of Cassation and Justice, by which, in relation to the limitation and violation of the preemption right, it was stated that: "By modifying the shareholding structure, under the conditions in which the accounting value of a share was more than 15 times higher than the nominal value, without the issuance premium, unbalanced the reports between the shareholders who could exert their preemption right even those who had blocked it''

Sentence no. 53 / 01.07.2009 of the Cluj Special Court, irrevocable by decision 36/2010 of the Galati Court of Appeal stating that "another reason for absolute nullity of the contested decisions, considered as founded by the court, is the violation of the imperative provisions of art. 216 and 217 of Law 31/1990. The applicant correctly notified that the provision in the LSC is reiterated in art. 29 paragraph 4 of the Second Council Directive of December 13, 1976, which states that <The right of pre-emption cannot be limited or withdrawn by statute or the instrument of consignment, the administrative body or the management must submit to this meeting a written report motivating the limitation or withdrawal of the right of preemption, justifying the proposed issue price>. In this case, the increase of capital challenged was done under the conditions of limiting the right of preference of the shareholders (there being a

higher threshold of 280,000 shares that could be held by a shareholder) without the imperative conditions and of the art. 217 of the LSC being fulfilled"

It is wrong / not true that the reason for the successive increases with the non-observance of the law was the capitalization of Farmec because they made increases with USD 0.5 per share and after 6 months they received dividends of approximately USD 1.5 per share corresponding to the shares that were issued recently failing to comply with the law. At the date of privatization, the issued shares were 2.5 lei, respectively about 16 USD per share.

In fact, even the substantive court finds the existence of court decisions in which several decisions of the Extraordinary General Meeting of Shareholders (EGMS) were canceled for non-observance of the imperative provisions and of the requirements imposed by the Law of the commercial companies regarding the general meetings of the shareholders to increase the share capital, but, in a way absolutely wrong, the judge of the merits considered that it is not justified "to impute the reasons held by the magistrates in the considerations of these decisions in the charge of the defendants as acts of defective performance of the duties of service, as administrators".

Supporting the court of first instance that the criminal liability of an administrator "cannot be drawn" for any decision made by the board of directors with the non-observance of the requirements imposed by the Law of commercial companies ", as long as there is the procedure of judicial annulment, prev. of art. 132 of Law no. 31/1990, and the aggrieved party used this procedure, is an inadmissible "argument" in relation to the criminal law and, moreover, it is devoid of any basis, as long as the decisions obtained in the annulment procedure were devoid of any legal effects, defendants summoning new Extraordinary General Meeting of Shareholders (EGMS) and obtaining new decisions to increase the share capital in violation of the same legal norms.

In relation to this state of affairs, it is not only unjustified, but also unacceptable for the judge of the merits to assert that "the illegality of the decisions of the general meeting of shareholders was found by the magistrates of hierarchically superior courts, with vast legal knowledge and professional experience, specialized in commercial law , and the administrators cannot substitute to them ”.

In addition, the conclusion of the existence of the fact and the guilt of the defendants is supported by the evidence administered by the court of appeal.

A. The Financial-accounting expertise, Supplement to this expertise and even the separate opinions of expert advisers appointed by the parties:

A.1. Designated expert conclusions formulated by the expert report of 25.04.2017 (page 49 of the Report)*:*

- "The register of shareholders used by SC FARMEC SA is presented in an incomplete form in relation to the legal provisions, in the sense that it lacks the heading <Payments>"
- „In connection with the Register of Shares, this could not be presented, under these conditions the accounting expert assuming that it does NOT exist"

A.2. The designated expert's response to the objections raised by the defendants (page 25 of the Report, supplement to the accounting expertise report)*:*

- "The objective established by the court makes express reference to the holding by the defendants of the register of shareholders and shares <IN THE FORM required by law>, respectively if <the register of shareholders contains the payments>, according to the legal provisions", "it is the domain of the evidence that the designated expert to comply with the requirements set by the objective set by the court ". It is of no interest "if the representative of the defendants considers that the provisions of art. 177 of Law no. 31/1990 and GD no. 885/1995 are <obsolete and ineffective>, as long as they were in force between 2002-2009"
- "With regard to the presumption of non-existence of the Register of shares, it is obvious that this could be removed only by presenting by FARMEC SA the respective document".

A.3. Designated expert conclusions formulated by the expert report of 25.04.2017 (page 15), also mentioned in the Supplement to the expert report*:*

- "In conclusion, as it results from the announcements published in the Official Gazette, according to the provisions of art. 212 paragraph 2 it was found that the defendants did not present in the convener the reasons for the increase of the share capital, the persons to whom the new shares are to be assigned, the number of shares attributed to each of them, but presented the nominal value of the newly issued shares

(equal to the issue value of the shares in the case of SC Farmec SA) and the total number of shares to be issued and, when appropriate, the proposal for capping the maximum number of shares that can be held by a shareholder."

- "As it results from the minutes of the general meetings, according to art. 217 paragraph 2) it was found that the defendants did not submit a written report stating the reasons for limiting or lifting the right of preference."

A.4. Designated expert conclusions formulated by the expert report of 25.04.2017*:*

- "Regarding the general meetings of the shareholders of FARMEC SA from 12.03.2002, 12.12.2002, 30.01.2003, 05.09.2003, 16.01.2004, 22.10.2004, 24.11.2005, 27.09.2007, 12.08.2008, 09.07. 2009, 10.09.2009, 22.10.2009, there were found differences between the content of the convening meeting for the EGMS or GMS (according to the text published in the Official Gazette, Part IV), the agenda and the issues under debate during the meeting (according to the minutes of the meeting) and the decisions adopted (according to the text published in the Official Gazette, Part IV)"

B. The documents admitted by the court of appeal by Closing from the hearing of 21.01.2019, respectively:

B.1. <u>Civil sentence no. 695 / 31.10.2018, delivered by the Constanta Court - Civil Section II, in the file no. 1514/285/2012, in which - although it refers to the OGMS from 06.08.2012, regarding an increase of social capital subsequent to the criminal acts forming the object of the present appeal - the judge of the merits retains the following elements that serve to ascertain the existence of these criminal facts, as well as to know the circumstances necessary for the just settlement of the case and that contribute to finding the truth in the criminal trial</u>:

- "Both the statutory obligation to keep the register of shares and the legal obligation to keep the register of shareholders have been violated by the company", considering that "By answering the question, by the details written on sheet 58 of volume III and the expert report administered in this case noted that the defendant company (nn FARMEC SA) does not have a register of shares, containing mentions related to the nominal shareholders record, the subscribed and paid up capital, the number of shares

paid in full and the assignment of the shares, despite the clause inserted in the constitutive act of the legal person, which explicitly provides that the transfer of shares is considered to have been perfected after being registered in the register of shares"

- "As can be seen directly from the verification of the data recorded on the two electronic storage media attached to sheets 271 of volume II, as the accounting expert points out, the register of shareholders does not contain any concrete data regarding the subscribed and paid share capital"
- "The deliberate omission of keeping the two registers, in accordance with the law and with the will of the shareholders, in the absence of the analytical accounts of the settlements with the shareholders regarding the share capital was the determining cause of some disputes between the shareholders and the defendant company, aiming at the legality of successive operations to increase the share capital"
- *"The circumstances set out lead to the firm conclusion that the defendant company did not comply with the legal provisions regarding the accounting matters, regarding the transactions with shares**, the members of the Board of Directors being at fault for the failure to keep the register of shares, the register of shareholders and the analytical record of share capital accounts**"*
- *"It should not be omitted that the registers were not rebuilt, respectively completed, even after the issuance of irrevocable court decisions, through which operations were annulled capital increase operations, for violating the imperative norms of Law no. 31/1990 regarding the prohibition of issuing new shares, without the previous ones being paid"*
- **"... the actions of the directors of the defendant company created, directly and directly, a real uncertainty regarding the legal regime of the participation in the share capital** *..."*

B.2. The report of judicial accounting expertise, prepared in the file no. 1514/285/2012 of the Constanta Court - Civil Section II, by which the expert appointed by the court ascertains the following elements that serve to prove the existence of the criminal facts that form the object of the present appeal, as well as to the knowledge of the circumstances necessary for the just settlement of the case and which helps to find the truth in the criminal case:

B.2.1. Expert findings and conclusions formulated by the expert report of 25.04.2018, regarding Objective no. 1*:*

- "From the accounting record of FARMEC SA the expert had the summary sheets of the respective accounts, the defendant not having available the analytical files of the accounts 456 <settlements with associates / shareholders regarding capital> and 101 <social capital>"
- "Regarding the Register of shares and the Register of shareholders, the defendant states that he does not hold the Register of shares, and the Register of shareholders made available to the expert does not comply with the format set out in Annex 1 of GD 885/1995, not including the payments made by the shareholders."
- "In view of the aspects presented, for the verification of transactions with shares, the expert asked the defendant to make available the Register of shares. The defendant mentioned that she does not hold this register, as recorded in the report concluded on 16.01.2015 at the Farmec SA headquarters"
- "In view of the above, it can be concluded that the company did not comply with the legal provisions regarding the accounting regarding the transactions with shares without having an analytical record of the social capital accounts. In the presented accounting records the expert did not identify the recording of the transactions with shares"

B.2.2. Conclusions at Objective no. 3 of the Expertise: "According to the verifications carried out, it results that the vote of 06.08.2012, out of the total of 24,969 shares (n.n. unsubscribed shares related to the increase of share capital since 1998), a number of 16,741 shares were used"

1.1.2. <u>We state that totally erroneous, the first court of instance retains the absence of</u> <u>a grievance of the legal interests of the aggrieved person, as a result of the violation of the duties of administrator, with the motivation that the accusation can not be based only on the "simple presumption" that the defective performance of some acts by the shareholders administrators also presupposes the grievance of the legal interests of a person and that from no means of evidence does not result the reduction of the percentage of shares held by the a</u>**<u>ggrieved party from 33% to 8%.</u>**

In fact, the evidence administered in this case proves not only the exclusive grievance of the legal interests of the aggrieved person Olăneanu Nicolae Cristinel, but also the material prejudice with the countervalue of the dividends corresponding to the legal

shares held from the total of the legal shares subscribed and paid that gave the right to receive dividends in 2002 -2009, as well as until now, and which have not been paid, as it results from the forensic accounting expertise carried out within the substantive judgment of the case, also confirmed by the judicial expertise and the supplement to the expertise administered ex officio by the court of appeal.

The grievance of the legal interests of the shareholder Olăneanu Nicolae Cristinel is certain and obvious, compared to the fact that, at the level of 2002, he held legally a number of 272,318 shares (of which 186,850 shares registered in the company registers, and the difference not registered as a result of the unjustified and abusive refusal of the directors-defendants, manifested on 05.03.2002), and the subscribed and paid-up share capital was 809,037 shares, (out of the 849,318 shares, which formed the share capital according to the shareholders register, the unsubscribed and unpaid ones were reduced, according to the court decisions, which represented a participation of approximately 33%, so that, following the illegal increases of the share capital from 2002-2009, successively realized and with fraudulent intention by the defendants, the participation of the aggrieved person in the share capital will be reduced until only about 8%.

In the trial phase of the appeal, the evidence was admitted and administered with documents and financial-accounting expertise, the probators confirming the wrong assessment of the first court of instance on the fact that "it does not result from any means of proof" reducing the percentage of shares held legally from the aggrieved party from about 32.06% to about 8%, thus:

- Minutes of 03.12.2002 concluded on the occasion of the verification of the fulfillment of the conditions for holding the GMS, from which it follows that "According to the accounting records and the Register of shareholders, the share capital amounts to 21,232,950,000 lei corresponding to a number of 849,318 shares"
- Excerpt from Official Gazette no. 1773 / 25.09.2002 in which was published the Additional Act to the company contract and the statute of S.C. FARMEC SA, modified by the EGMS decision of 12.03.2002, according to which "The subscribed and paid-up share capital is 21,232,950,000 lei, divided into 849,318 registered shares worth 25,000 lei each"
- **Designated expert conclusions formulated by the expert report of 25.04.2017 (on page 103), at the objective no. 8*:*** "The civil party Olăneanu C. held

32.06% in 2002 (ante increase), and after the increases of limited share capital he held 8.81% of the share capital"

- **"At the same time, the situation of the percentages of participation in the share capital, related to the same period, respectively 2002-2009, of the defendants and members of the Turdean and Pantea families, is presented as follows*:***
  - **Turdean Liviu**, positive variation from 3.58% to 11.48%, resulting in a percentage increase of 7.90%
  - **Turdean Mircea**, positive variation from 0.13% to 11.63%, resulting in a percentage increase of 11.49%
  - **Pantea Iacob**, positive variation from 8.37% to 11.49%, resulting in a percentage increase of 3.12%
  - **Turdean Mihaela**, positive variation from 0.00% to 10.61%, resulting in a percentage increase of 10.61%
  - **Turdean Horea**, negative variation from 12.52% to 11.63%, resulting in a percentage decrease of 0.89%
  - **Turdean Ioana**, positive variation from 3.48% to 10.77%, resulting in a percentage increase of 7.28% "
- The objections of FARMEC SA, through expert Marcel Vulpoi, recorded in the Expertise Report submitted on 06.06.2017, represent, in fact, a confirmation of the diminution of the percentage of shares held by the civil party Olăneanu C., who "after the increases of share capital held 8.81% of the share capital ", ie the same value established by the designated expert**.**

Thus, it is proved that the real and effective grievance of the legal interests of the aggrieved person by significantly diminishing the percentage of his participation in the share capital and, implicitly, in the distribution of the resulting dividends, especially that the abusive actions of the accused administrators have resulted in illegal increases of share capital by issuing new shares without issue premium, at the nominal value, provided that the value of the existing shares was over 15 times higher than the nominal value, as mentioned in the decision no. 2390 / 02.07.2008 of the High Court of Cassation and Justice.

In the synthesis of all the evidence administered in the present case, it is proved that the directors of the company ignored the law and used all the illegal means and ways to issue a number of 2,935,312 new shares, of which 2,115,542 subscribed by the defendants and the members of their families, with the result of gaining control and prejudice of the undersigned.

1) The shares were issued under the conditions of blocking by statute my right to buy new shares, right which is protected by Law at art. 216 of Law 31 and the Directive of the European Council;

2) The shares were issued at an undervalued price more than 15 times their accounting value

3) They did not present to the shareholders a written report containing the reasons for the limitation and the calculation of the price per share with which the successive increases of the share capital had to be made

4) They mentioned in the convocation that my limitation is made at a value expressed as a percentage and in the minutes and publication in the official monitor, the limitation was mentioned in number of shares because after the increase, the limitation limit expressed in number of shares represents a smaller percentage, a situation that favors administrators

5) They transferred shares to persons from the families of Turdean and Pantea, respectively Mihaela Turdean, Bria Sebastian, Turdean Horea, who, although they did not have the legitimacy of shareholders, because they bought shares with the non-compliance of the dispositions provided in art. 8 of the statute "the registered shares are transferable only between shareholders" with the result of obtaining a majority by 7 persons from the Turdean and Pantea families, while the undersigned I was limited to 190,000 shares although in fact they owned approximately 280,000 shares.

6) They illegally used shares not subscribed by shareholders

7) They used to vote shares that are not paid by the shareholders but by the company Farmec and subsequently they were passed on Turdean and Pantea's name although the ICCJ has ruled with judgment that the paid shares are only the shares that were paid by the shareholders and not by third parties, as extracted from pages 5 and 9 of the ICCJ decision 2390/2008

8) They ignored court decisions

6) They intentionally ignored notifications regarding the non-observance of the law and the need for remedies, which were sent by the court executor to and at the company headquarters with registration number, evidence on file

7) They did not fulfill the quorum condition ¾ from the share capital stipulated in art. 212, respectively 216 of Law 31, in case of increases with the limitation of the undersigned

8) The registers provided in the law regarding the control of the reality and legality of the quorum presented in the presence tables, respectively the register of shares and

the register of shareholders that contain the shareholders' vows on account of the shares were not presentedd to the judicial bodies, although art 177 paragraph (1) of law 31 establishes the task to the directors of the shareholders' registers in the form provided by law

9) The directors have fulfilled with bad faith the attributions of service towards all the shareholders and have made successive increases of share capital with the non-observance of the law, with the result that they together with persons from their families subscribe a number of 2,115,542 shares representing 72.06% of the capital increases proposed and ordered in violation of the law.

1.2. Concerning the subjective side of the crime of abuse while on duty

The judgment of the first court of instance is unlawful and unreasonable and in the aspect of the assessment *that "there was no intention of the defendants" for the harm of the legal interests and the prejudice of the injured party, which is not only devoid of any basis, but also evidently biased, in relation to the evidence administered during to the entire criminal trial and which prove both the existence of the guilt of the defendants in the form provided by the incrimination rule, but even the fact that the fraudulent intention of the defendants in the abusive fulfillment of the duties of the administrator function is qualified by the intended purpose, that is, by restricting the right to subscription of the aggrieved party, to carry out, together with family members, the acquisition of a number of actions to ensure their absolute decisional control over the company*.

1.2.1. In support of this conclusion, we review the following findings and conclusions of the expertise administered by the court of appeal:

A.1. Designated expert conclusions formulated by the expert report of 25.04.2017, at the objective no. 11: "The answer is affirmative in the sense that the limitation limit of 190,000 shares is close to the number of shares held by the civil party at the date of the capital increases from 2002-2003, respectively 186,850 shares", the opinion of the expert adviser of FARMEC SA being identical with that of the designated expert.

A.2. Designated expert conclusions formulated by the expert report of 25.04.2017, at the objective no. 12: "The answer is affirmative, in the sense that the limitation limit of 280,000 shares is close to the number of shares held by the civil party at the date of the capital increase in 2007 (26.09.2007), respectively 272,318 shares", so that the expert advisor's opinion of FARMEC SA in the sense that "the limitation limit of 280,000 shares did not affect the right of preference of the civil party, because it was not applied, the only limit regarding the number of shares that was applied is that of 190,000" is devoid of any basis and even illogical**.**

A.3. Designated expert conclusions formulated by the expert report of 25.04.2017*:*

A.3.1. "The defendants Turdean Liviu and Pîntea Petru Iacob, together with Turdean Mihaela, Turdean Mircea, Turdean Horea and Turdean Ioana, registered the following evolution, related to the period 1996-2009, regarding the shares held in the share capital of SC FARMEC SA*:*

TURDEAN LIVIU

- *Initial balance of shares 1996 _____ - 12.702 shares*
- *Acquiring shares 1997-2009 _____ - 468.386 shares*
- *Final balance of shares 2009 _____ - 354.735 shares*
- *Share capital stock _____ - 11,48 %*

PNTEA PETRU IACOB

- *Initial balance of shares 1996 _____ - 1.469 shares*
- *Acquiring shares 1997-2009 _____ - 453.382 shares*
- *Final balance of shares 2009 _____ - 354.851 shares*
- *Share capital stock _____ - 11,49 %*

TURDEAN MIHAELA

- *Initial balance of shares 1996 _____ - 0 shares*
- *Acquiring shares 1997-2009 _____ - 327.878 shares*
- *Final balance of shares 2009 _____ - 327.828 shares*
- *Share capital stock _____ - 10,61 %*

TURDEAN IOANA

- *Initial balance of shares 1996 _____ - 564 shares*
- *Acquiring shares 1997-2009 _____ - 331.957 shares*
- *Final balance of shares 2009 _____ - 332.521 shares*
- *Share capital stock _____ - 10,76 %*

TURDEAN HOREA

- *Initial balance of shares 1996 _____ - 0 shares*
- *Acquiring shares 1997-2009 _____ - 475.185 shares*
- *Final balance of shares 2009 _____ - 359.387 shares*
- *Share capital stock _____ - 11,63 %*

TURDEAN MIRCEA

- *Initial balance of shares 1996 _____ - 752 shares*
- *Acquiring shares 1997-2009 _____- 370.690 shares*
- *Final balance of shares 2009 _____ - 358.942 shares*
- *Share capital stock _____ - 11,62 %*

Regarding the response of the expert designated to objective 7, the expert states: "Thus it turns out that Turdean Mihaela, Turdean Horea and Bria Sebastian were not shareholders on the date of the privatization of the company (in 1995), these persons appearing in the register of shareholders filed with the court with balance 0 for the moment of privatization - in 1995"*;*

Excerpt from page 55 of the report: "According to art. 8 of the statute of the company Farmec SA in force between 2002-2009, the assignment of the shares is made only between shareholders as follows: "the registered shares are transferable only between shareholders" "; „Turdean Mihaela and Turdean Horea, not acting on the date of privatization, purchased shares on 30.10.1997 from PAS and Bria Sebastian not being a shareholder on the date of privatization, bought shares on 02.10.2003, also from PAS, according to the register of shareholders filed with the court. In conclusion Turdean Mihaela, Turdean Horea and Bria Sebastian, at the date of the first purchase of shares, not being a buyer of shares at the date of privatization and therefore not being a shareholder, according to art. 8 of the Company Statute, they could not buy shares*".*

"In accordance with art. 177 paragraph (2) "the registers provided for in paragraph 1 letter a), b) and f) will be kept by the care of the Board of Directors".

A.3.2. "From the number of shares issued as a result of the increases in the share capital in the period 2002-2009, totaling a cumulative number of 2,935,312 shares, the persons from the Turdean and Pântea families bought a number of 2,115,242 shares, representing 72.06% from the total number of shares issued*"*

1.2.2. Also, we allow the reiteration of the most significant elements of probation that are capable of proving, without the power of deception, the guilt of the defendants TURDEAN LIVIU and PĂNTEA PETRU IACOB:

- Register of shareholders from the date of privatization until 20.07.2012, filed electronically on CD by S.C. FARMEC SA in the commercial file no. 1514/1285/2012 of the Constanta Court, according to the address issued by the company under no. 85 / 24.03.2014, of which results:
  - In 1995, on the date of the privatization of the company, the defendant TURDEAN LIVIU invested the value of 1323 shares, and the defendant PÂNTEA PETRU IACOB (as external collaborator of the company) invested the value of a number of 1475 shares, which means that the two defendants at that time held a total of 2798 shares, which together represented 0.43% of the company's share capital
  - the situation of the shares acquired by the defendants TURDEAN LIVIU, PANTEA PETRU IACOB and their family members (Turdean Mircea Liviu, Turdean Ovidiu Horea, Turdean Ioana Virginia, Turdean Mihaela and Bria Sebastian) from those issued as a result of illegal share capital increases in the period 2002 - 2009, representing a percentage between 53.96% and 77% of the total shares corresponding to each capital increase

sale-purchase operations of shares performed between the defendant TURDEAN LIVIU and his sons, Turdean Ovidiu Horea and Turdean Mircea Liviu, and between the defendant PÂNTEA PETRU IACOB and Bria Sebastian, operations that allow the successive acquisition of a number of shares that will lead permanently the control over the activity of the company and the decisions of the shareholders exercised by the defendants and their family members

- **Notifications and summons that we sent to the administrators through the court executor or registered with the visa at the company headquarters as a result of non-compliance with the court decisions, evidence that is in the file.**
  - The notifications transmitted by the civil party to the defendants requesting the recovery of dividends illegally paid to the defendants and their family members (annex 16 to the bibliography submitted as evidence at the hearing of 27.03.2013).

- The notification and summons that were transmitted to the defendants Turdean Liviu and Pantea Petru Iacob - as administrators of the company FARMEC SA - through the judicial executor Stolneanu Marius, on December 5, 2007, after the final

decision no. 522 / 06.11.2007 of the Bucharest Court of Appeal and before carrying out the EGMS from 06.12.2007, when it was proposed by the administrators the increase of the share capital with illegal limitation of the undersigned

- from the summons submitted to the case file, it follows that Turdean Liviu and Pantea Petru Iacob knew about the court decision and the legal obligations arising from the decision, violated by the failure to execute and to increase the share capital under similar conditions of illegality.

- the notification also refers to the fact that the directors had to proceed to recover the value of the dividends which were distributed for illegally issued shares and which should have been returned by the persons from the Turdean and Pantea families, beneficiaries of approximately 72% of the illegal shares. issued between 2002 and 2009

- Sentence no. 5506 / 12.11.2009 of the Cluj Tribunal (annex 17 to the bibliographical record submitted as evidence at the hearing of 27.03.2013), which ordered the removal from the Office of the Trade Register of the mention regarding the increase of the share capital with the 680,000 shares illegally issued and which were canceled by the final decision no. 522 / 06.11.2007 of the Bucharest Court of Appeal, judicial action to which I was obliged due to the fact that the administrators TURDEAN LIVIU and PANTEA PETRU IACOB refused to comply with the court decision of the Bucharest Court of Appeal.

- Addresses and notifications (annex 16 to the bibliography submitted as evidence at the hearing of 27.03.2013) to the administrators of S.C. FARMEC SA, (which received a visa from the company, but was not followed by any answer), by which we requested the recovery of the value of the dividends distributed and paid illegally to the persons from the Turdean and Pantea families, after 2004, for the illegally issued shares and most of them acquired by them

- ***Documents*** *from which the position expressed by the defendants TURDEAN LIVIU and PÂnTEA PETRU IACOB, in the general meetings of the shareholders, regarding the judicial decisions which annulled decisions to increase the share capital by the courts and the attitude regarding the aggrieved person*:

  - ***Minutes of the EGMS*** *of 12.03.2002, from which results "the proposal that Mr. Olăneanu cannot buy shares from the additional issue", as well as "the proposal that Mr. Olăneanu be sued for action against Farmec and that the best lawyers to be hired"*

- ***Minutes of the EGMS of 24.11.2005,*** *from which it follows that the administrators of TURDEAN LIVIU and PÂNTEA PETRU IACOB proposed to order the aggrieved party to dispose of a number of approx. 90,000 shares, legally acquired and not registered in the shareholders register as a result of the abusive refusal of the same directors to comply with the registration application from 05.03.2002*
- ***Minutes of the EGMS of 12.08.2008,*** *from which it follows that the defendant TURDEAN LIVIU brought to the notice the EGMS that, by commercial decision no. 522/2007 of the Bucharest Court of Appeal, the decision to increase the share capital adopted by the AGEA from 2004 was annulled, "on the grounds that all the shares with which the share capital was increased in 1998 were not paid", but makes the following statements of the nature of the shareholder influence*:

- "At the request of Olăneanu an expertise was made by an expert from Bucharest

- "Him, in bad faith, did not want to take into account the actions bought by employees from the premiums granted by the company under the collective labor agreement in April 1998, from a credit granted by the union to the employees and from the compensation of a debt to S.C. Aurexim SRL*"*

- "Although the expert appointed by us demonstrated on the basis of documents that all the shares were paid, the court took into consideration the expert's point of view from Bucharest and delivered a totally wrong sentence."

- "Because the decision of the Court of Appeal was confirmed by the C.C.J. we have to apply it"

- ***Minutes of the EGMS of 09.07.2009,*** *from which it follows that the defendant PÂNTEA PETRU IACOB led the meeting of the EGMS, brought again to discussion the Decision no. 522/2007 of the Bucharest Court of Appeal and made it known to the shareholders that "the expert appointed by the court did not validate all payments for formal reasons, and the court took into account his opinion", however, to the dissatisfaction expressed by a shareholder "because several decisions of the GMS were annulled "and in his assessment that" those responsible for providing legal assistance to the society are responsible for this ", the same defendant PANTEA PETRU IACOB replied that" no one is guilty of the fact that not all the decisions of the judicial bodies are legal"*.
- **Minutes of the Shareholders' Meeting of 23.05.2013**, which results in the "proposal" of the defendant TURDEAN LIVIU that the shareholders "vote and

empower the members of the Board of Directors to carry out all the necessary steps to remove the shareholder Olăneanu".

- ***The statements of the witness BĂLĂŞOIU CRISTIAN****, including the one given before the court of appeal, evidence ordered and administered ex officio by it, from which it follows that the defendants had full representation of the violation of legal provisions and of judicial decisions, in order to limit the rights of shareholder of the aggrieved person and of diminishing his participation in the share capital of FARMEC SA*.

1.3. <u>The inadequacy of the conclusions made by the defendants and the civilly responsible party Farmec SA regarding the "last ratio" principle, invoked on the occasion of the appeals debate, according to the Decision no. 405/2016 of the Constitutional Court</u>

We ask you to find as unfounded the support of the defendants and of the civilly responsible party Farmec SA regarding the incidence of the provisions of Decision no. 405/2016 of the Constitutional Court, in relation to the "last ratio" principle, as it does not find application in the present case, for the following considerations**:**

1.3.1. The employment of the criminal responsibility in the case, represents the only legal, institutional way that contributes to the protection of the property, the restoration of the legal social capital by the Court of Appeal, at 809,037 shares, value of the legal share capital, according to the proposal of the Public Ministry from the indictment on pages 36-37, corresponding to March 2002, prior to the abuse while on duty in the continuous form and obliging the directors to pay the correct value of the dividends to shareholders, according to the expertise.

1.3.2. Conclusions regarding the alleged non-existence of the criminal character of the facts of the accused committed against the aggrieved person / civil party Olăneanu Nicolae Cristinel, in the aspect of the lack of the constitutive features of the crime of abuse while on duty, in relation to the principle "last ratio" mentioned in Decision no. 405 / 15.06.2016 of the Constitutional Court, are the consequence of a misunderstanding of the principle invoked and of a misinterpretation of the considerations of the decision of the Constitutional Court regarding the incidence and application of this principle by the judicial bodies.

The rigorous examination and from an objective perspective of the aforementioned decision reveals the certainty that the court of constitutional control has not ruled, in any case, that the judicial bodies have the right to consider that "the deed is not provided by the criminal law" in all situations where it would also be a civil sanction for the violations committed by an action or inaction that circumscribes the essential features of the crime of abuse while on duty.

Thus, the Constitutional Court starts from the premises that "criminal law must always remain a measure that is ultimately resorted to" and that "the legislator must analyze whether other measures than those of criminal law, for example administrative sanctions regimes of civil or administrative nature, could not sufficiently ensure the implementation of the policy and if criminal law could address the issues more effectively ", as stated in the Communication from the Venice Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions on to a unitary policy of the European Union in criminal matters.

In view of these premises, at paragraph 75 of the decision, "the Court holds that the offense of abuse while on duty is an offense of result, the immediate consequence of committing this fact is to cause a loss or damage to the legitimate rights or interests of a natural or legal person " and notes that " the legislator did not regulate a value threshold of the damage and no specific intensity of the grievance, which causes the constitutional court to conclude that, **regardless of the amount of the damage or the intensity of the damage resulting from the act , the latter, if the other constituents are met, can be a crime of abuse while on duty".**

Also, at point 78 of the decision, it is mentioned that, comparing the regulation of the crime of abuse with the legal provisions "which establish other forms of liability than the criminal one, the Court notes that, although they are not identical, they resemble each other to a degree which determines the possibility that in the event of a crime, both criminal liability and other forms of extra-penal liability, such as disciplinary, administrative or civil liability, may be incurred".

In relation to these considerations retained in the decision no. 405 / 15.06.2016, it follows that the assessment of the Constitutional Court, in the sense that the judicial bodies have the task and the responsibility to apply the provisions regarding "abuse while on duty" in accordance with the principle of "last ratio", can have no other

significance than that the establishment of the criminal liability must be analyzed both from the point of view of the gravity of the facts that are confined to the norm of criminalization of the crime, as well as in relation to the existence or the absence of other forms of extra-penal liability incident to the same facts.

However, in the present case, the facts that form the subject of the investigations do not fall under any other form of extra-penal liability (disciplinary, contraventional or contractual), so that no effect of the decision of the Constitutional Court in this case can be questioned.

Art. 67 paragraphs 1 and 3 of the law 31/1990 provides the possibility to recover dividends only if the dividends have not been determined from the profit according to the law.

The directors of the company distributed dividends calculated according to the financial statements as a total value, only that for the shareholders who bought shares from the illegal increases, the value of the dividends was higher and for those who were limited to subscribe, the value was lower. The civil party Olaneanu has often notified the directors of the company to recover the dividends from the persons who received a higher value and to pay the dividends due to the other shareholders.)

The application of this provision of the civil law cannot repair the damage that was created because it regulates only the right to dividends, respectively their restitution, if it was paid contrary to these provisions. The provisions of art. 67 of law 31 do not cover the situation of the illegal distribution of the dividend and of the recovery of the damage caused by committing an offense such as the case in which the officials of the company Farmec, as administrators, paid with the title of dividend amounts of undue money that they transferred, in proportion of about 72% to the personal accounts and to some persons from their families. These provisions are inapplicable in the case because, precisely, the directors should have (according to the notifications and summonses) recovered these amounts in the highest percentage from the persons of their rulers or their families but also from the other shareholders who received undue money and then to order payment to the right shareholders. The civil party, as a shareholder, did not have and has no possibility to recover the amounts of money according to the provisions of art. 67 / law 31, but no other possibility according to law 31, committing criminal liability in this file and solving the civil side remaining the only way.

- art. 155 paragraph 1) and art. 155¹ paragraph 1) of Law 31/1990 regulates the recovery of the money in the company account in case the joint stock company registered a damage without the existence of any norm that would allow the injured shareholders by illegal acts of the company representatives to bring legal actions against them:

*„**Art. 155** - (1) The action against the founders, the administrators, the directors, respectively the members of the board and the supervisory board, as well as the financial censors or auditors, for damages caused to the company by them…”,*

1.3.3. In addition, we state that, in relation to the object of the examination regarding the constitutionality of the criminal norms of incrimination of abuse while on duty, the provisions of Decision no. 405/2016 of the Constitutional Court are not capable of removing the criminal character of the facts of the defendants that are the object of the present case, since the constitutional control court has ruled that "(...) disposisions of art. 246 CP 1969 and art. 297 para. (1) NCPs are constitutional insofar as by the phrase "defective fulfills>" in their contents it is understood "fulfills by violation of the law".

However, as it is clear from the evidence administered in the present case and from the civil, final and irrevocable court decisions, the defendants have fulfilled the duties of administrators of FARMEC SA "in violation of the law", respectively of certain provisions expressly provided in Law no. 31/1990, republished, as well as the provisions of art. 29 paragraph (4) of the SECOND DIRECTIVE of the Council of Europe, adopted in December 1976, which leads to the conclusion that the conditions established by the Constitutional Court regarding the constitutionality of the provisions that incriminate the abuse while on duty committed and held by the accused are fully fulfilled.

2. <u>Concerning the civil side of the case</u>

I, the undersigned OLĂNEANU NICOLAE CRISTINEL, have constituted a civil part and I have asked the first court of instance to order the defendants, in solidarity with the civilly responsible part of S.C. FARMEC SA Cluj-Napoca, at the payment of 2,188,932.84 lei (RON), representing the value of the dividends that were not paid to me according to the legal shares held from the total of the legally subscribed and paid shares that gave the right to receive the dividends, updated with the inflation rate from the maturity date

of the payment obligation to the date of payment, value established by the judicial accounting expertise performed at the judgment on the merits*.*

Damage to the interests and property damage

(1) The practice on the capital market is that the price of shares in the joint stock company is increasing

(2) On the occasion of the privatization, the price of 2.5 lei per share represented 16 US dollars per share, value that we invested in the share capital at Farmec SA in 1995

(3) (3) In the period from 2002-2009, in which the abuse while on duty continued, the administrators Turdean and Pantea issued a number that exceeds 2,935,312 shares with non-compliance with art. 211, 212, respectively 216, 217 of the Law on commercial companies with the limitation of my right protected by law to subscribe new shares without a written report provided in the law regarding the proof of the real price per share.

Failure to comply with the law regarding the lack of a written report to be presented to the shareholders was made with the intention of issuing the shares mentioned above at a price undervalued more than 15 times per share, according to the ICCJ's finding in decision 2390/2008 on page 9: "by modifying the shareholder structure , when the accounting value was more than 15 times higher than the nominal value, without the issue premium, it imbalanced the relations between the shareholders who could exercise the right of pre-emption and those who had blocked it"

(4) Moreover, the expertise in the file shows at objective 14 (page 65) that the accounting price per share is between 12.18 RON in 2002 and 44.2 RON in 2009, while the defendants proposed and ordered the successive increases of share capital with 2.5 lei per share for the entire period 2002-2009, which according to objective 15 of the expertise created a difference of 69,386,700 LEI / RON, a value that reflects a decrease of the value per share about 20 times compared to the package of approximately 280,000 shares legally held by the undersigned.

Considering the provisions of art. 20 paragraph (5) lit. b) Criminal procedure code, I asked for the increase of the scope of the civil claims from the amount of 2,188,932.84 lei to the amount of 5,556,195 lei, which results from the judicial accounting expertise performed within the judicial investigation of the appeal and which represents the difference between the amount of the legal claim. 10,863,013 lei, representing the dividends that were due to me for the period 2002-2014, in case the defendants had not made illegal increases of share capital, and the amount of 5,306,818 lei, which was paid

to me as a dividend for the period during which the offense of abuse while on duty was committed.

<u>IN CONCLUSION</u>, we ask you to find that the appeal is fully founded and, in accordance with the provisions of art. 421 pt. 2 lit. a) and art. 423 of the Code of Criminal Procedure, to admit it, to set aside the sentence of the first court on this fact, both regarding the criminal side and the civil side, and to make a new decision ordering:

- ***the conviction of PANTEA PETRU IACOB*** *for committing the crime of abuse while on duty, in a continuous form and with particularly serious consequences, dispositions of art. 297 paragraph (1), with application of the art. 308, art. 309 and art. 35 paragraph (1) Criminal code, taking into account art. 5 of the Criminal code, in relation to the punishment limits provided by the norm of criminalization of the crime and by the general criteria for individualizing the punishment according to dispositions of art. 74 of the Criminal Code*
- cessation of the criminal case against the defendant TURDEAN LIVIU, as a result of his death
- obliging the defendants, in solidarity with the civilly responsible party S.C. FARMEC SA Cluj-Napoca, at the payment of 5,556,195 lei (RON), representing the value of the dividends that were not paid to me according to the legal shares held from the total of the legally subscribed and paid shares that gave the right to receive dividends, updated with the inflation rate from the maturity date of the payment obligation until the payment date, as well as the obligation to pay the amount of 100,000 lei (RON), with the title of moral damages
- applying the provisions of art. 256 of the Code of Criminal Procedure regarding the restoration of the situation prior to the commission of the crime, in accordance with the provisions of art. 397 of the Code of Criminal Procedure, in the sense of restoring the situation of the share capital of S.C. FARMEC SA, respectively of the number of shares corresponding to it, as well as of the structure of the shareholders and of the number of shares legally held by them before the EGMS of 12.12.2002, following to be ascertained:
    - the legal existence of a registered, subscribed and paid capital, amounting to RON 2,052,592.5, consisting of 809,037 shares, with a nominal value of 2.5 RON / share (849,318 shares - 40,281 unsubscribed shares, of which 15,312 unpaid shares from the issue of 1998, canceled by the courts = 809,037 shares)

- the legal holding by the undersigned, Olăneanu Nicolae Cristinel, of a total number of 272,441 shares, including the 89,726 shares acquired under previous assignment contracts, refused to be registered in full until a final court decision was obtained.

Lawyer,	**Civil Party**
Mihai Irimia	**Nicolae Olaneanu**