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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

ROMANIA

OPINION

ON AMENDMENTS

TO LAW No. 303/2004 ON THE STATUTE OF JUDGES AND PROSECUTORS, LAW No. 304/2004 ON JUDICIAL ORGANIZATION, AND LAW No. 317/2004 ON THE SUPERIOR COUNCIL FOR MAGISTRACY

adopted by the Venice Commission
at its 116th Plenary Session
(Venice, 19-20 October 2018)

on the basis of comments by:

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Mr Iain CAMERON (Member, Sweden)
Mr Nicolae ESANU (Substitute Member, Republic of Moldova)
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I. Introduction

1. In a letter dated 3 May 2018, the President of Romania requested the opinion of the Venice Commission on three legislative drafts amending existing legislation in the field of the judiciary:

Draft law amending Law no. 303/2004 on the status of judges and prosecutors,
Draft Law amending Law no. 304/2004 on judicial organization, and
Draft Law amending Law no. 317/2004 on the Superior Council of Magistracy.

The Monitoring Committee of PACE also asked, on 4 May 2018, for the opinion of the Venice Commission on the three drafts.

2. For the present draft opinion, the Venice Commission invited Ms Hanna Suchocka, Ms Claire Bazy-Malaurie, Mr Iain Cameron, Mr Nicolae Esanu, Mr Jean-Claude Scholsem, and Mr Kaarlo Tuori to act as rapporteurs.

3. On 10-11 June 2018, a delegation of the Venice Commission composed of Ms Hanna Suchocka, Mr Nicolae Esanu, Mr Jean-Claude Scholsem, and Mr Kaarlo Tuori, accompanied by Mr Thomas Markert, Secretary of the Venice Commission, and Ms Artemiza Chisca, Head of the Democratic Institutions and Fundamental Rights Division, visited Bucharest and had exchanges of views with the President of Romania, representatives of the different political parties in the Romanian Parliament, the Ministry of Justice, the President of the High Court of Cassation and Justice, the Superior Council of Magistracy (SCM), the Prosecutor General, the Head of the Anti-Corruption Directorate (DNA), professional associations of judges and prosecutors, civil society representatives.

4. At its 115th Session on 22 June 2018, the Commission was informed by the rapporteurs on the results of their visit to Bucharest. In view of the urgency of the matter, the Commission authorised the rapporteurs to prepare a preliminary opinion to be sent to the Romanian authorities in July 2018, following consultation of the Bureau and the Chair of the Sub-Commission on the Judiciary.

5. A preliminary opinion was issued on the basis of contributions by the rapporteurs and following consultation of the Bureau and the Chair of the Sub-Commission on the Judiciary. It was sent to the Romanian authorities on 13 July 2018, and published on the same day on the Commission's web site. Subsequently, the three amending laws were promulgated and entered into force.[1]

6. The Venice Commission was informed that, on 15 October 2018, a Government Emergency Ordinance[2] was adopted, aiming *inter alia* to address some of the recommendations contained in the present opinion. While the text of the adopted Ordinance was not submitted to the Commission, the Commission is aware that among other changes the Ordinance postpones to 1 January 2020 the entry into force of the early retirement scheme for magistrates introduced by an amendment to the Law on the status of judges and prosecutors (see Section V.B.2.i below).

[1] See Law no 207 of 20 July 2018 amending and completing Law no. 304/2004 on judicial organization, published in the Official Gazette on 20 July 2018; Law no 234 of 4 October 2018 amending and completing Law no. 317/2004 on the Superior Council of Magistracy, published in the Official Gazette on 8 October 2018; Law no 242 of 12 October 2018 amending and completing Law no. 303/2004 on the status of judges and prosecutors, published in the Official Gazette on 15 October 2018.

[2] Emergency Ordinance no. 92/15.10.2018 for amending and completing some normative acts in the field of justice, published in the Official Gazette no 874/16 October 2018

7. At the same time, a further Government Emergency Ordinance[3] adopted on 10 October 2018 establishes the framework for the operation of the Section for the Investigation of Criminal Offenses within the judiciary, a special body within the Prosecutor's Office attached to the High Court of Cassation and Justice set up by an amendment to the law on judicial organization (see Section V.B.II.d below).

8. The present Opinion was adopted by the Venice Commission at its 116th session on 19-20 October 2018.

II. Preliminary remarks

9. It is not the purpose of this document to provide a detailed and exhaustive analysis of the three draft laws submitted to the Commission (see CDL-REF(2018)022, CDL-REF(2018)023 and CDL-REF(2018)024). In view of the complexity of the proposed amendments, as well as of the related legislative process, involving successive versions of the three texts, the opinion focuses on the provisions raising more critical issues for the reforms, which are being undertaken.

10. The opinion has been prepared on the basis of the English translation of the draft laws provided by the Presidential Administration of Romania. Inaccuracies may occur due to the translation.

III. Background

11. According to the Romanian authorities, the reform process, which already started in 2015, was necessary and has been undertaken for several main reasons, including the need to address concerns of inefficiency and politicisation of the judiciary, and the need to increase its quality, transparency and accountability. In addition, a number of legislative changes were needed in order to implement several decisions of the Romanian Constitutional Court.

12. The overall functioning of the Romanian judiciary has been the subject of yearly assessment (and recommendations) under the EU Mechanism of Cooperation and Verification, established upon Romania's accession to the EU. While previous reports prepared in the context of this mechanism had noted that important progress in the reform of the judiciary had been made, the most recent report (in November 2017) expressed concern that this progress might be affected by the political situation4 and developments such as the adoption, in January 2017, of a Government Emergency Ordinance to de-criminalise certain corruption offences, and, lately, the controversy created around the revision of the three draft laws

13. The legislative process took place in a context marked by a tense political climate, strongly impacted by the results of the country's efforts to fight corruption. The Anti-Corruption Directorate (DNA) carried out a high number of investigations against leading politicians for alleged corruption and related offenses and a considerable number of Ministers or members of parliament were convicted.[5] This successful fight against corruption was widely praised on an international level.

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[3] Emergency Ordinance no. 90 of 10 October 2018 on some measures for the operationalization of the Section for the Investigation of Criminal Offences within the judiciary, Official Gazette no. 862 of 10 October 2018

[4] The last MCV Report, adopted in November 2017, noted in this respect: "*Within a nine months period since the January 2017 report, Romania has seen two governments, while growing tensions between State powers (Parliament, Government and Judiciary) made the cooperation between them increasingly difficult*." See Report from the Commission to the European parliament and the Council On Progress in Romania under the Co-operation and Verification Mechanism, COM(2017) 751 final, Brussels, 15.11.2017.

[5] According to information provided by the DNA, for the last 5 years DNA has indicted more than 68 high officials, charged with corruption offences (or assimilated to those of corruption): 14 ministers and former ministers, 39 deputies, 14 senators, 1 member of European Parliament. The courts have ruled final conviction decisions against

14. On the other hand, politicians alleged that there had been cases of misuse of their powers by some prosecutors (and, in some cases, by judges). Some acquittals in high-profile cases of corruption led to the methods used by the prosecution services being questioned. Following the recent disclosure of co-operation protocols signed between the Romanian Intelligence Service and judicial institutions, questions are being raised on the way the anti-corruption fight has been conducted as well as, more generally, on the impact of such co-operation on the independence of judicial and prosecutorial institutions.

15. At the same time, there are reports of pressure on and intimidation of judges and prosecutors, including by some high-ranking politicians and through media campaigns. Pending amendments to the Criminal Code and Criminal Procedure Code, which will be the subject of a separate opinion of the Venice Commission, are alleged to have the potential of undermining the fight against corruption.

16. In these circumstances, the recent controversy over the dismissal of the Chief anti-corruption prosecutor, beyond the questions that it raises about existing and future mechanisms of dismissal (and appointment) from/to leading positions within the Romanian judiciary, is a clear illustration of existing difficulties and blockages in terms of inter-institutional dialogue and co-operation.

17. This context makes any legislative initiative, which has the potential of increasing the risk of political interference in the work of judges and prosecutors, particularly sensitive.

IV. Constitutional framework

18. The specific chapter devoted by the Romanian Constitution to the regulation of the "Judicial authority" (Chapter VI, under Title III) comprises three sections: Section I on "Courts of law", Section II on "The Public ministry" and Section III on "The Superior Council of Magistracy". According to the constitutional provisions, prosecutors are thus, in the Romanian system, part of the judicial authority.

Article 124 (3) guarantees that "*Judges shall be independent and subject only to the law*", while Article 125 (1) adds that the judges, appointed by the President of Romania, "*shall be irremovable, according to the law.*" Paragraph (2) of the same provision states: "*The appointment proposals, as well as the promotion, transfer of, and sanctions against judges shall only be within the competence of the Superior Council of Magistracy, under the terms of its organic law*."

19. Article 126 (1) establishes that "*[j]ustice shall be administered by the High Court of Cassation and Justice, and the other courts of law set up by the law*."

20. Article 132 on the "statute of public prosecutors" states, in its paragraph 1: "*[p]ublic prosecutors shall carry out their activity in accordance with the principle of legality, impartiality and hierarchical control, under the authority of the Minister of Justice*."

21. Article 133 (1) provides that the Superior Council of Magistracy "*shall* guarantee *the independence of justice*, and Article 134 establishes, as main SCM powers, that SCM "s*hall propose to the President of Romania the appointment of judges and public prosecutors, except for the trainees, according to the law"* (paragraph 1); and *"shall perform the role of a court of law, by means of its sections, as regards the disciplinary liability of judges and public prosecutors, based on the procedures set up by its organic law[…]".*(paragraph 2).

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27 of these officials (5 ministers, 17 deputies, 4 senators, 1 member of the European parliament). During the same period, seizure measures over 2 billion euros have been ordered.

V. Analysis

A. Procedural issues

22. While the overall reform process already started in 2015, the current legislative process relating to the three draft laws only started in August 2017, with the presentation, by the Ministry of Justice, of the main lines of the planned reform. Subsequently, the three drafts were taken up and registered as a parliamentary legislative initiative by a number of MPs. Previous drafts, which had been the subject of wide consultations within the Romanian judiciary, were abandoned.

23. A special and speedy parliamentary procedure (an emergency procedure) was chosen and the amendments were considered by a body established especially for that purpose (a special joint committee of the two chambers of parliament). Using this procedure for the extensive amendment of three important organic laws was questioned by Romanian magistrates and civil society, but was considered constitutional by the Constitutional Court.

24. At the different stages of the legislative process, the three draft laws and the related legislative process have drawn strong criticism in Romania and internationally. At the domestic level, this took *inter alia* the form of : two negative opinions of the Superior Council of Magistracy on initial versions of the drafts; a memorandum for the withdrawal of the drafts signed by almost 4000 judges and prosecutors (October 2017);[6] silent protests of Romanian magistrates in front of courts and public prosecutor's offices (December 2017); appeals, by representatives of the opposition in the Romanian Parliament, as well as by the High Court of Cassation and Justice, to the Romanian Constitutional Court, but also to international institutions, including the Venice Commission; various critical reports and appeals by civil society organisations.[7]

25. Concerns have also been expressed over the fact that, although in some aspects, wide ranging transformations are being considered, the whole process was not accompanied by a proper assessment of the institutional, legal and financial implications of the envisaged changes.

26. Repeated statements and calls by representatives of European institutions (including the EU and Council of Europe institutions, such as GRECO, the Council of Europe's anti-corruption body[8]), have recommended a process providing opportunities for more inclusive and thorough consultations. The Romanian authorities were invited, as a useful step prior to the adoption of such important legislation, to request the Venice Commission's legal expertise, with a view to identifying acceptable solutions, in line with existing standards, on most disputed issues. One may regret that the recommendation which was made, i.e. to postpone the adoption in order to first have the Venice Commission Opinion as a useful input into the debate, was not followed.

27. Despite the strong reaction and above-mentioned calls, the legislative process has advanced and is now in its final stages, with little scope left for exchanges and opportunities likely to contribute to a wider appropriation of the proposed changes, or for addressing remaining controversial issues.

28. Numerous amendment proposals, and subsequent versions, have been contested before the Constitutional Court by the parliamentary opposition and the President of Romania as well as, quite unique, by the High Court of Cassation and Justice, while being publicly criticized by other judicial institutions and magistrates' professional associations. Several rounds of decisions of the Constitutional Court have enabled improvements to be made to the proposed regulations, although critical issues remain.

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[6] http://www.forumuljudecatorilor.ro/index.php/archives/2813
[7] http://www.nineoclock.ro/romania-100-platform-65-ngos-urge-govt-to-scrap-bill-amending-justice-legislation/
[8] GRECO-AdHocRep(2018)2, *Ad hoc Report on Romania* (Rule 34), Adopted by GRECO at its 79th Plenary Meeting, (Strasbourg, 19-23 March 2018)

29. According to the Romanian authorities, the reform process was open and transparent, with representatives of the professional associations as well as the Superior Council of Magistracy (SCM) and civil society having been involved.

30. However, various interlocutors of the rapporteurs have described the process as excessively fast and lacking transparency, and being conducted in the absence of inclusive and sufficiently effective consultations. According to many interlocutors of the rapporteurs, if such consultations were held, they were rather formal. The final stage of the reform process, which started in August 2017, was indeed quite fast for such a comprehensive and controversial reform.

31. The rapporteurs also noticed that this legislative process had proven to be quite divisive. There are diverging views among the Romanian political class, among the judiciary (including within the SCM), among the professional associations of judges and prosecutors, and within civil society organisations and the public opinion (with recurrent street protests) regarding the necessity of the reform, its content and its potential consequences - positive or adverse - on the Romanian judiciary. As a result, at this stage, it seems quite hard to have a rational, balanced and honest dialogue on reforming the Romanian judiciary.

32. As the Venice Commission pointed out many times, the law-making procedure is of great importance. In its Report on the rule of law,[9] legality, including a transparent, accountable and democratic process for enacting laws is mentioned as one of the elements of the definition of the rule of law. This means that, in a truly democratic state based on the rule of law, it is mandatory to ensure that, at all stages of any reform process, all interested parties be involved either directly or through appropriate consultation.

33. The Commission has been highly critical[10] of situations in which acts of Parliament regulating important aspects of the legal or political order were being adopted in an accelerated procedure, frequently prompted by a motion put forward by an individual member of the Parliament (so as to avoid required procedures for the assessment of government drafts). Such an approach to the legislative process cannot provide conditions for proper consultations with the opposition or the civil society.

34. Especially when adopting decisions on issues of major importance for society, such as judicial reforms, wide and substantive consultations involving the various political forces, the input of the judiciary, and of civil society, is a key condition for adopting a legal framework which is practicable and acceptable for those concerned, and in line with democratic standards.[11] It is regrettable that the current process could not benefit from such a wide and comprehensive debate. It is noted at the same time that the Constitutional Court found the adoption procedure to be in line with the Constitution.

[9] CDL-AD(2011)003rev, Report on the rule of law, Adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011)

[10] CDL-AD(2011)001, Opinion on three legal questions arising in the process of drafting the New Constitution of Hungary, paras.16-19; see also CDL-AD(2012)026, Opinion on the compatibility with Constitutional principles and the Rule of Law of actions taken by the Government and the Parliament of Romania in respect of other State institutions and on the Government emergency ordinance on amendment to the Law N° 47/1992 regarding the organisation and functioning of the Constitutional Court and on the Government emergency ordinance on amending and completing the Law N° 3/2000 regarding the organisation of a referendum of Romania, para. 74.

[11] CDL-AD(2011)001, Opinion on Three Legal Questions Arising in the Process of Drafting the New Constitution of Hungary, CDL-AD(2013)010, Opinion on the draft New Constitution of Iceland, para. 17, CDL-AD(2014)010, Opinion on the Draft Law on the Review of the Constitution of Romania, paras. 25-30

B. Substantial issues

1. General Aspects

35. The present opinion will focus in particular on those aspects in the three draft laws, which are of particular relevance for the independence and the efficiency of the judiciary. The relevant provisions are to be assessed not only as to their wording, but also in view of the cumulative effect that they could have on the independence, efficiency, and quality of the judiciary, as well as on the fight against corruption. It is also important to take into account, as a specific feature of the Romanian judicial system, that the Constitution includes the prosecutorial service in the judiciary.

36. Main issues include:

- prosecutors' status and the principles inherent to their functions;
- scope of the hierarchical control of prosecutors and the role of the Ministry of Justice;
- new arrangements for appointments to/dismissal from leading positions in the prosecution service/in the judiciary;
- new rules for the exercise of judges' and prosecutors' freedom of expression;
- new rules for the material liability of judges and prosecutors;
- the new Section for investigating offences committed within the judiciary;
- issues related to the role and the operation of the Superior Council of Magistracy, the guarantor of the independence of the judiciary;
- the risk that experienced judges and prosecutors will be induced to leave the system without the possibility of replacing them in the short or medium term, thus diminishing the efficiency and independence of the whole judicial system;
- interference of the intelligence services in the activities of the Romanian judiciary.

2. Specific aspects

a. Appointment to / dismissal from leading positions

i. In the judiciary

37. While acknowledging that there is no single model that applies to all countries, the Venice Commission has stressed on many occasions, how important it is to provide, as safeguards for the independence and impartiality of judiciary, for transparent and depoliticised methods of judicial appointment. In the Commission's view, decisions concerning appointment and judges' professional career should be based on merit, applying objective criteria prescribed by the law.[12]

38. From this perspective, the involvement, with a decisive influence, of an independent judicial council with a pluralist composition, appears as one of the main ways to ensure neutrality of the appointment and to avoid the danger that political considerations prevail over the objective merits of potential candidates.[13]

39. Under the existing rules (Article 53 (1) and (2) of Law no. 303/2004),[14] the President, vice-president and presidents of section of the High Court of Cassation and Justice (hereinafter the

[12] Report on European standards as regards the independence of the judicial system: part I - The Independence of Judges, (CDL-AD(2010)004), para 27

[13] CDL-AD(2012)024, Opinion on two Sets of draft Amendments to the Constitutional Provisions relating to the Judiciary of Montenegro, paras. 16-17; Report on European standards as regards the independence of the judicial system: part I - The Independence of Judges, (CDL-AD(2010)004), para. 32; see also Report on Judicial Appointments, CDL-AD(2007)028, para. 49.

[14] "Art. 53 (1) The president, the vice-president and the section presidents of the High Court of Cassation and Justice shall be appointed by the President of Romania, at the proposal of the Superior Council of Magistracy, from among the judges of the High Court of Cassation and Justice who have worked at this court for at least 2 years.

High Court) are appointed by the President of Romania, at the proposal of SCM. The President may refuse the appointment in a reasoned form.

40. The revocation is made by the President of Romania, at the proposal of SCM.[15] Possible grounds for revocation are provided, in an exhaustive manner, by Article 51(2) of Law no. 303/2014: 1/ if they no longer fulfil one of the requirements for appointment to a leading position; 2/ in case of inappropriate exercise of management duties, in terms of effective organisation, behaviour and communication, of assuming responsibilities and management skills); 3/ in case of application of one of the disciplinary sanctions. No mention is made of a possible refusal by the President.

41. Under the proposed provisions, a decisive role is given to the SCM, through its Judges' Section, which will be responsible both for the appointment and the revocation. The involvement of the Section, instead of the Plenum of the SCM, is intended to ensure consistency with the new distribution of competencies within SCM, separating the decision-making power and giving SCM Prosecutors' Section and SCM Judges' Section the decision-making power, respectively, on prosecutors' matters, and judges' matters (see related comments, below).

42. The ensuing major change, in the new system, is that the President will be entirely excluded from the appointment/dismissal procedures.

43. The proposed system, making SCM the exclusive actor in the appointment, is a welcome solution, which confirms the crucial role of SCM as the guarantor of the independence of the judiciary,[16] although the Venice Commission has also accepted that the Head of State may play a formal role in appointing judges. This is even more important in the case of early termination of the mandate, which is designed in a similar and symmetric way. The new system also has the advantage of avoiding a critical situation, where the President would exercise his/her veto power by refusing to ratify a decision of SCM.[17] Such a situation has occurred in the past and was also addressed by the Romanian Constitutional Court.[18]

44. That being said, in view of the importance of the positions at issue and the high and exclusive responsibility assigned to SCM, it will be essential to ensure that all safeguards are provided, in law and in practice, for a transparent and neutral process of selection/revocation, within the framework of SCM (its Judges' Section). In particular, strong procedural guarantees, including appropriate judicial remedies, should be available in the case of dismissal of the President of the High Court.[19]

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(2)The President of Romania may refuse only in a reasoned form the appointment into the leading position in paragraph (1), notifying the reasons for his refusal to the Superior Council of Magistracy.
(3) The appointment into the offices in paragraph (1) is made for a 3 years term of office, which is renewable only once."

[15] "(6)The revocation from office of the president, the vice-president or of the section presidents of the High Court of Cassation and Justice shall be made by the President of Romania at the proposal of the Superior Council of Magistracy, which may act *ex officio*, at the request of one third of the number of its members or at the request of the general assembly of the court, for the reasons provided by Article 51 paragraph (2) which shall apply accordingly."

[16] See Bulgaria, Opinion on the Judicial System Act, CDL-AD(2017)018, para 76.

[17] See CDL-AD(2013)034, Opinion on proposals amending the draft law on the amendments to the constitution to strengthen the independence of judges of Ukraine, para. 16.

[18] RCC, Decision no. 375 of 6 July 2015. In its decision, with reference to Articles 94 (c) and 125 (1) of the Constitution, the Court confirmed the right of the President to refuse the appointment proposal (for chief judges and prosecutors) made by the SCM.

[19] See CDL-AD(2017)031, Poland - Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts, para. 50, where reference is made to the case-law of the European Court of Human Rights, in particular to the Grand Chamber case of *Baka v. Hungary*, concerning the premature dismissal of the President of the Hungarian Supreme Court, and where the ECtHR found a breach of Article 6 of the Convention because of the absence of judicial remedies in the case of dismissal of a chief judge; see ECtHR, *Baka v. Hungary* [GC], no. 20261/12, ECHR 2016.

45. To sum up, the Venice Commission welcomes the exclusive role of the SCM in the appointment and revocation of judges, excluding the President from this procedure.

ii. In the prosecution service

46. The Venice Commission notes in its Rule of Law Checklist,[20] concerning the prosecution service, that "[*t]here is no common standard on the organisation of the prosecution service, especially about the authority required to appoint public prosecutors, or the internal organisation of the public prosecution service. However, sufficient autonomy must be ensured to shield prosecutorial authorities from undue political influence.* […]

47. The Venice Commission, when assessing existing appointment methods, has paid particular attention to the necessary balance between the need for the *democratic legitimacy* of the appointment of the head of the prosecution service, on the one hand, and the requirement of *depoliticisation*, on the other. From this perspective, in its view, an appointment involving the executive and/or the legislative branch has the advantage of giving democratic legitimacy to the appointment of the Chief Prosecutor. However, in this case, supplementary safeguards are necessary to diminish the risk of politicisation of the prosecution office.[21] As in the case of judicial appointments, while different practical arrangements are possible, the effective involvement of the judicial (or prosecutorial council), where such a body exists, is essential as a guarantee of neutrality and professional, non-political expertise.

48. At present, in Romania, the Prosecutor General and deputies, the chief Prosecutor of DNA and deputies, the Chief Prosecutor of DIICOT (Department for Investigating Organised Crime and Terrorism) are appointed by the President of Romania, at the proposal of the Ministry of Justice, and after receiving the opinion of SCM. The reasoned refusal of the President, although the law does not mention how many times, is allowed (Article 54 (1) and (2) of Law no. 303/2004).

49. The President is also responsible for the revocation from the above positions upon proposal submitted by the Minister of Justice, and after receiving the opinion of the SCM (Article 54 (3)). Revocation may be proposed for the same reasons as for the revocation from leading positions in the judiciary (see above). No mention is made in the law of a possible refusal by the President.

50. Under the proposed amendment,[22] both appointment and revocation procedures remain unchanged, with two exceptions. First, in the future, the President may only refuse the

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[20] Venice Commission CDL-AD(2016)007, Rule of Law Checklist, para. 91.

[21] CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, paras. 19, 20 and 27

[22] "In Article 54, paragraphs (1), (3) and (4) shall be amended and shall have the following content:
"Art. 54 - (1) The Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice, the first deputy and his deputy, the chief prosecutor of the National Anticorruption Directorate, his deputies, the chief prosecutors of these prosecutor's offices, the Chief Prosecutor of the Directorate for the Investigation of Organized Crime and Terrorism and his deputies are appointed by the President of Romania, at the proposal of the Minister of Justice, with the opinion of the Prosecutors Section of the Superior Council of Magistracy, between the prosecutors who have a minimum of 10 years of service as judge or prosecutor, for a period of three years, with the possibility of re-investing only once.
(3)The President of Romania may, in justified cases, refuse once the appointment to the management positions provided for in paragraph (1), making the reasons for the refusal known to the public.
(4) The dismissal of the prosecutors from the management positions provided for in paragraph (1) shall be made by the President of Romania, at the proposal of the Minister of Justice, which may be heard ex officio at the request of the general meeting or, as the case may be, of the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice or the General Prosecutor of the National Anticorruption Directorate or the Directorate for the Investigation of Organized Crime and Terrorism, with the opinion of the Section for Prosecutors of the Superior Council of Magistracy, for the reasons set out in Article 51 paragraph (2) which shall apply

appointment once. Second, instead of the opinion of the plenum of the SCM, now the opinion of the Prosecutors' Section is required.[23] This latter aspect will be examined below.

51. Recommendation no. 1 of the European Commission CVM Report of 15 November 2017,[24] reiterated the recommendation addressed by the European Commission in previous MCV reports to Romania to "*[p]ut in place a robust and independent system of appointing top prosecutors, based on clear and transparent criteria, drawing on the support of the Venice Commission*." In the view of the European Commission, the fulfilment of this recommendation "*will also need to ensure appropriate safeguards in terms of transparency, independence and checks and balances, even if the final decision were to remain with the political level*."

52. The new system, allowing the President to refuse an appointment only once, makes the role of the Minister of Justice in such appointments decisive and weakens, rather than ensures, checks and balances. The current system, by involving two political organs, allows the balancing of various political influences. This is important since the President, contrary to the Minister of Justice, does not necessarily belong to the majority.

53. Moreover, the current system gives a real role to the SCM by enabling the President to take an informed decision on the basis of the opinion of this body. On the contrary if, as it results from the amending proposal, the President is bound to appoint the second candidate proposed by the Minister of Justice even in case of a negative opinion by the SCM, the opinion of this body loses most of its relevance. For the second proposal this is evident. As regards the first proposal, the Minister of Justice has less incentive to propose a candidate who would appear suitable to the SCM, since the Minister will anyway be able to impose his or her second candidate.

54. This new rule can therefore only be considered as a step backwards, reducing the independence of the leading prosecutors. This is particularly worrying in the context of the current tensions between prosecutors and some politicians, due to the fight against corruption. If the leading prosecutors depend for their appointment and dismissal on a Minister, there is a serious risk that they will not fight in an energetic manner against corruption among the political allies of this Minister.

55. This being said, the proposed appointment system may not be considered without taking into account recent developments related to the proposal made by the Minister of Justice for the dismissal of the DNA Chief Prosecutor, and its refusal by the Romanian President, as well as the related Decision of the Constitutional Court (CCR Decision no. 358 of 30 May 2018**)**.

56. In its decision, the Court explicitly stated, thereby interpreting Article 94 (c) and Article 132 (1) of the Constitution (these provisions are silent on the issues of appointment / revocation of chief Prosecutors, which are regulated by Law 303/2014), that the President has no refusal power in the revocation process. The Court explained, in particular, that the President's power in the dismissal procedure is limited to verifying the legality of the procedure (paragraph 98 of the Decision) and does not include a power for the President to analyse, on the merits, the dismissal proposal and its opportunity. In the view of the Court, by assessing the evaluation made by the Minister of Justice of the work of the DNA Head, the President had placed himself above the Minister's authority in this procedure, which was unconstitutional.

57. The Court further established that the position expressed by SCM (in the future, Prosecutors' Section), shall serve, for the Minister of Justice, as an advisory reference regarding both the legality and the soundness of the dismissal proposal, while for the President, in view of

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accordingly. "

[23] However, according to the comments provided by the Romanian authorities, in practice "the SCM Plenum has never been involved in the procedure of appointing high ranking prosecutors."

[24] Report from the Commission to the European parliament and the Council On Progress in Romania under the Co-operation and Verification Mechanism, COM(2017) 751 final, Brussels, 15 .11.2017

the President's - more limited - competence in the procedure, it shall only serve as advice in respect of legality issues (paragraph 115 of the Decision)

58. These are interpretations of high importance for relevant future revocation regulations and, it seems also, for the appointment of Chief prosecutors. To sum up, the decision gives the Minister of Justice the crucial power in removing high-ranking prosecutors, while confining the President in a rather ceremonial role, limited to certifying the legality of the relevant procedure. The weight of SCM (under the system which is currently proposed, its Prosecutors' Section) is also considerably weakened, taken into account the increased power of the Minister of Justice and the limited scope of the influence that it may have on the President's position (only on legality issues).

59. In a previous decision,[25] the Constitutional Court examining the constitutionality of the draft law amending Law no. 303/2014, had concluded that the amendment reducing (to one refusal) the power of the President to refuse the appointment proposal made by the Minister of Justice for the function of Chief prosecutor, did not raise issues of constitutionality. In that context, the Court had stressed that the Minister of Justice plays a central role in the appointment of Chief prosecutors. By contrast, in an earlier decision of 2005,[26] the Court had ruled that the role of the President in the appointment procedure of prosecutors could not be purely formal. These different judgments are hard to reconcile and the precise constitutional situation for appointments remains therefore somewhat unclear.

60. Nevertheless, the impact of the decision is even likely to go beyond the issue of chief prosecutors' removal, since it also contains elements of interpretation of constitutional provisions of relevance for the relationship between the prosecution service/prosecutors and the executive. In particular, the role and powers of the Minister of Justice vis-à-vis the prosecution service and the prosecutors are largely addressed in the decision (as already indicated, the Court analysed in particular Article 132 paragraph (1) of the Constitution, in relation to Article 94 (c) of the Constitution.)[27]

61. The judgment leads to a clear strengthening of the powers of the Minister of Justice with respect to the prosecution service, while on the contrary it would be important, in particular in the current context, to strengthen the independence of prosecutors and maintain and increase the role of the institutions, such as the President or the SCM, able to balance the influence of the Minister. The Constitutional Court has the authority to interpret the Constitution in a binding manner and it is not up to the Venice Commission to contest its interpretation of the Constitution. The Constitutional Court based[28] its decision on Article 132 (1) of the Constitution ("*Public*

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[25] See CCR Decision no. 45 of 30 January 2018, para 165.
[26] See CCR Decision no. 375 of 6 July 2005.
[27] The Court held that Article 94 (c) of the Constitution is a text of a general nature, of principle, in the sense that the President of Romania appoints in public positions, under the terms of the law [the Court refers to its Decision no. 285/2014]; for the Court, based on this provision, the President certifies the legality of the procedure for appointment / dismissal (para. 98 of Decision 358/2018). Instead, for the Court, Article 132 (1) of the Constitution is a "text of a special nature", which "establishes a decision power of the Minister of Justice on the prosecutors' activity", and indicates that "in this procedure the Minister has a central role" (the Court refers to its own recent Decision No. 45/2018];
[28] The Court notes that the Minister of Justice bases his authority over prosecutors on the provisions of Article 132 (1) of the Constitution […]" (para. 65 of Decision 358/2018); "the Minister of Justice has a wide margin of appreciation, the exercise of which can be limited by establishing certain legal conditions that the prosecutor must meet in order to be eligible to be appointed to a managerial function. Instead, the margin of discretion of the Minister of Justice cannot be annihilated / distorted by attributing powers to other public authorities, so as to affect the balance and implicitly reconfigure their constitutional competences." (para. 99 of Decision 358/2018); "Also, the constitutional text of Article 132 (1), as has been pointed out, is of a special nature, a text which establishes the competence of the Minister of Justice with regard to the activity of prosecutors, so that, insofar as the organic legislator has chosen that the act of appointment be issued by the President under the provisions of Article 94 (c) of the Constitution, the latter cannot be recognized a discretionary power, but a power to verify the regularity of the procedure." (para. 100 of Decision 358/2018); "The Court finds that the President of Romania has in the given case

prosecutors shall carry out their activity in accordance with the principle of legality, impartiality and hierarchical control, under the authority of the Minister of Justice"), in relation to Article 94 (c) of the Constitution, stating that the President has, inter alia, "*to make appointments to public offices, under the terms provided by law*". To strengthen the independence of the prosecution service and individual prosecutors, one key measure would therefore be to revise, in the context of a future revision of the Romanian Constitution, the provisions of Article 132 (1) of the Romanian Constitution. At the legislative level, it could be considered, as far as dismissal is concerned, to amend Law no. 303 in such a way as to give to the opinion of the SCM a binding force.

b. Prosecutors' status. Principles underlying prosecutors' functions

62. As noted by the Venice Commission in its 2014 Opinion on the revision of the Romanian Constitution,[29] the Romanian Constitution does not proclaim the independence of the prosecution service. While Article 124 (3) stipulates that "*Judges shall be independent and subject only to the law*", Article 132 (1) establishes that "*Public prosecutors shall carry out their activity* in *accordance with the principle of legality, impartiality and hierarchical control, under the authority of the Minister of Justice*". At the same time, the Constitution regulates the role of the Prosecution Service and the status of prosecutors under the judicial authority. No change to the existing system was envisaged in the context of the 2014 proposal for constitutional revision.

63. The Venice Commission acknowledges that there are no common standards requiring more independence of the prosecution system, and that "a plurality of models exist" in this field. However, only a few of the Council of Europe member states have a prosecutor's office under the executive authority and subordinated to the Ministry of Justice (e.g. Austria, Denmark, Germany, the Netherlands) and "*a widespread tendency to allow for a more independent prosecutor's office, rather than one subordinated or linked to the executive*" may be observed.[30]

64. From this perspective, the Commission expressed concern, in 2014, in relation to a reported discussion in Romania on removing prosecutors from the magistracy, a step which, in its view, could risk threatening the already fragile independence of the prosecutor's office.[31]

65. More generally, in view of the difficulties highlighted during the exchanges it had in Romania, the Commission stressed the importance "of a unified and coherent regulation of the status of prosecutors, with clear, strong and efficient guarantees for their independence" and invited the Romanian authorities "to review the system" in order to address the shortcomings. The Commission also suggested that, in the context of a more comprehensive reform, the independence principle be added to the list of principles related to prosecutors' functions.[32]

66. To date, no such comprehensive change has taken place in Romania, while in the current situation of conflict between prosecutors and some politicians, due to the fight against corruption, this change would be even more important.

67. On the contrary, the proposed amendments confirm, while recognising the prosecutors' independence in taking solutions (i.e. the decision to initiate, pursue or withdraw criminal proceedings), the legislator's choice for maintaining the existing system based on hierarchical control, under the authority of the Minister of Justice, and its reluctance to having independence

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carried out an "assessment of the evaluation" of the Minister of Justice, in other words, of the merits of the reasons contained in the revocation proposal, placing himself above the authority of the Minister of Justice, which contravenes Article 132 paragraph (2) of the Constitution" (para. 113 of Decision 358/2018). (*unofficial translation)*

[29] CDL-AD(2014)010, paras. 182-185.

[30] See *Report on the European Standards as regards the Independence of the Judicial System: Part II: Prosecution Service*, CDL-AD(2010)040, para. 26.

[31] CDL-AD(2014)010, para. 191

[32] CDL-AD(2014)010, para. 185

among the general principles which underlie the prosecution system, as suggested by the Venice Commission.

68. The proposed new wording of Article 3 (1) of Law no. 303/2014 in fact repeats Article 132, in this way providing for better compliance with the Constitution. This approach is confirmed by the legislator's choice to leave out, in the new text of Article 3 (1), the express reference to prosecutors' independence, as laid down in the provision currently in force: "Prosecutors […] enjoy stability and are independent, according to the law". Moreover, new paragraph 3 of Article 4 recalls: "*Judges and prosecutors must, as a rule, be and appear to be independent of each other*."

69. At the same time, new Article 3(1^1) states that prosecutors "*are independent in the settlement of the solutions, under the conditions stipulated by the Law no. 304/2004[…]*" (see related comments in the next section). Additional references to the prosecutors' independence "in the exercise of their office" may be found in other new provisions of Law no. 303. These include: new Article 35 (on the continuous professional training of judges and prosecutors as a guarantee for their independence and impartiality in the exercise of the function); as well as new Article 75 (2) (a), entrusting SCM Prosecutors' Section with the task of defending prosecutors against any interference that could affect their impartiality or independence in deciding on cases.

70. According to an official explanation by the Romanian authorities, the current system, which provides that the prosecutors are independent, is being changed in relation to the Venice Commission's position on the issue of independence of judges *versus* that of prosecutors. This is regrettable, as it is obviously a misinterpretation of the Venice Commission's texts. It is true that in paragraph 28 of the *Report on European Standards as regards the Independence of the judicial system: Part II – the prosecutors*, the Commission expressly acknowledged that "*the independence of the prosecutor's office is not as categorical in nature as that of the courts*". The Venice Commission considers important to refer to the substantive difference that exists, in view of their specific roles and functions, between judges and prosecutors. However, neither this report nor any Venice Commission document provides expressly or can be interpreted in the sense that the Venice Commission would question the systems, where the prosecutor's office is independent or would require the reform of such systems. Specifically, with respect to Romania, the Venice Commission has, on the contrary, underlined the need to increase independence of the prosecutors.

71. The proposed amendments have been perceived, especially by prosecutors, as aiming to reduce their independence and as a worrying signal in relation to the fight against corruption and related investigations in high-level corruption cases.

72. On its own, it is difficult to contest the amendment of new Article 3 (1), which reflects the text of the current Constitution. Taken together with the other amendments, this amendment points, however, to a general tendency to reduce the independence of prosecutors, which is contrary to the direction the Venice Commission has recommended to Romania.

c. Guarantees for the independence of prosecutors. Hierarchical control

73. As it results from Article 64 of Law no. 304/2014, the current Romanian legislation provides a certain degree of independence for the prosecutor within the hierarchy. If, under paragraph 2 of Article 64, in the solutions that they decide, "prosecutors are independent, according to the law", according to paragraph 3, the hierarchically superior prosecutor may invalidate those solutions, in a reasoned manner, when they are deemed *illegal*.

74. As indicated before, under the proposed amendment, in the solutions reached, the prosecutor remains "independent, under the conditions stipulated by the law" (new Article 3(1^1) of Law 303). The conditions are laid down in the draft law amending Law no. 304, as a clarification

for the understanding of the independence of prosecutors vis-à-vis their hierarchy: prosecutors are independent in the solution reached (new Article 64 (2)), and free to present before the court the conclusions that they deem grounded (new Article 67(2)). Yet, prosecutors' solutions may now be invalidated by the superior prosecutor not only on grounds of lawfulness, as provided by the current law, but also for reasons of *groundlessness* of the decision (new Article 64 (3)).

75. It is important that, to counterbalance the weight of the hierarchy, prosecutors may challenge the decision of the superior prosecutor with the SCM Prosecutors' Section, under the procedure for the verification of judges' and prosecutors' conduct (new Article 64 (2)).

76. The addition of the word "ungrounded" in article 64 of the law on judicial organisation (as referred to in paragraph 74) as a reason for the higher prosecutor, in addition to *lawfulness*, for invalidating a prosecutor's solution, has raised fears that the increased role of the Ministry of Justice[33] - who is politically appointed - in the appointment and dismissal procedures, may, in conjunction, give way to an increase of the political influence on criminal investigations. Both the Prosecutor General and the Head of DNA, whose position would appear to be strengthened by this power, considered that it will be difficult for them to resist pressure from politicians to interfere in individual cases, not least cases of corruption. The Commission however understands that, while the reference to groundlessness has indeed been added to the previous text of Law no. 304/2014, the principle already appeared in the Criminal Procedure Code.

Prosecutors' dismissals

77. A number of amendments are being introduced to Articles 79, 86, 87, 88 of Law no. 304/2014, on issues related to the operation of the DIICOT and the DNA, intended as answers to criticism about the competences of the prosecutors working in these directorates and lack of transparency in recruitment procedures, or more generally as regards these bodies' activities.

78. The possibility, for the DIICOT or DNA Chief Prosecutor, to dismiss the prosecutor appointed within the respective body "in case of improper exercise of position-specific duties" or "in case of disciplinary sanctions" is problematic, as it is formulated in too broad terms and allows the prosecutor's dismissal for the lightest offenses (new Articles 79(9) and 87 (8), but also in the currently in force text of these provisions). Although the endorsement of the dismissal by the SCM Prosecutors' Section can be seen as a safeguard, it is recommended that the grounds be formulated in a more precise manner.

79. Similarly, the grounds for dismissal from the management positions provided in Article 51 (2) of Law no. 303/2014, unchanged in the amending text, and applicable both to judges and prosecutors, are also formulated in rather broad terms, involving subjective criteria (dismissal for all cases where the person does no longer fulfil one of the conditions required for the appointment), as well as the risk of a disproportionate dismissal decision[34] (since the existence of any disciplinary sanction is sufficient). To ensure that these grounds contribute to efficiency and do not allow for bias and abuse,[35] it is recommended to define them in more precise terms.

d. New Section for investigating criminal offences within the judiciary

80. As foreseen by the draft amending Law no. 304/2004 (Articles 88^1 - 88^9), it is proposed that a Section for the investigation of criminal offences in the judiciary (hereinafter "the Section") be established within the Prosecutor's Office attached to the High Court of Cassation and Justice. The Section will have exclusive competence for the prosecution of criminal offences committed

[33] See CCR, Decision no. 358 of 30 May 2018 concerning the revocation of the Chief prosecutor of the DNA.
[34] CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, para. 53
[35] CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, para. 102

by judges and prosecutors, including SCM members, even when other persons, in addition to judges and magistrates, are under investigation (this may include, for example, MPs, ministers, local elected officials, civil servants, etc.). The General Prosecutor shall solve conflicts of jurisdiction arising between the new Section and other structures within the Public Ministry. The Section will be managed by a Chief Prosecutor, appointed by the Plenum of the Superior Council of Magistracy, assisted by a deputy chief prosecutor, also appointed by the Plenum of the Superior Council of Magistracy.

81. The initial proposal, i.e. to establish a separate Directorate for investigating judges and prosecutors (which would have been a separate Prosecutor's office, such as DNA or DIICOT), was abandoned following strong criticism. It is noted, however, that currently, within the National Anti-Corruption Department, there is a service in charge of investigating corruption offences committed by magistrates.

82. There are different views within judicial circles in Romania on the opportunity and benefits of the new Section.

83. The establishment of the new structure has raised questions and strong concerns, in particular as regards the reasons for its existence, its impact on the independence of judges and prosecutors and on the public confidence in the criminal justice system and in the Romanian judicial system, more generally. Possible conflicts of competence with specialised prosecutor's offices (such as DNA or DIICOT, especially with respect to already well-advanced investigations), and issues of effectiveness of centralising all such investigations in one single location are additional aspects that have raised concern. Finally, but not of a lesser concern, the possible rerouting of high-profile cases of corruption, which are pending with the DNA, has been pointed out as one of the most serious risks entailed, as, together with investigated judges and prosecutors, other persons investigated for corruption will be removed from the specialised jurisdiction of the DNA; this would undermine both DNA's anti-corruption work and DNA as an institution.[36]

84. According to many interlocutors of the Venice Commission, there is no reasonable and objective justification for the necessity of creating a separate structure to investigate offences perpetrated within the judiciary since, despite isolated cases, there appears to be no widespread criminality among Romanian magistrates. According to DNA sources, in 2017, out of 997 defendants sent to trial for offences of high-level corruption, or assimilated, only six were acting as magistrates - three judges and three prosecutors. Consequently, questions have been raised as to the actual purpose of the creation of the new structure, and hence of the choice of applying a different legal treatment, in the framework of a highly sensitive field (criminal prosecution), to magistrates. In addition, singling out judges and prosecutors as the target of a special structure of public prosecution could also be interpreted as acknowledging a phenomenon of widespread corruption and criminality throughout the judiciary; this can only be detrimental to the image of the profession in Romania.

85. Evidently, the organisation and structure of the Public Prosecution Service is a matter for the competent national authorities to decide. Also, the legislator's concern for providing, in the framework of the proposed new Section, effective procedural guarantees to the magistrates concerned, is to be welcomed.

86. This is the case, in particular, of the involvement of the SCM in the appointment of the Section's Chief prosecutor, as well as of prosecutors employed by the Section, through a project-based competition organised by a special commission to be set up within the Council, as well as in their revocation. The Deputy Chief Prosecutor will be appointed by the SCM Plenum, upon motivated proposal by the Chief Prosecutor of the Section, from the prosecutors already

[36] See GRECO, Greco-AdHocRep(2018)2, para 34.

appointed within the Section. The involvement of the Plenum (i.e., judges and prosecutors) is important since, although in the hands of the Chief prosecutor, the Section will deal with both prosecutors and judges (see proposed Articles 88^3 to 88^5 of Law no. 304).

87. Also, the precise description in the law of the criteria (including at least 18 years seniority as a prosecutor) and procedural conditions for selecting the best candidates provides for some important guarantees of quality, and hopefully of impartiality, for appointments in this sensitive section.

88. That being so, the Explanatory note to the draft law is silent on the reasons motivating the creation of the new Section. At the same time, the relevance of reported examples of recent abuses by prosecutors in the current framework (cases of judges being investigated *for the content of their judicial decisions*), which has been invoked as justifying the need for such structure, has been disputed.

89. One may wonder whether the recourse to specialised anti-corruption prosecutors,[37] with increased procedural safeguards for investigated judges and prosecutors, without creating a special structure for this purpose, would not be a more appropriate solution, if the objective of the legislator is indeed to combat and sanction corruption within the judiciary. The Venice Commission has acknowledged, in its work, the advantages of the recourse to specialised prosecutors, associated with appropriate judicial control, for investigating very particular areas or offences including corruption, money laundering, trading of influence etc. Otherwise, for other offences, the regular jurisdiction framework should be applicable, as for all other Romanian citizens.

90. In these circumstance, while the choice of the means for fighting against offenses belongs to the national legislator, existing fears that the new structure would serve as an (additional) instrument to intimidate and put pressure on judges and prosecutors - especially if coupled with other new measures envisaged in their respect, such as the new provisions on magistrates' material liability - may be seen as legitimate and should not be ignored. Additional consultations, effective and comprehensive, with the profession, should help to identify the most suitable framework for combating offences, including corruption within the judiciary. In any event, the adherence of the profession to the proposed model is an essential precondition for its effectiveness.

e. Interaction between the judiciary and the intelligence services

91. Concerns over the (unlawful) involvement of the Romanian secret intelligence agencies, in the judiciary, have been a prominent subject in the public debate, in recent years, raising questions and controversy around the independent functioning of the Romanian judiciary and the necessary guarantees to combat such interference.

92. The recent memory of the communist regime, marked by widespread interference of the former political police in most sectors of public, but also private life, has contributed to the tense climate surrounding these sensitive, multifaceted, matters.

93. Some representatives of professional associations of magistrates, of official authorities and civil society have highlighted the issue of involvement of the intelligence service in the judicial process, based on secret orders or decisions and co-operation protocols, and have also pointed to the unsolved question of possible undercover agents among the magistrates, as a real threat to the independence of the judiciary and to fundamental rights.

[37] See Venice Commission, CDL-AD(2014)041, Interim Opinion on the Draft Law on Special State Prosecutor's Office of Montenegro, paras.17, 18, and 23; see also CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova Prosecution, paras. 78-79.

94. The Constitutional Court, in 2016 (Decision No.51 of 16 February 2016), declared as unconstitutional ambiguous provisions of the Criminal Procedural Code having allowed involvement of the intelligence service in the criminal investigation.[38]

95. At the same time, many high-level corruption cases have been investigated by the DNA with the - officially acknowledged - technical support of the Romanian Intelligence Service. In view of alleged lack of clarity and transparency concerning the legal basis for such support, and of sufficiently effective mechanisms of control, uncertainty persists among the public as to the nature, the extent and the legality of the involvement of the intelligence service, with worrying consequences on the public trust in the way in which justice is administered.

96. According to explanations provided to the Venice Commission delegation, the above support was justified by legal and technical imperatives linked to the enforcement of special investigation measures in complex corruption cases.

97. The confirmation, lately, of the existence of co-operation protocols signed, in the past years, by the Romanian Intelligent Service with the different institutions of the judiciary, has contributed to an increased sense of unease around these matters in Romania. Recently unveiled to the public, the contents of protocols signed with the Office of the Prosecutor General to the High Court of Cassation and Justice, including DNA's Office, with the Superior Council of Magistracy, but also with the High Court of Cassation and Justice, have drawn great public interest and concern.

98. It is not the mandate of the Venice Commission within the framework of this opinion to take a view on the above processes and concerns, nor to assess the legal and practical implications of the above-mentioned protocols. It belongs to the different parties involved (specialised parliamentary committees and other bodies with supervising tasks over the activities of intelligence services, but also to judicial institutions, magistrates, judicial council, intelligence services) to establish facts, roles and - probably shared - responsibilities. A thorough review of the legal rules on the control of the intelligence services seems necessary.

99. The Venice Commission would like to underline that the requirements of independence and impartiality of justice are at the core of a democratic society governed by the rule of law, and that states must provide all the conditions necessary for the judiciary, and its members, judges and prosecutors, to perform their duties in full observance of those requirements, free from undue political or other influence.

100. Against the above background, the concern of the legislator for improved legal mechanisms to prevent and combat undue interference appears as legitimate (see in particular new Articles 6-7 and Article 48 (10) of Law no. 303/2014).

101. New Articles 6 and 7 of Law no. 303 provide for a ban on infiltration of the judicial authorities by intelligence services, a system of "screening" of judges and prosecutors for being undercover intelligence operatives, as well as sanctions for such cases, and new transparency rules.

102. A specific provision (new paragraph 2^1 of Article 6) is introduced as the legal basis authorising "lustration" in the justice system: "*Affiliation as a collaborator of the intelligence bodies, as political police, has the effect of releasing the person concerned from office*".

[38] The 2014 activity report submitted by SRI to the Parliament indicates, for instance, that in 2014 the Service conducted 2,762 security mandates, 42,263 technical surveillance warrants and 2,410 ordinances from the Public Ministry and the DNA. https://www.sri.ro/assets/files/rapoarte/2014/Raport_SRI_2014.pdf

103. Further provisions in the new text of Article 7 of Law no. 303 are aimed at preventing and addressing such interference, by way of a prohibition imposed on judges and prosecutors, subject to the sanction of dismissal, from being or having been collaborators, operative workers, under-cover informants of any intelligence service. An individual statement of non-affiliation to such services is required every year from judges and prosecutors. While such obligation already exists in the current legislation, a notable change is that the truthfulness of the non-affiliation statement will be checked every year, for each statement, by the Supreme National Defence Council (CSAT). The decision taken by the CSAT can be appealed to a court. A first version of this mechanism entrusting specialised parliamentary commissions, together with CSAT, with such verification, was declared unconstitutional.

104. A further novelty is that intelligence service officers are forbidden, under harsh criminal sanctions, to recruit magistrates as operative workers, including under-cover informants or collaborators.

105. Also, as a protection against hidden rules or agreements, new publicity rules are being introduced concerning inter-institutional agreements involving judicial institutions as well as for core documents for the judicial organisation and operation or affecting the conducting of judicial procedures. Under the proposed amendment, these shall represent information of public interest, to which free access is guaranteed (new Article 7 (9) of Law no. 303/2014).

106. While questions may be raised in terms of their actual practicability, given the crucial importance, in the current Romanian context, of the independence of the Romanian judiciary and its image of independence, including for the continuation of the country's anti-corruption efforts, the proposed system for screening magistrates, if coupled with adequate procedural safeguards and a right of appeal to a judicial body, appears as acceptable in general. However, a wide interpretation of terms such as "informant" or "collaborator" would forbid Romanian magistrates - judges and prosecutors - from ever being or having been in contact with the intelligence services even for legitimate purposes. It would thus be helpful to better specify the terms in new Article 7 (3) of Law no. 303: "operative workers, including under cover, informants or collaborators." In addition, it is difficult to understand why it is necessary and appropriate to ask judges to make an *annual* statement that they have not been collaborators of the intelligence services.

107. Also, it is one thing to forbid the intelligence agency from recruiting judges or prosecutors - this is obviously justified. At the same time, for such measures to be efficient, it is essential for them to be combined with a thorough review of the legal rules on the control of the intelligence services with the objective of establishing a satisfactory holistic system of control, capable of upholding respect for the rule of law, democratic oversight and providing legitimacy in the eyes of the public. The investigation of corruption, as with other economic offences, should primarily be a matter for the police and the prosecutor. Many other countries have established dedicated police and prosecutor bodies, with specialist competence in the field of corruption. Thus, it would seem appropriate for Romania, in line with the judgment of the Constitutional Court (see above) to strengthen within the police the necessary technical capacity for investigation (surveillance etc.). In making such a change, it is also particularly important to minimize dangers of political interference with anti-corruption investigations by providing appropriate mechanisms to safeguard the integrity of such specialist police and prosecutorial bodies (see above, 2.c).

f. Material liability of judges and prosecutors

108. According to the draft law amending Law no. 303/2004, the action for recovery brought by the state against the magistrate who, in bad faith or gross negligence, has committed a judicial error is no longer optional. Under the proposed new Article 96 of Law no. 303, the Ministry of Public Finance has to start the procedure by requesting the Judicial Inspection to provide a report (which is of consultative nature) on whether the judicial error was caused as a result of bad faith

or gross negligence by the magistrate. Depending on the conclusions of the Judicial Inspection and "its own evaluation", the Ministry of Public Finance shall file an action for recovery within six months from the communication by the Judicial Inspection of its report.[39] The new liability rules will apply both to active judges or prosecutors and to judges and prosecutors who, even if no longer in office, "practiced their profession in bad faith or gross negligence."

109. To justify the new rules, the existence of conviction decisions of Romania by the ECtHR has been invoked and, in this relation, the difficulty to enforce liability against responsible magistrates under the current legislation. Growing popular dissatisfaction and a worrying diminution in citizens' trust in the acts of magistrates is another argument which has been put forward in this connection, as well as a number of recent acquittal decisions in corruption-related cases, which have been given prominent media attention.

110. The new provisions have been criticised for their lack of clarity and especially for adding pressure on magistrates, notably in the current context. In particular, magistrates have stressed the risk of their legal reasoning (when interpreting the law, assessing evidence etc.) being put into question.

111. Two successive versions of the definition of the judicial error, challenged before the Constitutional Court for being unclear and unpredictable and affecting the independence of magistrates, have been declared unconstitutional.[40] The final text of the definition, as amended by the Parliament in order to bring it into line with the Constitutional Court conclusions, is as follows:

"*(3) A judicial error exists when, in judicial proceedings:*

a) One ordered the performance of procedure acts in obvious breach of substantive or procedural law, whereby a person's rights, freedoms and legitimate interests were seriously violated, thus causing damage that could not be remedied by an ordinary or extraordinary avenue of appeal;

b) One pronounced a final court decision that is obviously contrary to the law or the factual situation resulted from the evidence produced in the case, severely affecting a person's rights, freedoms and legitimate interests, and such damage could not be remedied by an ordinary or extraordinary avenue of appeal."

112. Further concerns relate to: the risk of two parallel procedures for acting in bad faith or gross negligence - action for recovery and disciplinary procedure - with different possible outcomes; the increased role of the Judicial Inspection in the recovery process and the large powers of the Chief Inspector; and the exclusion of SCM, the guarantor of the magistrates' independence, from the procedure.

113. The Venice Commission examined the issue of state liability and subsequent judges' liability, a sensitive issue in many countries, recently in an *Amicus Curiae* brief prepared at the request of the Constitutional Court of the Republic of Moldova.[41] The position of the Venice Commission on this issue may be summarised as follows:

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[39] *"(7) Within 2 months of the final court decision returned in relation to the action specified under para. (6), the Ministry of Public Finance* ***shall*** *(emphasis added) notify the Judicial Inspection, in order for it to verify whether the judicial error was caused by the judge or prosecutor as a result of performing his/her duties and prerogatives in bad faith or in gross negligence, according to the procedure provided for by Art.74[1] of Law no.317/2004, as republished and subsequently amended.*

(8) The state, through the Ministry of Public Finance, shall file reverse action against the judge or prosecutor if, following the consultative report of the Judicial Inspection stipulated at para. (7) and its own evaluation, it believes that the judicial error was caused as a result of performance of duties and prerogatives by judges or prosecutors in bad faith or gross negligence. The term for filing a reverse action is 6 months after the date of communication of the Judicial Inspection's report."

[40] See Constitutional Court of Romania, Decision no.45 of 30 January 2018, Decision no. 252 of 19 April 2018.

[41] See CDL-AD (2016)015, *Amicus Curiae* Brief for the Constitutional Court on the Right of Recourse by the State against Judges, paras. 77-80. See also paragraphs 10 to 25 for existing European standards and practice. See

- in general, judges should not become liable for recourse action when they are exercising their judicial function according to professional standards defined by law (functional immunity);
- judges' liability is admissible as long as there is intent or gross negligence on the part of the judge;
- a negative ECtHR judgment (or a friendly settlement of a case before the ECtHR or a unilateral declaration acknowledging a violation of the ECHR) should not be used as the sole basis for judges' liability, which should be based on a national court's finding of either intent or gross negligence on the part of the judge;
- a finding of a violation of the ECHR by the ECtHR does not necessarily mean that judges at the national level can be criticised for their interpretation and application of the law, since violations may stem from systemic shortcomings in the member States, e.g. length of proceedings cases, inadequate / unclear legislative provisions, in which personal liability cannot be raised.

114. As regards existing practice, the Venice Commission notes that European countries that allow the personal liability of judges (such as Bulgaria, the Czech Republic, Germany, Italy, Norway, Serbia, Spain (up until October of 2015) or Sweden) "require that the judge's guilt be proven" (see paragraph 17 of the *Amicus Curiae* brief). It appears however that, as a rule, such legislation is seldom enforced.

115. As regards the proposed amendments, one may indeed conclude that the main requirements for a better definition of the notion of judicial error seem to have been reached. It is not possible to define judicial error without recourse to general notions, which have to be interpreted by the courts. In order to remove concerns that this new definition could block judges or prosecutors in making decisions, it would, however, be advisable to add a clause in new Article 96 stating explicitly that, in the absence of bad faith and/or gross negligence, magistrates enjoy functional immunity and are not liable for a solution which could be disputed by another court.

116. As regards the procedure, the prominent role entrusted to the Judicial Inspection although the Chief Inspector is appointed by and accountable to the SCM Plenum (new Article 67 paras. (3), (5) and (6) of Law no. 317/2014), may also raise questions, especially if seen together with the total exclusion of the SCM from the procedure.

117. In fact, while the final decision on the magistrate's liability belongs to a court (ultimately to a Chamber of the High Court of Cassation and Justice), the liability procedure involves, in its initial, but not unimportant stage, two key actors: the Ministry of Public Finance and the Judicial Inspection. Beyond the important role assigned to the Judicial Inspection, the decisive role of the Ministry of Public Finance, which is an actor outside the judiciary and which cannot be the most appropriate body to assess the existence and causes of a judicial error, is questionable. It is the Ministry that decides whether to file an action for recovery or not, based on the consultative report of the Judicial Inspection[42] and "its own evaluation". No criteria for "its own evaluation" are provided by the draft law (see new Article 96 (8)). Since it is the public funds of the State which are at a loss, the Ministry of Public Finance may indeed be the active plaintiff in deciding to seek

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also:
CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, para. 94; Report on the Independence of the Judicial System Part I: The Independence of Judges, CDL-AD(2010)004, paras. 59-61, with reference to *CCJE Opinion No. 3 on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality*; Opinion on draft amendments to laws on the Judiciary of Serbia, CDL-AD(2013)005, paras. 17-23, with reference to *Recommendation CM/Rec(2010)12 on judges: independence, efficiency and responsibilities*; Opinion on the laws and the disciplinary liability and evaluation of judges of "the former Yugoslav Republic of Macedonia" (CDL-AD(2015)042), para. 47.

[42] See for the procedure related to the preparation of the report proposed new article 74^1 of Law 317/2004.

recovery. However, the Ministry should not have any role in assessing the existence or causes of the judicial error.

118. An alternative approach would be to initiate the procedure for action of recovery, only once disciplinary liability of the concerned judge or prosecutor has been established by the SCM.[43] Not only would this avoid the risk of conflicting solutions from two parallel procedures, but it would enable the SCM to play its role in the procedure and fulfil its duties as established by Articles 133 (guarantor of the independence of justice) and 134 (key role with regard to the disciplinary liability of judges and public prosecutors) of the Constitution. Deadlines established by the proposed amendments for filing action of recovery would have to be modified to ensure that recovery remains effective. The legitimacy of the process implies, obviously, that there is confidence in the Judicial Inspection, the SCM and courts.

119. The draft law also introduces a regulation (Article 96, para. 11 of Law no. 303) on mandatory professional insurance to be established by the SCM within six months after the entry into force of the law. In view of the practical questions that this solution may involve (for example, it will hardly be possible to insure cases of deliberately illegal judgments), one may wonder whether appropriate impact and comparative law analysis preceded the proposal. One may also note that, in practical terms, the mandatory professional insurance amounts to a reduction in salary for judges and prosecutors.

120. The implementation of the new rules in respect of judges and prosecutors who are no longer in office may also raise difficulties. For example, it is not clear whether judges and prosecutors who are no longer in office, at the date at the entry into force of the law, such as already retired magistrates at that date, will also be covered by the proposed liability scheme.

121. Finally, the new liability scheme, excluding SCM, should be seen in the context of other provisions dealing with the magistrates' liability, such as the new Section for investigating criminal offences of judges and prosecutors or the limitation of freedom of speech of magistrates. It would be difficult not to see the danger that, together, these instruments could result in pressure on judges and prosecutors and, ultimately, undermine the independence of the judiciary and of the way justice is administrated. Furthermore, read in conjunction with the early-retirement arrangements, the new liability scheme might be seen as an additional incentive for early departure from the profession, detrimental to the overall justice system.

122. To sum up,

- The new definition of judicial error seems unobjectionable in principle, but should be supplemented by explicitly stating that, in the absence of bad faith and/or gross negligence, magistrates are not liable for a solution which could be disputed by another court;
- It would be preferable to provide that the action of recovery should take place once the disciplinary procedure was concluded;
- In the absence of these additional safeguards, the new provisions would risk being perceived as an additional mechanism of putting pressure on magistrates.

g. Freedom of expression of judges and prosecutors

123. Under the proposed new Article 9 (3) of Law no. 303/2004, judges and prosecutors "*are obliged, in the exercise of their duties, to refrain from defamatory manifestation or expression, in any way, against the other powers of the state - legislative and executive*."

[43] According to proposed new Article 99 (t) of Law 303, among the disciplinary offences is included "the exercise of the position in bad faith or serious negligence, if the act fails to meet the constitutive elements of a crime. Disciplinary sanctions do not remove criminal liability." (See Article 99[1], unchanged, for the definition of bad faith or serious negligence)

124. This provision has raised concerns among Romanian magistrates, who fear that it may prevent them from criticising other state powers when addressing cases involving the state and may be used as a tool for political pressure against them.

125. According to the Venice Commission Report on freedom of expression of judges,[44] based on a review of European legislative and constitutional provisions and relevant case law, freedom of expression guarantees also extend to judges. Moreover, in view of the principles of the separation of powers and the independence of the judiciary, permissible limits of a judge's freedom of expression call for closer scrutiny. As ruled by ECtHR, opinions expressed by judges on the adequate functioning of justice, which is a matter of public interest, are protected by the European Convention, "[…] *even if they have political implications, and judges cannot be prevented from engaging in the debate on these issues. Fear of sanctions may have a discouraging effect on judges expressing their views on other public institutions or policies. This dissuasive effect is detrimental to society as a whole*".[45]

126. Drawing on the ECtHR's case law on the matter, the Venice Commission points to the importance of a "contextual" approach in defining those permissible limits.[46] The wider domestic political, historical and social background is also of particular importance.

127. It is obvious that, as a key pre-requirement for recognising impartiality of judges and of the judiciary, in general, both judges and prosecutors have a duty of restraint, as part of the standards of conduct applying to them.[47] As stated in the Opinion No. 3 on ethics and responsibility of judges of the Consultative Council of European Judges (CCJE),[48] *"[a] reasonable balance […] needs to be struck between the degree to which judges may be involved in society and the need for them to be and to be seen as independent and impartial in the discharge of their duties."* The European judges' body further specifies that, while necessary criticism of another state power or of a particular member of it must be permitted, "the judiciary must never encourage disobedience and disrespect towards the executive and the legislature" (CCJE Opinion no. 18 on the position of the judiciary and its relation with the other powers of state).[49]

128. In the CCJE's view, "an equal degree of responsibility and restraint" is expected from the other powers of the state, including with regard to reasonable criticism from the judiciary. Removals from judicial office or other reprisals for reasonable critical expression towards the other powers of the state are unacceptable (reference is made to ECtHR *Baka v. Hungary*). More generally, unwarranted interferences should be solved through loyal cooperation between the institutions concerned and, in case of conflict with the legislature or the executive involving individual judges, an effective remedy (a judicial council or other independent) should be available.[50]

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[44] Venice Commission, Report on freedom of expression of judges, CDL-AD(2015)018, paras. 12, 80-84.
[45] See *Baka v. Hungary*, *Application no. 20261/12*, Chamber Judgment, 27 May 2014, para. 101; see also Grand Chamber Judgment, 23 June 2016, para 125.
[46] All specific circumstances, including the office held by the judge, the content of the statement, the context in which the statement was made, the nature and severity of the penalties imposed, the position held by a particular judge and matters over which he/she has jurisdiction, are to be taken into account when examining such matters.
[47] See ECtHR, *Prager and Oberschlick v. Austria,* Judgment of 26 April 1995, para. 34, *Alter Zeitschriften Gmbh no. 2 v. Austria,* Judgment of 18 September 2012, para. 39.
[48] CCJE (2002) Op. N° 3 on ethics and responsibility of judges, Strasbourg, 19 November 2002; see also United Nations "Basic principles on the independence of the judiciary" (1985), Article 8 stating that judges "shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary".
[49] Consultative Council of European Judges (CCJE), Opinion n° 18 on "The position of the judiciary and its relation with the other powers of state in a modern democracy", CCJE (2015) 4, para 42.
[50] Idem, para 43

129. From this perspective, the new obligation imposed on Romanian judges and prosecutors appears to be unnecessary at best and dangerous at worst. It is obvious that judges should not make defamatory statements with respect to anyone, not only with respect to state powers. It seems unnecessary to specify this by law.

130. On the contrary, it seems dangerous to do so, especially as the notion of defamation is not clearly defined and this obligation relates specifically to other state powers.[51] This opens the way for subjective interpretation: what is meant by "defamatory manifestation or speech" for a member of the judiciary "in the exercise of their duties"? What are the criteria to assess such conduct? What is, for the purpose of this prohibition, the meaning of the notion of "power"? Does it refer to persons or to public institutions? What is the impact of the new obligation on the SCM task of defending judges and prosecutors, by publicly expressed statements, against undue pressure by other state bodies?

131. In addition, the new provision cannot be justified as a reflection of the principle of loyal co-operation between institutions, the importance of which was underlined by the Venice Commission already in 2012 in respect of Romania.[52] If this were the motivation of the provision, the same obligation would have to be imposed on all state powers, including with respect to criticism of judges by holders of political office.

132. There are serious doubts as to how such a general restriction on magistrates' freedom of expression could be justified. At least from the point of view of necessity and legal clarity, the restriction may be seen as problematic under Article 10 ECHR. It should therefore be deleted.

h. Role and functioning of the Superior Council of Magistracy

133. According to the draft law amending Law no. 317/2004 (proposed new Articles 38, 40 and 41), the decision-making on issues of specific relevance for the two professions - judges and prosecutors - is transferred from the Plenum to the two SCM Sections (for judges and for prosecutors, respectively).[53]

134. This transfer of powers, aimed at clearly separating careers of judges and prosecutors, was, according to the Romanian authorities, requested in 2017 by a resolution of judges from all courts in the country, through their presidents. The new mode for decision-making would lead to a strengthening of the judges' independence, which is not entirely possible as long as decisions on judges' careers are taken by prosecutors as well.

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[51] According to the information available to the Venice Commission, there is no definition in Romanian law of defamatory statements or expression, nor legislative provisions specifically regulating such conduct. Section III of Romanian Civil Code contains provisions on the respect for private life and the dignity of the person (including private life, dignity and personal image). Article 70 of the Civil Code protects the right the freedom of expression, in line with article 30 of the Romanian Constitution, within the limits established by article 75 of the Civil Code (where reference is made to the limits allowed by the law and the international treaties or conventions to which Romania is a Party for the exercise of the constitutionally protected fundamental rights). It is noted that previous provisions of the Romanian Criminal code criminalizing defamation and insult were abolished in 2006, by art. I, point.56, of Law no.278/2006. This provision was subsequently declared as unconstitutional (on 18 January 2007). On 18 October 2010, the High Court of Cassation and Justice clarified that insult and defamation should not be re-criminalized following the decision of the Constitutional Court.

[52] See CDL-AD(2012)026, paras 72-73.

[53] The Plenum remains competent, in particular, beyond the election and revocation of SCM President and Vice-President, for solving notifications on safeguarding the independence of the authority of the judiciary, upon request or *ex officio*, and for the adoption of the deontological code for both judges and prosecutors. It validates the result of the ballot for withdrawal of confidence of SCM members and concludes the procedure by taking note of the withdrawal of confidence (see for further functions current Article 36 of Law 317/2004). These powers of the Plenum are not an exception, but an application of the constitutional (and practical) position of the SCM as representing the whole judicial authority.

135. The Venice Commission stated, in its above-mentioned Report on the prosecution service: *"If prosecutorial and judicial councils are a single body, it should be ensured that judges and prosecutors cannot outvote the other group in each other's appointment and disciplinary proceedings because due to their daily 'prosecution work' prosecutors may have a different attitude from judges on judicial independence and especially on disciplinary proceedings […]*."[54] The Commission reiterated this position in its 2014 Opinion on the review of the Romanian Constitution,[55] in relation to the proposal to entrust to the judges' section the appointment of judges and entrust to the prosecutors' section the appointment of prosecutors.

136. The proposed change is therefore in principle to be welcomed, subject to the considerations under the following section. Even if judges and prosecutors are both part of the judicial authority, and if they can cross the border during their career, the rules are different on many points and must be managed by different bodies or structures. The hierarchical control of prosecutors, the main substantial difference, has consequences in the fields of management and discipline.

i. Role of civil society representatives members of SCM

137. Both under the law in force and the amending draft, civil society representatives members of SCM only participate in the sessions of the Plenum. The amending draft clearly states that these representatives "shall not participate" in the Sections' meetings, and describes, in an exhaustive manner, the specific duties of civil society representatives as SCM members: to inform civil society organisations on SCM work and consult them on how SCM should act to improve the operation of the judicial bodies; to monitor SCM obligations as to transparency, public access to information and addressing petitions from the civil society (paragraph 6 of new Article 54 of Law no. 317/2014). This means that in practice, based on the amendments, civil society representatives will not take part in the adoption of the decisions taken by the Sections of the SCM.

138. As the Venice Commission mentioned on many occasions,[56] in order to avoid the perception of corporatism in judicial councils, it is important that such councils include in their work persons from outside the judiciary. In its 2014 Opinion on Romania, in accordance with its consistently held view, the Commission stated:

> "*an autonomous Judicial Council "that guarantees the independence of the judiciary does not imply that judges may be self-governing. The management of the administrative organisation of the judiciary should not necessarily be entirely in the hands of judges. In fact, as a general rule, the composition of a Council foresees the presence of members who are not part of the judiciary, who represent other State powers or the academic or professional sectors of society. This representation is justified since a Council's objectives relate not only to the interests of the members of the judiciary, but especially to general interests. The control of quality and impartiality of justice is a role that reaches beyond the interests of a particular judge. The Council's performance of this control will cause citizens' confidence in the administration of justice to be raised*."

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[54] CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, para. 66. See also CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, paras 58-59 ,where the Venice Commission many times pointed out on this issue: *"The 2004 Law created the HJPC as a single and uniform body. Although this is not entirely unusual, ideally the two professions – judges and prosecutors – should be represented by separate bodies. For this reason the initial structure of the HJPC had been criticised and it was recommended that it be sub-divided into two sub-councils. (…) However, if both professions are to be represented in a same structure, that structure must provide a clear separation between the two professions. […]"*

[55] CDL-AD(2014)010, Opinion on the Draft Law on the Review of the Constitution of Romania, para. 196.

[56] CDL-AD(2010)040, para. 65, CDL-AD(2014)010, para. 188

139. The limited number of civil representatives and the limited role given to them in the work of the SCM is not an appropriate solution and should be reconsidered, if necessary by amending the Constitution.[57]

ii. Revocation of SCM members

140. According to the draft amendments (new Article 55 (1)-(5) of Law no. 317/2004), an elected SCM member may be revoked at any time if: a) he/she no longer meets the legal requirements for being an elected SCM member; b) he/she has been the subject of one of the disciplinary sanctions provided by the law; c) if the majority of judges or prosecutors in the courts/prosecutor's offices that he/she represents withdraw confidence in his/her respect. These provisions (which are not entirely new) are problematic.

141. As concerns the first ground, it is not clear what „the person in question no longer meets the legal requirements for being an elected SCM member" exactly means. Except for specific exclusions (1/ cases of potential conflict of interest, and 2/ cases of past or present affiliation with intelligence services, cases for which a personal statement of interest and, respectively, of non-affiliation is required), no further particular conditions[58] are established by the (draft) law for being elected SCM member.

142. The possibility to revoke an SCM member for having been the subject of "*one of the disciplinary sanctions provided by law for judges and prosecutors*" (Article 55 (1) b) is also questionable, as it allows the dismissal of the person even for the lightest disciplinary sanctions. In addition, the problem of a double sanction for the same misconduct arises in this case.

143. The most problematic is the third ground, allowing the revocation of elected SCM members by withdrawal of confidence, i.e. by vote of the general meetings of courts or prosecutors' offices (procedure explained in new Article 55, para. (3)). The Venice Commission has consistently objected to the introduction of such a mechanism, because it involves a subjective assessment and may prevent the elected representatives from taking their decisions independently.[59] A vote of confidence is rather specific to political institutions, and is not suitable for institutions such as judicial councils, and even less for individual members of such councils. The Commission stated in its 2014 Opinion on the review of the Romanian Constitution "*[…] a person elected to an important position such as membership of a judicial Council should not be subject to recall merely because the electorate do not agree with the decisions which are made. It should be the duty of persons elected to such positions to bring their own independent judgement to bear on the important decisions the SCM has to deal with without having to anticipate a possible recall. Furthermore, such a rule is difficult to reconcile with SCM's disciplinary functions. Revocation for very strict conditions, such as failure to attend meetings or otherwise neglecting duties, may be stipulated by the law on the organisation and functioning of the SCM."* The Commission noted in that context that the Constitutional Court had declared this mechanism unconstitutional."[60]

144. According to the Romanian authorities, six years after the decision of the Constitutional Court, it was necessary to fill the gap as, despite repeated requests from judges and prosecutors

[57] According to article 133 (2) (b) of the Romanian Constitution, the two representatives of the civil society "shall only participate in plenary proceedings". The representative of the civil society will therefore, especially considering the new distribution of prerogatives between the two SCM Sections, be excluded from most of the decisions.

[58] Although there are also self-evident cases where the conditions are no longer fulfilled, such as the case of a judge or prosecutor who retires. He/she loses *ipso facto* his quality to be member of the SCM.

[59] CDL-AD(2014)029, Opinion on the Draft amendments to the Law on the State Prosecutorial Council of Serbia, para. 56*: "[…] Members of prosecutorial councils are autonomous (see Article 164 of the Constitution) and subjecting them to a vote of no confidence makes them too dependent on the wishes of the prosecutors and effectively means that an elected member of the SPC may be dismissed at any given moment without objective reasons. The Venice Commission strongly recommends for such a procedure not to be introduced."*

[60] CDL-AD(2014)010, para 194; see also Constitutional Court of Romania, Decision no. 196/2013.

to have such a possibility, there was no mechanism to regulate SCM members' responsibility. It has also been explained that the proposed procedure provides all guarantees necessary regarding the right of defence of the SCM member concerned and for the institutional stability of SCM. While the concern of the legislator for such guarantees may be welcomed, the objection of principle remains since, beyond its procedural aspects, such a revocation mechanism clearly introduces a threat to the independence and impartiality of elected SCM members in fulfilling their tasks in the SCM framework.

145. Equally problematic is paragraph 4 of new Article 55, which provides that the vote of no-confidence may be adopted by petition signed by a majority of judges of those courts/prosecutor's offices. This would mean that the revocation can be decided without holding a meeting and without giving the possibility to the concerned SCM member to address to judges or prosecutors and defend/express his/her position, as provided for the case of a no-confidence vote (paragraph 3 (e) of new Article 55).

146. The interpellation of SCM members (by a number of judges or prosecutors or by professional associations, in relation to the activities undertaken and the manner in which they fulfil the commitments made upon election - new Article 55[1]) may be seen as a positive novelty in terms of SCM members' accountability and transparency. Similarly, the proposed publicity rules concerning the SCM plenary sessions, agendas, etc. are welcome proposals. It will be important to ensure that this mechanism indeed serve the purpose of openness and transparency, fruitful and constructive exchanges with the members of the judiciary, and not as a way to exercise control or influence over SCM members by their voters.

147. It is recommended to re-examine and better specify, in the light of the above observations, the grounds for the revocation of SCM members, and to eliminate the no-confidence vote of the general meetings of courts or prosecutors' offices (including by the way of petition) from the admissible grounds.

i. New rules on recruitment and early retirement

148. The proposed new Article 16 (3) of Law no. 303 increases the duration of professional training courses at the National Institute of Magistracy (NIM) from two to four years, and the subsequent practical internship (probationary period, after having graduated NIM) from one to two years (proposed new of Article 22 (1) of Law no. 303/2004). This means that, in the near future, during the next four years, there will be no judges or prosecutors admitted to the magistracy through the NIM (the regular admission modality).

149. The official explanation to the proposed amendments stresses, in relation to the entry into the judiciary, the emphasis put by the legislator on aspects related to "professional maturity, complex knowledge of the justice system, balance, and integration in the society" of young magistrates, in an effort to adapt the Romanian judiciary and the access to the judiciary, to new realities.

150. The Venice Commission has not examined these requirements in detail and has no objection of principle against requiring longer training periods, as long as the judicial career remains attractive for good applicants. However, it has to be ensured that there always is a sufficient number of judges at the different levels, and it is problematic to introduce rules implying that there will be few new entrants into the judiciary at the same time as a new more generous early retirement scheme is set up.

151. The new early retirement scheme for judges and prosecutors, assistant magistrates of the High Court, assistant magistrates of the Constitutional Court and assimilated legal specialty personnel, (proposed new Articles 82 and 83 of Law no. 303/2004) allows retirement at the age of 60, after 25 years seniority, and even between 20 and 25 years seniority, with a slightly

reduced pension. The proposal seems to respond to a specific request of magistrates, supported by the Superior Council for Magistracy, although, there seems to have been no impact assessment concerning the personnel structure of courts and prosecutor's offices.

152. This proposal creates a real risk of a severe decrease in the body of magistrates within the Romanian judiciary, especially at the senior level. The Romanian judiciary risks losing its most experienced and qualified members, while the training time for junior judges and prosecutors to join the magistracy will be increased.

153. The combination of increasing the training period for entering the magistracy and providing for more generous rules on early retirement, added to further envisaged changes (such as those affecting the composition of judges' panels), can seriously undermine the efficiency and quality of justice. It is obvious that this perspective also represents a serious danger for the continuation and consolidation of Romania's efforts to fight corruption.[61]

154. In the current situation of conflict between some holders of political office and magistrates and increased pressure on the magistrates including through some of the amendments discussed, there is a risk that many qualified judges will choose early retirement.

155. In the absence of an impact assessment concerning the personnel structure of courts and prosecutor's offices and existing and future needs in the system, the fact that some of the above changes originate in proposals made by magistrates cannot be a sufficient justification for the new scheme. It is strongly recommended, as a guarantee for the efficient, professional and independent operation of the Romanian judiciary, to conduct, before the entry into force of the proposed 'human resources' measures, the necessary impact studies. The proposed early retirement scheme should be abandoned unless it can be ascertained that it will have no adverse impact on the functioning of the system.

VI. Conclusions

156. According to the Romanian authorities, the reform process was necessary and has been undertaken in order to provide answers to existing problems and needs of the judicial system and to adapt it to new social realities. The proposed amendments were aimed at strengthening independence of judges, by separating judges' and prosecutors' careers, but also at increasing efficiency and accountability of the judiciary. Some of the changes were needed in order to implement a number of decisions of the Romanian Constitutional Court.

157. The legislative process took place in a context marked by a tense political climate, strongly impacted by the results of the country's efforts to fight corruption, with controversy and debate around sensitive aspects both for the continuation of Romania's efforts in this field and for the independent functioning of its judicial system. On the one hand, there are reports of pressure on and intimidation of judges and prosecutors, including by some high-ranking politicians and through media campaigns; on the other hand, alleged cases of misuse of their powers by some Romanian magistrates, in particular prosecutors, have led to a questioning of the methods used to fight corruption. Also, following recent disclosure of co-operation protocols signed between the Romanian Intelligence Service and judicial institutions, questions are being raised on the impact of such co-operation on the independence of the judicial institutions and on safeguards required to protect the judiciary against undue interference.

158. At the same time, the legislative process, which has proved to be very divisive for the Romanian society, has been criticised for being excessively fast and lacking transparency, and conducted in the absence of inclusive and effective consultations.

[61] See also GRECO, Greco-AdHocRep(2018)2, § 30

159. In view of the urgency of the matter, but also of the complexity of the changes introduced by the three drafts and of their repeated amendment during the legislative process, this opinion only deals with certain, particularly controversial aspects of the drafts.

160. A number of improvements are being proposed, such as the exclusive role of the SCM in the appointment and revocation of high-ranking judges or the separation of the decision-making, on judges' and prosecutors' matters, within the SCM.

161. However, as emphasised in the present opinion, there are important aspects introduced by the three drafts, which seen alone, but especially taking into account their cumulative effect, in the complex political context currently prevailing in Romania, are likely to undermine the independence of Romanian judges and prosecutors, and the public confidence in the judiciary.

162. These include in particular proposed rules affecting the independence of prosecutors, such as the new system for appointment and dismissal of Chief prosecutors and the role of the Ministry of Justice therein. Particular concerns are also raised by the limitation of freedom of expression of magistrates and the new provisions dealing with the magistrates' liability, the new Section for investigating offences of magistrates, as well as the arrangements weakening the role of the Superior Council of Magistracy, as the guarantor of the independence of the judiciary.

163. The Venice Commission notes that two recent government emergency ordinances address issues covered by the present opinion. While a first ordinance, adopted on 10 October 2018, establishes the framework for the new Section for investigating criminal offenses within the judiciary, which the Commission considers problematic for the independence of the judiciary, the decision to postpone, to 1 January 2020, the entry into force of the early retirement scheme for magistrates (by government emergency ordinance adopted on 15 October 2018), is a positive step, providing time for parliament to reconsider this scheme. The Commission did not examine other parts of this ordinance and reserves its position in this respect.

164. Although welcome improvements have been brought to the drafts following criticism and a number of decisions of the Constitutional Court, it would be difficult not to see the danger that, together, these instruments could result in pressure on judges and prosecutors, and ultimately, undermine the independence of the judiciary and of its members and, coupled with the early retirement arrangements, its efficiency and its quality, with negative consequences for the fight against corruption.

165. The Venice Commission therefore recommends to Romanian authorities to:

- Re-consider the system for the appointment / dismissal of high-ranking prosecutors, including by revising related provisions of the Constitution, with a view to providing conditions for a neutral and objective appointment/dismissal process by maintaining the role of the institutions, such as the President and the SCM, able to balance the influence of the Minister of Justice;

- Remove the proposed restriction on judges and prosecutors freedom of expression;

- Supplement the provisions on magistrates' material liability by explicitly stating that, in the absence of bad faith and/or gross negligence, magistrates are not liable for a solution which could be disputed by another court; amend the mechanism for recovery action in such a way as to ensure that the action for recovery only takes place once and if liability of the magistrate has been established through the disciplinary procedure;

- Reconsider the proposed establishment of a separate prosecutor's office structure for the investigation of offences committed by judges and prosecutors; the recourse to

specialized prosecutors, coupled with effective procedural safeguards appears as a suitable alternative in this respect ;

- Re-examine, with a view to better specifying them, the grounds for the revocation of SCM members; remove the possibility to revoke elected members of the SCM through the no-confidence vote of the general meetings of courts or prosecutors' offices (including by the way of petition);

- Identify solutions enabling more effective participation, in the work of the SCM, of SCM members who are outside of the judiciary;

- Definitively abandon the proposed early retirement scheme unless it can be ascertained that it will have no adverse impact on the functioning of the system;

- Ensure that the proposed "screening" measures of magistrates are based on clearly specified criteria and coupled with adequate procedural safeguards and a right of appeal to a court of law, and identify ways to strengthen oversight mechanisms of the intelligence services.

166. The Venice Commission remains at the disposal of the Romanian authorities for further assistance.