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(VENICE COMMISSION)

ROMANIA

OPINION

**ON THE DRAFT LAW
ON THE DISMANTLING
OF THE SECTION FOR INVESTIGATING CRIMINAL OFFENCES
WITHIN THE JUDICIARY**

**adopted by the Venice Commission
at its 130th Plenary Meeting
(Venice and online, 18-19 March 2022)**

on the basis of comments by

**Mr Jean-Claude SCHOLSEM (Substitute Member, Belgium)
Ms Hanna SUCHOCKA (Honorary President, Poland)
Mr Kaarlo TUORI (Member, Finland)
Mr Johan HIRSCHFELDT (Expert, Former Member, Sweden)**

Contents

I.	Introduction	3
II.	Background.....	3
III.	Scope of the opinion	6
IV.	Analysis	6
a.	Preliminary remarks.....	6
b.	Aim of the Law.....	6
c.	Selection criteria.....	8
d.	Appointment process.....	9
e.	Take-over of cases and vexatious complaints	11
f.	Transitional provisions.....	12
V.	Conclusions	12

I. Introduction

1. By letter of 31 January 2022, the Committee on the Honouring of the Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee) of the Parliamentary Assembly of the Council of Europe (PACE) requested an opinion of the Venice Commission on the draft law dismantling the section for investigating criminal offences committed within the judiciary in Romania (CDL-REF(2022)008).
2. Mr Johan Hirschfeldt, Mr Jean-Claude Scholsem, Ms Hanna Suchocka and Mr Kaarlo Tuori acted as rapporteurs for this opinion.
3. On 23 and 24 February 2022, the rapporteurs held online meetings with the Minister of Justice of Romania, the Parliament (the President of the Legal Committee of the Senate and President of the Legal Commission of the Chamber of Deputies), the National Anti-Corruption Directorate (DNA), the Prosecutor General, the acting president of the Superior Council of Magistracy (SCM), professional associations of judges and prosecutors, representatives of the international community and NGOs. The Venice Commission is grateful to the Ministry of Justice for the organisation of these on-line meetings.
4. The draft law was approved by the Government on 14 February 2022, after which it was submitted to the Romanian parliament. The Chamber of Deputies adopted the draft law on 21 February 2022. It was made clear to the delegation of the Venice Commission during the on-line meetings that the draft law would be adopted before the Commission would be in a position to issue its opinion and indeed, on 28 February 2022, the Senate adopted the draft law. Following a constitutional challenge of the draft law (which was unanimously rejected by the Constitutional Court on 9 March 2022), the law was signed by the President of Romania on 11 March 2022 and entered into force a few days thereafter. At all stages of the legislative procedure amendments were made to the draft law. This opinion was prepared in reliance on the English translation of the draft law as finally adopted by the Senate (CDL-REF(2022)008rev). The translation may not accurately reflect the original version on all points.
5. This opinion was drafted on the basis of comments by the rapporteurs and the results of the on-line meetings on 23 and 24 February 2022. Following an exchange of views with George-Cătălin Șerban, Secretary of State, Ministry of Justice of Romania, the opinion was adopted by the Venice Commission at its 130th Plenary Session (Venice and online, 18-19 March 2022).

II. Background

6. This is not the first time the Venice Commission provides an opinion on the section for investigating criminal offences within the judiciary (hereafter: SIOJ), a structure in the prosecution service dedicated to investigating and prosecuting offences committed by judges and prosecutors. In October 2018, the Venice Commission gave its opinion on the establishment of the SIOJ. In this opinion (hereinafter “the 2018 Opinion”), the Venice Commission pointed to “*questions and strong concerns raised*”, 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."¹ It recommended the Romanian authorities to "*reconsider the proposed establishment of a separate prosecutor's office structure for the investigation of offences committed by judges and prosecutors*", indicating further that "*specialised prosecutors, coupled with effective procedural safeguards appears as a suitable alternative in this respect*".² This recommendation was however not followed by the Romanian authorities and SIOJ was established in October 2018.

7. In its Opinion of June 2019 on emergency ordinances GEO no. 7 and GEO no. 12 amending the Laws of Justice (hereafter "the 2019 Opinion"), the Venice Commission repeated its criticism of the establishment of the SIOJ, stating that "*the reasons for the creation of the special Section for the investigation of criminal offences in the judiciary (the Section), with loosely defined jurisdiction, remain unclear*".³ It also expressed criticism of the prosecutors of the Section being appointed under a transitional scheme "*which de facto remove the prosecutors' wing of the Supreme Council of Magistracy (the SCM) from the decision-making process, which does not sit well with the institutional design of the SCM*" and observed that it was "*uncertain to what extent the prosecutors of the Section and its Chief Prosecutor are under the full hierarchical control of the Prosecutor General*".⁴ The Venice Commission concluded that "*since the Section would be unable to effectively deal with all cases within its competence, it risks being an obstacle to the fight against corruption and organised crime*".⁵

8. In January 2021, the Romanian Government decided to dismantle the SIOJ, outlining that this would be an essential and urgent first step in the reform of the justice laws and would be followed by the adoption of three draft laws, respectively on the status of judges, judicial organisation and the SCM. It requested the Venice Commission for an Opinion on the draft law dismantling the SIOJ. In its opinion adopted in July 2021 (hereafter "the 2021 Opinion"), the Venice Commission expressed a positive view pointing out that "*the Venice Commission could agree that the draft Law is in line with its recommendation by abolishing the SIOJ and transferring the pending cases to the Prosecutor's Offices competent under the law. The same applies to the re-establishment of the competence of the National Anti-Corruption Directorate vis-à-vis judges and prosecutors, as provided by the draft Law in Article 3*".⁶

9. In the meantime, on 18 May 2021, the Court of Justice of the EU (CJEU) rendered a preliminary ruling on the compatibility with EU law of the legislation establishing the SIOJ, as also outlined in the 2021 Opinion. The CJEU clarified that in order to be compatible with EU law, such legislation must, first, be justified by objective and verifiable requirements relating to the sound administration of justice and, secondly, ensure that that section cannot be used as an instrument of political control over the activity of those judges and prosecutors and that the section exercises its competence in compliance with the requirements of the EU Charter of

¹ Venice Commission, CDL-AD(2018)017, Romania – Opinion on Amendments to Law No.303/2004 on the State of Judges and Prosecutors, Law No. 304/2004 on Judicial Organisation, and Law No. 317/2004 on the Superior Council for Magistracy, adopted by the Venice Commission at its 116th Plenary Session (19-20 October 2018), paragraph 83.

² *Ibid.*, paragraph 165.

³ Venice Commission, CDL-AD(2019)014, Romania – Opinion on Emergency Ordinances GEO No. 7 and GEO No. 12 amending the Laws of Justice, adopted by the Venice Commission at its 119th Plenary Session (21-22 June 2019), paragraph 49.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ Venice Commission, CDL-AD(2021)019, Romania – Opinion on the draft law for dismantling the section for the investigation offences committed within the judiciary, adopted by the Venice Commission at its 127th Plenary Session (2-3 July 2021), paragraph 31.

Fundamental Rights of the European Union.⁷ The CJEU thus laid down a number of criteria for assessing the compatibility of such legislation with EU law and, after identifying a number of possible concerns with regard to the fulfilment of these criteria in the present case, left the ultimate assessment to the referring courts.

10. On 7 June 2021, the Pitești Court of Appeal was the first referring court to apply the ruling of the CJEU, declaring that the SIOJ's existence was not justified by objective and verifiable requirements relating to the sound administration of justice and that it was therefore not competent to investigate a case brought before it. However, this was followed on 8 June 2021 by a judgment of the Constitutional Court of Romania, repeating earlier judgments that it did not oppose the creation of the SIOJ, clarifying that it was up to the legislature to set up and dismantle structures such as the SIOJ.⁸ The Constitutional Court also held that "*in so far as certain courts disapply national provisions of their own motion which they consider to be contrary to European law while others apply the same national rules, considering them to be in compliance with the European law, the standard of predictability of the rule would be severely affected, which would entail a serious legal uncertainty and hence the violation of the rule of law principle.*" In short, it found that once it had held that the legislation at issue complied with the Romanian Constitution an ordinary court had no jurisdiction to examine the conformity of that national legislation with EU law.

11. On 21 December 2021, CJEU issued a preliminary ruling, which set out the principle of primacy of EU law and endorsed the binding nature of the benchmarks under Cooperation and Verification Mechanism established by Commission Decision 2006/928/EC of 13 December 2006 (which in its progress reports *inter alia* refers to the abolishment of the SIOJ).⁹ This was confirmed by another preliminary ruling rendered by the CJEU on 22 February 2022, in which the Court held, in relation to the abovementioned judgment of the Constitutional Court of 8 June 2021, that EU law precludes a national rule under which national courts have no jurisdiction to examine the conformity with EU law of national legislation which has been held to be constitutional by a judgment of the constitutional court of the Member State.¹⁰

⁷ The Court added that the national legislation at issue cannot have the effect of exposing judges or prosecutors dealing with corruption cases to the external factors, in particular to any direct or indirect influence of the legislature or executive liable to have an effect on their decisions, as this would disregard the requirements arising from the second subparagraph of Article 19(1) TEU and Romania's specific obligations under Decision 2006/928 (which established the Cooperation and Verification Mechanism in Romania) in the area of the fight against corruption. CJEU, [Judgment of 18 May 2021](#) in Joined Cases C-83/19 Asociația 'Forumul Judecătorilor Din România' v Inspekția Judiciară, C-127/19 Asociația 'Forumul Judecătorilor Din România' and Asociația 'Mișcarea Pentru Apărarea Statutului Procurorilor' v Consiliul Superior al Magistraturii and C-195/19 PJ v QK and in Cases C-291/19 SO v TP and Others, C-355/19 Asociația 'Forumul Judecătorilor din România', Asociația 'Mișcarea Pentru Apărarea Statutului Procurorilor' and OL v Parchetul de pe lângă Înalta Curte de Casație și Justiție - Procurorul General al României and C-397/19 AX v Statul Român - Ministerul Finanțelor Publice.

⁸ Decision no. 390 of 8 June 2021 concerning the exception of unconstitutionality of the provisions of Articles 881 -889 of Law no. 304/2004 on judicial organization and of the Government Emergency Ordinance no. 90/2018 concerning certain measures for the operationalization of the Section for investigating criminal offences within the judiciary. Published in the Official Gazette of Romania, Part I, no. 612 of 22 June 2021.

⁹ CJEU, [Judgment of 21 December 2021](#) in Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19. The CJEU *inter alia* held that the primacy of EU-law is to be interpreted as "*precluding national rules or national practice under which national ordinary courts are bound by decisions of the national constitutional court and cannot, by virtue of that fact and without committing a disciplinary offence, disapply, on their own authority, the case-law established by those decision, even though there are of the view, in the light of the Court of Justice, that the case-law is contrary to the second subparagraph of Article 19(1) TEU, Article 325(1) TFEU or Decision 2006/928.*"

¹⁰ CJEU, [Judgment of 22 February 2022](#) in Case C-430/21. In this case, an action before the Court of Appeal in Craiova, Romania, challenged the excessive duration of criminal proceedings (following a complaint against several judges for the alleged commission of offences). The Court of Appeal

12. In the meantime, the draft law dismantling the SIOJ, which was subject to the 2021 Opinion, stalled in Parliament. On 25 November 2021, following a two-month political crisis, a new government was formed. The new Minister of Justice prepared a new draft law on dismantling SIOJ, which is meant to take into account the Opinions of the Venice Commission and relevant judgments of the CJEU.

III. Scope of the opinion

13. The Law is only a minor part of a package of judicial reforms under preparation. The Venice Commission had wished to provide an opinion with a holistic approach on such a general reform package, as it suggested in its earlier opinions. However, as there are currently no proposals concerning the wider reform of the judiciary, this opinion focuses only on issues connected to the dismantling of the SIOJ and its replacement by a new mechanism.

IV. Analysis

a. Preliminary remarks

14. The draft law on dismantling the SIOJ (hereafter: “the Law”) proposed by the Minister of Justice was adopted (with various amendments) by the Government on 14 February 2022, followed by Chamber of Deputies (with further amendments) on 21 February 2022 and the Senate (with further amendments) on the 28 February 2022. The delegation of the Venice Commission was told that its opinion could not be awaited *inter alia* because the deadline for the abolishment of the SIOJ in the programme of the Government was set for 31 March 2022, that it was important to make swift progress with the abolishment of the SIOJ to reach the relevant benchmark under the Coordination and Verification Mechanism and to avoid a legal situation which would generate an infringement procedure against Romania, in light of the judgments of the CJEU.

15. The Venice Commission regrets the haste with which this law got adopted: It will mean that any improvements to the Law it may recommend will not be possible without further amendments to the legislation in force. In addition, this haste has made it difficult to assess the various amendments introduced at different stages of the legislative process on their merits. As the Venice Commission’s opinion is to be adopted almost two weeks before the deadline of the government programme and given the doubts that have been expressed by various interlocutors as to whether the chosen solution lives up to the requirements set out in the CJEU judgment of 18 May 2021, the Venice Commission remains unconvinced by the arguments advanced in justification of a speedy adoption of the Law and it considers that an opportunity for improvement of the Law has been lost.

b. Aim of the Law

16. As outlined above, in its 2018 and 2019 Opinions, the Venice Commission was highly critical of the establishment of the SIOJ. In its 2021 Opinion, the Commission considered the dismantling of the SIOJ and the re-establishment of the competences of the DNA vis-à-vis prosecutors and judges, a positive development. Similar to 2021, the dismantling of SIOJ – which has been plagued by claims of underperformance, interference in high-level corruption

considered that it would have to assess the compatibility with EU law (specifically Article 19(1), second paragraph TFEU and Decision 2006/928/EC) of the national legislation establishing the SIOJ. However, considering the abovementioned judgment of the Constitutional Court of Romania of 8 June 2021, it would not, under national law, have jurisdiction to do so, and referred to the CJEU for a preliminary ruling.

cases and exerting pressure on magistrates¹¹ – seems now again to be welcomed by a large part of the judicial community in Romania as well as the international community and NGOs. This is however where consensus ends. In view of the Venice Commission, the dismantling of SIOJ cannot be an end in itself but should primarily be a means to ensure a more effective investigation into offences – most importantly corruption – committed by judges and prosecutors.

17. The crucial issue in this respect is what happens to the cases currently handled by SIOJ and the powers transferred in 2018 from the DNA and the Directorate for Investigation of Organised Crime and Terrorism (DIICOT). Different from the draft law proposed in 2021, the new law does not seek to re-establish the competences of DNA (and DIICOT) as regards corruption offences (or organised crime and terrorism in the case of DIICOT) committed by judges and prosecutors. Instead the competences of SIOJ will be taken over by a) the criminal prosecution section of the Prosecutor's Office attached to the High Court of Cassation and Justice, for offences committed by members of the SCM, judges and prosecutors attached to the High Court of Cassation, judges and prosecutors attached to the courts of appeal and the military court of appeal, as well as judges of the Constitutional Court (a category which were added during the proceedings in the Chamber of Deputies in the Romanian Parliament) and b) the prosecutor's offices attached to the courts of appeal, for offences committed by judges and prosecutors attached to courts of first instance, tribunals and military tribunals.¹²

18. While acknowledging that the organisation and the structure of a public prosecution service is a matter for the authorities to decide, the Venice Commission has consistently supported institutional specialisation in the fight against corruption.¹³ In the 2018 Opinion, it also recognised 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*".¹⁴ Especially in countries where an effective specialised structure with a proven track record already exists, it seems difficult to justify the exclusion of judges and magistrates from the remit of such structures, especially in a manner that may further dissipate resources and continue the use non-specialised prosecutors to investigate corruption offences.

19. In discussing this in its on-line meetings, the delegation of the Venice Commission heard once again allegations of "abuse" in the work of DNA, which has been invoked to justify that the competences of DNA (and DIICOT) have not been re-established vis-à-vis judges and prosecutors, and noted the strong polarisation around this issue. It notes that the explanatory note to the Law also makes mention of this (in relation to a decision of the plenary of the SCM on the report of the Judicial Inspection for the period 2014-2018).¹⁵ While it is difficult for the Commission to assess the severity of these allegations, as it also said in its 2018 Opinion¹⁶, it considers that these will likely have been incidental issues involving individual DNA prosecutors rather than a structural problem at the heart of the DNA (also bearing in mind that

¹¹ See, for example, European Commission, [Report](#) from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism (COM(2021) 370 final), 8 June 2021, p.5.

¹² Article 3, paragraph 1 and 2 of the Law.

¹³ See for example: Venice Commission, CDL-AD(2014)041, Montenegro - Interim Opinion on the Draft Law on Special State Prosecutor's Office, adopted by the Venice Commission at its 101st Plenary Session (13-14 December 2014), paragraphs 17-18 and 23; CDL-AD(2016)009, Albania – Final Opinion on the Revised Draft Constitutional Amendments on the Judiciary, adopted by the Venice Commission at its 106th Plenary Session (11-12 March 2016), pp. 46-47.

¹⁴ 2018 Opinion, paragraph 89.

¹⁵ The decision of the SCM notes "*practices of DNA prosecutors dealing with cases with judges (...) represented forms of pressure on them, with direct consequences in terms of administration of justice.*" (Explanatory note to the Law, p. 10).

¹⁶ 2018 Opinion, paragraph 88.

the actions of the DNA are subject to judicial oversight, which would counter any overzealousness on its part).

20. The new mechanism is also more vulnerable in terms of its functional independence than the DNA (and DICOTT) when it comes to investigating and prosecuting corruption cases, which may involve the prosecutor's colleagues and superiors.¹⁷ In this connection, the Venice Commission also refers to the observations it made in its 2021 Opinion on the independence of an individual prosecutor in a hierarchical system¹⁸, as well as the observations made in its 2018 Opinion on the independence of the prosecution service in Romania in general¹⁹, against the background of the earlier noted "widespread tendency to allow for a more independent prosecutor's office"²⁰ in Venice Commission member states.

21. In relation to this, a further argument for the solution proposed in the Law, the special treatment of magistrates regarding offences committed by them, was – as also pointed to in the explanatory note – to guarantee the independence of judges. This is however a misunderstanding of judicial independence. As the Commission has pointed out on various occasions when discussing immunity of judges, judicial independence is not a personal prerogative or privilege of a judge.²¹ It does not mean that when it comes to intentional crimes, such as corruption, judicial independence forms justification for dealing with crimes *ad personam* and excluding judges and prosecutors the remit of specialised structures. Any special treatment of magistrates should be strictly limited to functional immunity for actions carried out in good faith in pursuance of their duties or in the exercise of their functions and should not extend to the commission of crimes.

22. Concerns remain also as to whether the SIOJ will only undergo a *de jure* dismantling and that - other than in respect of the number of prosecutors attached to it and its territorial distribution - the new structure will not be fundamentally different from SIOJ. This would raise questions as to whether the new mechanism will be able to effectively fight corruption in the judiciary. Given that the DNA has built up an effective working structure, covering the whole territory of Romania, with the required technical means and experience in investigating complex corruption cases and in light of the concerns expressed in its 2018, 2019 and 2021 Opinions, the Venice Commission regrets that the competences of DNA (and DIICOT) vis-à-vis offences committed by judges and prosecutors have not been re-established.

c. Selection criteria

23. Prosecutors with respectively at least 15 years' experience (for those designated to work for the Prosecutor's Office attached to the High Court of Cassation and Justice and who have a corresponding professional rank) or 12 years' experience (for those designated to work for the prosecutors' offices attached to the courts of appeal) as a prosecutor, who have the

¹⁷ The importance of the necessary independence of – in this case - specialised bodies in the fight against corruption is emphasised by international standards. See, for example, Article 20 of the Council of Europe's Criminal Law Convention on Corruption (CETS 173), adopted on 4 November 1998; entered into force on 1 July 2002, as well as Article 36 of the 2003 United Nations Convention against Corruption (UNCAC). See also on this issue, Venice Commission, CDL-AD(2014)041, paragraphs 15-18 and 55.

¹⁸ 2021 Opinion, paragraphs 36-37. See also for further critical observations on this matter: James Hamilton, "Prosecution services thirty years after the fall of communism", *Venice Commission: Thirty Years of Quest for Democracy Through Law 1990-2020* (2020), pp. 314-317.

¹⁹ 2018 Opinion, paragraph 63 and 61.

²⁰ Venice Commission, CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II – Prosecution Service, adopted by the Venice Commission at its 85th Plenary Session (17-18 December 2010), paragraph 26.

²¹ See for example Venice Commission, CDL-AD(2010)004, Report on the independence of the judicial system Part I: the independence of judges, adopted by the Venice Commission at its 82nd Plenary Session (12-13 March 2010).

grade “very good” in the last two professional evaluations and have not been subject to disciplinary sanctions in the last three years, who have impeccable moral conduct and who have significant professional experience in supervising or prosecuting criminal offences can submit their application to the SCM.²² Whether applicant prosecutors meet these criteria is then checked by a special department of the SCM. In the initial proposal of the Minister of Justice the requirement of significant professional experience had to be mainly related to (but not limited to) the investigation of corruption and corruption-related offences and/or organised crime and terrorism, which was in the later draft of the Government replaced by significant professional experience in supervising or prosecuting criminal offences.

24. Given some of the designated prosecutors will be required to also investigate highly complex cases of corruption in the judiciary, it is regrettable that the initial proposal by the Minister of Justice, requiring previous experience in the investigation of corruption-related offences, has not been maintained and that instead general prosecutorial experience is being required. The Law seems to erroneously equate experience with specialisation.

25. This “significant professional experience” is to be assessed by reference “also to the specifics and complexity of the cases investigated”, as based on information provided from the prosecutor’s offices where applicant prosecutors worked before, which is to include data on “the rate of acquittals, restitutions, convictions, possible notifications made by the investigated persons and the solutions given to them, as well as any other relevant aspects”.²³ Given the Venice Commission’s earlier observations on the use of quantitative criteria, such as the rate of acquittals and convictions²⁴, and given that in the context of Romania – see on vexatious complaints further below – the criterion “possible notifications made by the investigated persons” could be problematic, it is welcomed that qualitative criteria such as the specifics and complexity of cases are explicitly included in these selection criteria. However, notions such as “other relevant aspects” and “other relevant issues”²⁵, which carry an element of unpredictability with them, should preferably be avoided.

d. Appointment process

26. A special department within the SCM checks whether the applicant prosecutors fulfil these criteria, after which the plenary of the SCM makes a proposal to the Prosecutor General of the prosecutor’s office attached to the High Court of Cassation and Justice. In the initial draft proposed by the Minister of Justice the prosecutors were to be appointed by the plenary of the SCM on the basis of a reasoned proposal by either the Prosecutor General of the prosecutor’s office attached to the High Court of Cassation and Justice (for those designated to work for the Prosecutor’s Office attached to the High Court of Cassation and Justice) or the general prosecutor attached to the prosecutor’s offices attached to the courts of appeal (for those designated to work for these prosecutor’s offices). In total a maximum of 59 prosecutors (a maximum of 14 prosecutors at the High Court of Cassation and Justice and a maximum three prosecutors appointed at each of the 15 courts of appeals) will be appointed for a renewable four-year term.²⁶

27. The prosecutors thus appointed will not exclusively deal with offences committed within the judiciary but may also take on other cases falling within the competence of the prosecutor’s

²² Articles 4, paragraph 1, and 5, paragraph 1, of the Law.

²³ Article 4, paragraphs 2 and 4 of the Law.

²⁴ Venice Commission, CDL-AD(2014)042, Montenegro – Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, adopted by the Venice Commission at its 101st Plenary Session (12-13 December 2014), paragraphs 86-87.

²⁵ Article 4, paragraph 5 and Article 5, paragraph 3 of the Law.

²⁶ Articles 10 and 6 of the Law.

office to which they are attached.²⁷ In this time they may not be moved to another section of the prosecutor's office without their consent²⁸, but their term as specially designated prosecutor can be terminated by the Prosecutor General on the proposal of the plenary of the SCM in case of professional inefficiency, at their own request for duly justified reasons, in case of a disciplinary sanction being applied, in case s/he cannot exercise his function for a period longer than 3 months, in case s/he is voluntarily moved, delegated, seconded or transferred to another prosecutor's office or in case his/her appointment is not renewed after the four-year appointment period.²⁹

28. The Venice Commission recalls that in its 2019 Opinion it was critical of the role of the plenary of the SCM in the procedure for appointing certain SIOJ prosecutors, as it ignored the symmetry between the functions of the two "wings" of the SCM (those of judges and of prosecutors) and allowed the judges in the SCM plenary (which has a majority of judges) to dominate the decision-making process.³⁰ The Commission appreciates that in the current Law this domination by judges in the selection process has been counterbalanced by a veto-power of the Prosecutor General (who has also been involved in the decision-making by the plenary) over the final appointment of prosecutors to the new mechanism. It would however be reasonable to give the prosecutorial section of the SCM a stronger involvement in the initial selection of prosecutors, in line with Venice Commission previous opinions on Judicial Councils.³¹

29. It is furthermore regrettable that the Law does not provide for a competitive procedure. Many prosecutors are likely to meet the eligibility criteria and it is unclear how the plenary of the SCM is to select the candidates to be proposed to the Prosecutor General. This would need to be clarified. Furthermore, the appointment for a period of four years is relatively short to guarantee sufficient independence of individual prosecutors, in particular as it would be possible that these prosecutors are to investigate complex offences committed – for example - by SCM members involved in their selection procedure.

30. In light of its previous observations on the weak performance of SIOJ due to its understaffing and centralisation,³² the Venice Commission acknowledges that the Law foresees the appointment of up to 59 prosecutors divided over the various prosecutor's offices. These designated prosecutors will not exclusively deal with offences committed within the judiciary but may also take on other cases falling within the competence of the prosecutor's office to which they are attached.³³ The Venice Commission notes that it is left to the plenary of the SCM to decide the actual number to be appointed, which – given the reports on the inability of the SCM to overcome internal divisions³⁴ – may result in further inaction on the side of the new mechanism, which also considering the backlog of cases of the SIOJ is a matter of concern. In this context, it may be useful to set out criteria for establishing the appropriate number of prosecutors to guarantee the effectiveness of the new mechanism.³⁵

²⁷ Article 3, paragraph 4 of the Law.

²⁸ Article 7 of the Law.

²⁹ Article 8 of the Law.

³⁰ 2019 Opinion, paragraph 36.

³¹ See, for example, Venice Commission, CDL-AD(2020)035, Bulgaria – Urgent Interim Opinion on the Draft New Constitution, adopted by the Venice Commission at its 125th Plenary Session (11-12 December 2020).

³² 2021 Opinion, paragraph 32.

³³ Article 3, paragraph 4 of the Law.

³⁴ European Commission, Report on Progress in Romania under the Cooperation and Verification Mechanism, pp. 20-21.

³⁵ Venice Commission, CDL-AD(2014)041, paragraph 68.

31. Finally, the fact that the plenary of the SCM also decides on the termination of the appointment of prosecutors designated to the new mechanism, either *ex officio* or on notification of the Prosecutor General attached to the High Court of Cassation and Justice is problematic, notwithstanding the fact that this termination does not affect the employment of the prosecutor as such and does not affect his/her professional rank.³⁶ Unlike with the appointment of these prosecutors, the Prosecutor General does not appear to have a veto power over the decision to terminate an appointment, which – given the earlier-noted dominance of judges in the plenary of the SCM – could be problematic, especially if these prosecutors would be involved in investigating crimes committed by SCM members and/or judges. In this context, it would also be welcomed if the criteria for the termination of the appointment, such as “professional inefficiency” (which is assessed according to “the efficiency and quality of the activity”) are more clearly delineated.

e. Take-over of cases and vexatious complaints

32. The operational rule according to which, if other persons are investigated for - for example - corruption together with judges and prosecutors, the corruption file is transferred from DNA to the designated prosecutors, is maintained under the Law. However, in light of the criticism³⁷ of SIOJ for intervening in high-level corruption cases investigated by the DNA (through vexatious complaints mentioned below), for the new mechanism a safeguard has been introduced in the Law, providing that the cases will only be joined if “for reasons of good conduct of the prosecution, the case cannot be disjoined”.³⁸ While this is an improvement, in light of the fact that the decision to join or disjoin a case remains with the designated prosecutor, the Venice Commission takes the view that at least further safeguards against what was dubbed during the on-line exchanges as “a hostile take-over of cases” from the DNA are needed. Preferably this operational rule would be completely revised as it has the potential to significantly weaken the fight against corruption.

33. In this connection, in its 2021 Opinion, the Venice Commission pointed to the problem of vexatious complaints (often criminal complaints) by private individuals against judges and prosecutors, which *inter alia* allowed SIOJ to take over cases (see above) and which blocked ordinary case-handling.³⁹ The huge number of such complaints was regarded as one of the reasons for the lack of effectiveness of the SIOJ and the backlog of cases. It was explained to the delegation of the Venice Commission that this is part of ordinary criminal procedure: Anyone can make a criminal complaint, regardless of the offence to which it relates or alleged perpetrator, which is then to be investigated. To make any kind of derogation from the provisions of the criminal procedure code in this respect specifically for judges and prosecutors would likely be incompatible with the Constitution. While the Venice Commission acknowledges that with the new mechanism a greater number of prosecutors will be able to deal with criminal complaints against judges and prosecutors, whether vexatious or not, considering the sheer number of such complaints targeting specific professions and given that they have a similar potential of affecting the new mechanism (especially as designated prosecutors will also handle other cases) and can enable an objectionable transfer of cases from the DNA and other prosecution offices,⁴⁰ the Venice Commission reiterates the advice it gave in its 2021 Opinion to urgently reform the way of addressing these vexatious

³⁶ Article 8, paragraphs 2 and 4 of the Law.

³⁷ See, for example, European Commission, Report on Progress in Romania under the Cooperation and Verification Mechanism, p.5 and the [progress report](#) for 2019 (COM(2019) 499 final), 22 October 2019, p. 5., but also the 2019 Opinion (paragraph 40).

³⁸ Article 3, paragraph 5 of the Law.

³⁹ See the 2021 Opinion, paragraph 63 and 67.

⁴⁰ For example, by filing a vexatious criminal complaint against the judge or prosecutor in however minor role in a case against other persons being investigated by DNA or another prosecutor’s office.

complaints.⁴¹ As is evident from the experiences of other countries, this would not necessitate any constitutional amendments.

f. Transitional provisions

34. The Law contains a number of stipulations on the transfer of cases and staff of the SIOJ, which are to a large extent similar to those assessed as part of the 2021 Opinion.⁴² It is provided that cases will have to be transferred by the Prosecutor's Office attached to the High Court of Cassation and Justice to the competent prosecutor's offices within 60 days (this was 5 days in the 2021 draft law),⁴³ acts of procedure carried out in compliance with the legal provisions in force at the date of their fulfilment remain valid⁴⁴ and dismissals, waivers of criminal prosecution and indictments, as well as acts performed and measures taken by the SIOJ, which were not subject to the hierarchical control prior to the entry into force of the Law, will be subject from the date of dismantling of the SIOJ, to the control exercised by the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice.⁴⁵ Unlike the 2021 draft, the Law allows for a suspension of both the limitation period and the deadlines for executing procedural acts for a period of 60 days (i.e. the time period in which the cases are to be transferred to the competent prosecutor's office) and provides that until the appointment of the designated prosecutors the Chief Prosecutor of the Criminal Prosecution Section and the general prosecutors attached to the courts of appeal will decide on any urgent measures to be taken in the relevant case files.⁴⁶ As regards the staff, similar to what was provided in the 2021 draft law, the prosecutors from the SIOJ return the prosecutor's offices where they came from.⁴⁷

35. The Venice Commission refers in this respect to the observations it made in its 2021 Opinion as regards the hierarchical control in the prosecution service and the independence of individual prosecutors (as also referred to above), and reiterates that "*changes introduced as a result of a reorganisation in the judiciary, could be carried out in such a manner as to not cause any problems with respect to the administration of justice and the treatment of prosecutors, who were initially in charge*".⁴⁸ The backlog of cases of the SIOJ is in the context of this reorganisation a matter of additional concern, in particular considering that it will take time to set up the new mechanism and have prosecutors selected by the plenary of the SCM. The fact that the limitation period and deadlines for procedural acts are temporarily suspended and a mechanism for deciding on any urgent measures to be taken is provided for is to be welcomed in this respect.

V. Conclusions

36. The Venice Commission regrets the haste with which this controversial law on dismantling the SIOJ has passed through parliament and has been promulgated, which has meant that the Law has been adopted before the Commission has been able to issue its opinion.

⁴¹ See also Consultative Council of European Judges (CCJE), Opinion no. 3, paragraph 54, which recommends that "*in countries where a criminal investigation or proceedings can be started at the instigation of a private individual, there should be a mechanism for preventing or stopping such investigation or proceeding... when there is no proper case for suggesting that any criminal liability exists on the part of the judge*".

⁴² See paragraphs 34-42 of the 2021 Opinion.

⁴³ Article 1, paragraph 2 of the Law.

⁴⁴ Article 1, paragraph 4 of the Law.

⁴⁵ Article 1, paragraph 5 and 6 of the Law.

⁴⁶ Article 18 of the Law.

⁴⁷ Article 2, paragraph 2 of the Law.

⁴⁸ The 2021 Opinion, paragraph 37.

37. Dismantling the SIOJ should not be an objective in itself. The objective of dismantling SIOJ should be to ensure more efficacy in investigating and prosecuting offences – most importantly corruption – committed by judges and prosecutors. It is implausible that a structure of non-specialised prosecutors at the level of the prosecutor's offices attached to the High Court of Cassation and Justice and those attached to the courts of appeal will be better placed to conduct investigations into allegations of corruption by judges and prosecutors than the existing specialised prosecution service DNA. Given DNA and DIICOT's relative autonomy and functional independence, their specialisation, experience and the technical means at their disposal, the Venice Commission regrets that unlike the draft law it assessed in its 2021 Opinion (which would have returned to the situation to what it was before the 2018 amendments), the legislator has not restored the competences of these specialised prosecution services. Consequently, the Venice Commission recommends restoring the competences of these specialised prosecution services to also investigate and prosecute offences within their remit committed by judges and prosecutors.

38. In addition, as it has also outlined in its 2021 Opinion, the way in which vexatious complaints (often criminal complaints) by private individuals against judges and prosecutors are addressed needs to be reformed urgently. Furthermore, as an additional priority, operational rules under which prosecutorial files can be removed from the competence of specialised prosecution services if other persons are investigated together with magistrates need to be revised and/or further safeguards against the take-over of such cases need to be provided.

39. Finally, if the Law is maintained as is, the Venice Commission recommends to provide the prosecutorial section of the SCM a stronger involvement in the selection of the prosecutors designated to investigate offences by judges and prosecutors to do justice to the institutional design of the SCM, to provide for a competitive selection procedure and a clearer delineation of some of the criteria for the appointment (and termination of this appointment) of the designated prosecutors, as well as a longer period of appointment.

40. As dismantling the SIOJ is only a first step in a larger package of reform measures, the Venice Commission would like to encourage the Romanian authorities to continue this wider reform and it remains at the disposal of the Romania authorities and the Parliamentary Assembly for any further assistance that may be required.