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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

ROMANIA

URGENT OPINION

ON

THREE LAWS CONCERNING THE JUSTICE SYSTEM

**Issued on 18 November 2022 pursuant to Article 14a
of the Venice Commission's Rules of Procedure**

On the basis of comments by

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Contents

I.	Introduction	3
II.	Background.....	3
III.	Procedure of adoption of the laws	4
IV.	General observations	5
V.	Specific issues	5
A.	Appointments to managerial positions	6
B.	The procedure for appointing deputy managers in courts and prosecutors' offices	6
C.	Appointment and removal of high-ranking prosecutors	7
D.	Length of appointment of prosecutors.....	9
E.	Power of the General Prosecutor to challenge acts of the prosecutors at any level ...	9
F.	Civil and disciplinary liability of magistrates – disciplinary liability for not following the case-law of the Constitutional Court.....	11
G.	Judicial Police.....	11
H.	Fight against corruption in the judiciary – Role of the DNA	12
VI.	Conclusion	13

I. Introduction

1. By letter of 15 September 2022 from the Chair of the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe, the Parliamentary Assembly of the Council of Europe (PACE), requested an opinion of the Venice Commission on three (draft) Laws concerning the justice system of Romania: the Law on the Superior Council of Magistracy ([CDL-REF\(2022\)046](#)), the Law on the Judicial Organisation ([CDL-REF\(2022\)047](#)), and the Law on the Status of Judges and Prosecutors ([CDL-REF\(2022\)048](#)).
2. On 25 October 2022, the Minister of Justice of Romania asked for this opinion to be dealt with under the urgent procedure. The Bureau of the Venice Commission approved the use of the urgent procedure on 26 October 2022.
3. Mr Cameron, Mr Seners and Ms Suchocka acted as rapporteurs for this urgent opinion.
4. On 7 November 2022, the rapporteurs, assisted by Mr Schnutz Dürr, had online meetings with the Minister of Justice, Parliament, the High Court of Cassation and Justice, the Superior Council of Magistracy (SCM), professional associations of judges and prosecutors, the General Prosecutor¹ and Chief Prosecutor of the National Anticorruption Directorate (DNA), representatives of the international community as well as with representatives from civil society. The Commission is grateful to the Ministry of Justice for the excellent organisation of the meetings.
5. This opinion was prepared in reliance on the English translation of the Laws. The translation may not accurately reflect the original version on all points.
6. This opinion was drafted on the basis of comments by the rapporteurs and the results of the online meetings on 7 November 2022. It has been issued in accordance with the Venice Commission's protocol on the preparation of urgent opinions ([CDL-AD\(2018\)019](#)) on 18 November 2022 and will be presented to the Venice Commission for endorsement at its 133rd Plenary Session, (Venice 16 - 17 December 2022).

II. Background

7. The three draft laws were adopted on 17 October 2022. Their constitutionality was challenged before the Constitutional Court by the Ombudsman and some members of Parliament. On 9 November 2022, the Constitutional Court announced that it rejected all appeals as unfounded.² The Laws were enacted by the President of Romania on 15 November 2022.³
8. In several respects, this urgent opinion is a continuation of earlier opinions of the Venice Commission on reforms of the judicial system in Romania:
 - [CDL-AD\(2014\)010](#), Opinion on the Draft Law on the Review of the Constitution of Romania [731/2012]
 - [CDL-AD\(2018\)021](#), Romania - Opinion on draft amendments to the Criminal Code and the Criminal Procedure Code [924/2018]
 - [CDL-AD\(2018\)017](#), Romania - Opinion on draft amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organisation, and Law No. 317/2004 on the Superior Council for Magistracy [924/2018]

¹ General Public Prosecutor of the Public Prosecutor's Office attached to the High Court of Cassation and Justice, Article 133 of the Constitution.

² <https://www.ccr.ro/comunicat-de-presa-9-noiembrie-2022/> (in Romanian).

³ <https://www.presidency.ro/ro/media/decrete-si-acte-oficiale/decrete-semnate-de-presedintele-romaniei-klaus-iohannis1668520683>.

- [CDL-AD\(2019\)014](#), Romania – Opinion on Emergency Ordinances GEO No. 7 and GEO No. 12 amending the Laws of Justice [950/2019]
- [CDL-AD\(2021\)019](#), Romania - Opinion on the draft Law for dismantling the Section for the Investigation of Offences committed within the Judiciary [1036/2021]
- [CDL-AD\(2022\)003](#), Romania - Opinion on the draft law on the dismantling of the section for investigating criminal offences within the judiciary [1079/2022]

9. On 13 October 2022, the Parliamentary Assembly adopted Resolution 2466 on Romania.⁴ Paragraph 7 of that Resolution reads:

“7. Concerning the three justice laws, namely on the Status of Magistrates, on the Organisation of the Judiciary and on the Superior Council of Magistracy, which were submitted to the parliament, the Assembly takes note of the setting up by the parliament of the Joint Parliamentary Committee for the examination of laws in the field of justice and invites the authorities to follow the recommendations formulated by the Venice Commission and GRECO, in particular with regard to the civil and disciplinary liability of magistrates, competitions for admissions in the judiciary and rules on the status as well as appointment and removal of specialised and high-ranking prosecutors.”

10. As this opinion, upon request by the Romanian authorities, is being prepared under the urgent procedure, the Commission cannot examine in detail the three Laws. In the limited time at its disposal, the Commission will therefore analyse only some issues, notably those relating to issues raised in PACE Resolution 2466.

11. This opinion cannot be seen as expressing a view on the compatibility of the three Laws with European standards on any other points than those discussed below. The Venice Commission also cannot not enter the political discussion whether the adoption of these Laws justifies the termination of the EU Mechanism for Cooperation and Verification (CVM), as was pointed out by some interlocutors of the delegation of the Venice Commission.

III. Procedure of adoption of the laws

12. Unlike earlier reforms,⁵ the current laws were subject of lengthy preparation since 2020 and numerous consultations with all stakeholders took place. This is a positive point, which must however be tempered by the fact that at the end of the process, the parliamentary debate was conducted in a rushed manner.

13. As was the case in previous opinions,⁶ also the March 2022 Opinion on the dismantling of the Section for Investigating Criminal Offences within the Judiciary in Romania⁷ criticised the haste with which that law had been adopted.

14. The Romanian authorities had announced that they would take into account the opinions of the Venice Commission.⁸ However, the Government did not request an opinion on the draft laws. The Government argued that this was necessary due to the need to quickly ensure the

⁴ <https://pace.coe.int/en/files/31399#trace-3>.

⁵ Venice Commission, [CDL-AD\(2019\)014](#), Romania – Opinion on Emergency Ordinances GEO No. 7 and GEO No. 12 amending the Laws of Justice, §§ 9 to 21.

⁶ Ibid.

⁷ Venice Commission, [CDL-AD\(2022\)003](#), Romania - Opinion on the draft law on the dismantling of the section for investigating criminal offences within the judiciary.

⁸ See also Government Programme for 2021-2024, Chapter on Ministry of Justice, Justice and Rule of Law, Vision and Principles: “in the field of Justice and the rule of law, the Government proposes to continue and improve the reforms, taking into account the reports of the European bodies - the Venice Commission, GRECO, MCV and the EC Report on the rule of law.”

https://gov.ro/fisiere/programe_fisiere/Program_de_Guvernare_2021%E2%80%942024.pdf (in Romanian).

termination of the CVM and to enter the Schengen Space; any consultation on the intermediary versions would not have brought an accurate assessment on the drafts, since they were only reflecting the respective stage of the process.⁹ The Venice Commission regrets that it was not consulted until after the laws had been adopted, whereas the lengthy preparatory procedure would have made it possible to obtain the opinion beforehand.

15. This acceleration of the procedure also led to a hasty adoption of the laws in Parliament. Debates in Parliament started on 12 September and the laws were adopted on 17 October 2022. Relatively little time appears to have been made available for debate in the Parliament because an emergency procedure was applied.

16. The Venice Commission regrets the haste of the adoption procedure and the fact that it was not asked in time to prepare an opinion on the draft laws and that it should deal with the adopted laws under the urgent procedure.

17. The authorities insist that the drafting process was transparent and inclusive, the parliamentary debate being only the last step of this long democratic process. In Parliament, the emergency procedure had been fully respected, a special commission had been set up, in line with the transparent emergency procedure, not affecting the democratic debates, with the participation of all parliamentary groups and stakeholders.

IV. General observations

18. With regard to the content of the new provisions, it should be emphasised at the outset that the majority of opinions gathered during the meetings on 7 November were positive. There were some very critical voices but they focused on specific issues rather than questioning the laws altogether.

19. The SCM, several of the judges' and prosecutors' associations and some representatives of civil society are of the opinion that these new laws represent progress, even if improvements are still desirable on certain points. In this respect, the overall tone of the comments received is quite different from that of 2018/2019 and even at the time of the abolition of the Special Section.

20. As concerns the quality of the texts, these three Laws are voluminous pieces of legislation. They are very detailed. One can question whether many provisions need to be regulated on the level of law in such detail, such as on training and other technical questions. However, this seems to be part of the national legislative style.

21. A relevant document to be taken into account by the Romanian authorities is also GRECO's Second Interim Compliance Report on Romania in the framework of the Fourth Evaluation Round on "Corruption prevention in respect of members of parliament, judges and prosecutors", which also includes the follow-up to the *ad hoc* (Rule 34) Report on Romania.¹⁰ A Third Interim Compliance Report including Follow up to the *ad hoc* Rule 34 procedure is scheduled for discussion at the next plenary session of GRECO on 28 November - 2 December 2022.

V. Specific issues

22. This opinion focuses on the topics that were raised in Resolution 2466 of the Parliamentary Assembly of 13 October 2022. These are the civil and disciplinary liability of magistrates, the competitions for admissions in the judiciary and the rules on the status as well as the appointment and removal of specialised and high-ranking prosecutors. The points discussed below relate to these issues but cannot cover them in their entirety, in view of the urgent character of this opinion.

⁹ <https://www.romania-insider.com/minister-defends-quick-endorsment-justice-laws>.

¹⁰ Adopted by GRECO at its 87th Plenary Meeting (Strasbourg, 22-25 March 2021).

A. Appointments to managerial positions

23. An important change in the Law as compared to the current situation is that there will no longer be written tests for appointments to managerial positions. Under the previous legislation, a written multiple-choice test was required. This test was criticised within the Judiciary because it favoured younger judges who were still used to sitting tests from their time at the judicial academy, the National Institute of Magistracy. More senior judges allegedly did not want to sit these tests and therefore did not apply for positions that they merited in view of their experience and seniority.

24. Instead, the Laws introduce an evaluation based on a judge's or prosecutor's quality of work, efficiency and ability to communicate.¹¹ This was criticised by some of representatives of civil society because it removes an objective part of the appointment procedure (the written test) and introduces subjectivity in this evaluation.

25. The criteria applied seem to be reasonable: *"a) capacity for analysis and synthesis, coherence in expression; b) argumentation in terms of clarity and logic, reasoned analysis of the requests and defences formulated by the parties, compliance with the unified jurisprudence of the High Court of Cassation and Justice and the courts of appeal; c) compliance with reasonable deadlines for resolving cases/works and drafting decisions, considering the volume of activity"*.¹² These qualities are indeed necessary when managerial skills are needed, and this would appear to be positive.

26. As always, in order to overcome problems of subjectivity, transparency is warranted. Clear records of the evaluations need be kept and, on this basis, candidates who did not pass the evaluation should be able to appeal against a negative evaluation. An appeal against the score obtained during the evaluation is indeed possible under the Law on the Status of Judges and Prosecutors.¹³

27. Whatever the practical implications may be, both models (written tests and/or evaluation of previous practice) *a priori* seem not to be contrary to European standards.

B. The procedure for appointing deputy managers in courts and prosecutors' offices

28. A specific issue raised during the discussions was the methods of appointing deputy managers in courts and prosecutors' offices, within the courts of appeal, the courts of first instance and the specialised courts. Contrary to the current legislation, deputy managers will be chosen by the president of the court or prosecutor's office on the basis of the compatibility of their 'management project'¹⁴.

29. Whereas the presidents and, moreover, the judges at the High Court of Cassation are appointed by the SCM after a competitive procedure, these second-level managerial officials in courts and prosecution offices will be appointed on the proposal of the respective presidents: *"The appointment to managerial positions other than those referred to in paragraph (1) in the first*

¹¹ Article Art. 139 § 1 of the Law on the Status of Judges and Prosecutors : *"The effective promotion competition consists of taking a test with the object of evaluating the activity and conduct of the candidates in the last 3 years of effective activity"*.

¹² Article 140 § 1 of the Law on the Status of Judges and Prosecutors.

¹³ Article 140 § 11 of the Law on the Status of Judges and Prosecutors.

¹⁴ *"A project regarding the exercise of the specific duties of the management position for which he participates in the selection"*, Article 154 §3.a of the Law on the Status of Judges and Prosecutors.

*instance courts, tribunals, specialised tribunals and courts of appeal and the prosecutors' offices attached thereto shall be carried out without competition or examination, upon a proposal from the president of the court or the head of the prosecutor's office, in accordance with the procedure laid down in this law.*¹⁵

30. The reason given by the authorities is to ensure consistency of management within the courts, between the court or prosecution office president and his or her deputies. The Venice Commission's delegation was informed that there had been problems between presidents and deputies in various courts and prosecution offices in past.

31. While ensuring an efficient cooperation between the presidents and their deputies is a valid goal, there is also a clear danger that such a system leads to clientelism within the judiciary. This is all the more serious because together the president and the deputies can wield great influence on the other judges or prosecutors.

32. Furthermore, the procedure for filling deputy positions/heads of sections remains unclear. These deputies will be appointed by the respective Section for Judges or the Section for Prosecutors of the SCM. However, there seems to be no provision on what should happen if the Section does not approve the choice of the court president or head of the prosecution office. Do they have to pick another candidate or is the respective SCM section bound by the choice made by the president of the court or the prosecution office? This seems to be the case according to Article 150 § 3, which would oblige the SCM Sections to ratify the president's choice ("shall be carried out ..."). This would unduly limit the competences of the SCM.

33. The Venice Commission delegation was informed that the choice of a deputy will be made by the president on the basis of the compatibility of their respective management plan. However, there does not seem to be such an express condition in the Law. If there is no such express condition, the way is open for the court or prosecution office president to choose his or her deputy also on the basis of purely personal criteria. Even if a condition of compatibility of management plans were to be introduced, a procedure would need to be devised on how such compatibility could be verified.

34. The authorities insist that the tasks of the deputies from courts and prosecutors' offices are strictly administrative, replacing the chiefs during their absence, without any impact on judges and prosecutors, who keep their independence on their files. The cohesion of the management team has a direct beneficial effect on the administrative discipline and on the working climate in courts and prosecutors' offices.

35. Nonetheless, the Venice Commission recommends introducing a competitive selection also for deputy managers. As professional judges or prosecutors, they should be able to ensure smooth cooperation also with persons who have different ideas about management.

C. Appointment and removal of high-ranking prosecutors

36. As regards the appointment and removal procedure for prosecutors, it is positive that this is now regulated on the level of the law, rather than a ministerial order.

37. The method of appointing the senior officials of the public prosecutor's office will change according to the Law. The June 2019 Opinion [CDL-AD\(2019\)014](#) on Emergency Ordinances GEO No. 7 and GEO No. 12 amending the Laws of Justice had criticised the excessive power conferred on the Minister of Justice to choose these senior officials, noting that his or her decision-making power was not balanced by the prerogatives of either the SCM or the President of

¹⁵ Article 150 § 2 of the Law on the Status of Judges and Prosecutors.

Romania, the latter not having the power to oppose the Minister's choice.¹⁶ The Opinion noted in this respect that the President of Romania does not necessarily belong to the same political family as the Minister and that his or her right of review could be a balancing factor to avoid partisan appointments.

38. According to the new Law, the situation will be different as the President of Romania has the power to decide on the appointment of the highest officials of the Public Prosecutor's Office (including the General Prosecutor, who has authority over all prosecutors), on the proposal of the Minister of Justice, with the opinion of the Prosecutors' Section of the SCM.¹⁷

39. Three institutions will thus be involved (the respective section of the SCM, the Minister of Justice and the President of Romania). As such this should ensure a positive degree of transparency. It should also be recalled that Venice Commission does not require that appointments of senior prosecutors be decided without the intervention of political authorities.¹⁸

40. Candidates who are not endorsed the SCM Section will have to be re-interviewed by the Minister of Justice.¹⁹ This is a relatively weak safeguard. It seems to be based on the idea that there will be public pressure on the Minister *not* to appoint a candidate who is not endorsed by the SCM.

41. In essence, the new appointment procedure still gives the Minister the decisive role: the *“Minister of Justice shall select the candidates and shall make a reasoned proposal for each of the managerial positions.”*²⁰ This is not in accordance with the Venice Commission previous recommendation to attribute a major role to the respective SCM Section. In the discussions the Minister underlined that under the Constitution²¹ it is the Minister of Justice, not the SCM, who has the authority over prosecution.

42. Under the Law on the Status of Judges and Prosecutors, the political responsibility for the decision will be shared between the two authorities (Minister of Justice and the President), which partly meets the Venice Commission's criticism of 2019. The role of the SCM in the appointment of these senior officials will be strengthened, since it will issue an opinion that can force the Minister, if the opinion were negative, to reconsider his or her choice and to justify this publicly.²²

43. It should also be noted that the Law on the Status of Judges and Prosecutors provides for the examination of applications for these senior posts, prior to the opinion of the SCM, by a commission in which the Minister and the representatives of the Ministry are in the minority.²³ The new regime thus marks an improvement with regard to the risks of partisan appointments.

¹⁶ Venice Commission, [CDL-AD\(2019\)014](#), Romania – Opinion on Emergency Ordinances GEO No. 7 and GEO No. 12 amending the Laws of Justice, §§ 30 and 38.

¹⁷ Article 144 of the Law on the Status of Judges and Prosecutors.

¹⁸ Venice Commission, [CDL-AD\(2010\)040](#), Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service.

¹⁹ Article 148 §§ 2 and 3 of the Law on the Status of Judges and Prosecutors.

²⁰ Article 147 § 1 of the Law on the Status of Judges and Prosecutors.

²¹ Article 132 § 1 of the Constitution: *“(1) 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.”*

²² Article 148 of the Law on the Status of Judges and Prosecutors.

²³ Article 146 of the Law on the Status of Judges and Prosecutors.

D. Length of appointment of prosecutors

44. Article 144 § 1 of the Law on the Status of Judges and Prosecutors provides for the appointment of high-ranking prosecutors,²⁴ including the General Prosecutor, and the Chief Prosecutors of the National Anticorruption Directorate (DNA) and the Directorate for the Investigation of Organised Crime and Terrorism (DIICOT) for a period of three years only, renewable once.

45. In its Report on the Independence of the Judiciary, Part II – Prosecutors, the Venice Commission recommends that the prosecutor general should not be eligible for re-appointment because there is a potential risk that a prosecutor who is seeking re-appointment by a political body will behave in such a manner as to obtain the favour of that body or at least be perceived as doing so. A prosecutor general should rather be appointed permanently or for a relatively long period without the possibility of renewal at the end of that period. Furthermore, the period of office should not coincide with Parliament's term in office. That would ensure the greater stability of the prosecutor and make him or her independent of current political change.²⁵

46. The authorities argue that the duration of the mandate for the management positions within the judiciary is a matter of opportunity and the reappointment possibility is based on the need to have a sufficiently long total (6 years) and a need for an in-depth evaluation of the managerial activity by evaluating the activity during a first mandate.

47. Nonetheless, the Venice Commission recommends that Article 144 § 1 of the Law on the status of Judges and Prosecutors be amended to provide that high-ranking prosecutors, including the General Prosecutor, as well as the Chief Prosecutors of the DNA and the DIICOT and their deputies be appointed for longer periods and without the possibility of renewal, to guarantee their functional independence.

E. Power of the General Prosecutor to challenge acts of the prosecutors at any level

48. Article 68 § 3 of the Law on the Judicial Organisation provides that *“The measures and the solutions adopted by the prosecutor can be refuted by written and reasoned decision by the hierarchically superior prosecutor or by the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice, when he/she finds that they are unlawful or unfounded.”*

49. It is positive that the decisions of the General Prosecutor with regard to subordinate prosecutors (as well as those of other senior prosecutors with regard to their subordinates) must be in writing and lawful, and that reasons must be given when they contradict a decision of a subordinate prosecutor.²⁶

²⁴ *“The Prosecutor General of the Prosecutor's Office of the High Court of Cassation and Justice, his Deputy and First Deputy, the Chief Prosecutor of the National Anticorruption Directorate and of the Directorate for the Investigation of Organized Crime and Terrorism, their Deputies, the Chief Prosecutors of the Prosecutor's Office of the High Court of Cassation and Justice, of the National Anticorruption Directorate and the Directorate for the Investigation of Organised Crime and Terrorism are appointed by the President of Romania, on the proposal of the Minister of Justice, with the opinion of the Prosecutors' Section of the Superior Council of Magistracy, from among prosecutors who have a minimum of 15 years' seniority as a prosecutor or judge, for a period of three years, with the possibility of reappointment once in the same way. ...”* (Article 144 § 1 of the Law on the Status of Judges and Prosecutors.

²⁵ Venice Commission, [CDL-AD\(2010\)040](#), Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, § 87.

²⁶ Article 68 §1 and §3 of the Law on the Judicial Organisation.

50. However, Article 68 § 3 allows measures of prosecutors to be refuted not only by the hierarchically superior prosecutor but also directly by the General Prosecutor when s/he finds that they are unlawful or unfounded. Thus, the General Prosecutor, who is appointed by the political authorities, will be able to directly intervene in each individual case in the country, without the need to have instructions passed down the prosecutorial hierarchy. The possibility of direct intervention could be abused to prevent justified prosecution in specific cases.

51. As guarantees against such abuse, the authorities argue that the General Prosecutor is him-/herself a prosecutor and enjoys all guarantees of impartiality and independence in the exercise of its functional attributions. Under Article 31 of the Law on the Superior Council of Magistracy prosecutors can to the SCM when their independence, impartiality or professional reputation are affected. In such a case the SCM (or its sections) would send to the Judicial Inspection verify these allegations.

52. However, the possibility to bypass the prosecutorial hierarchy can be problematic. In the 2017 Opinion on the Polish Act on the Public Prosecutor's Office, the Commission stated that *"direct instruction cuts out senior level prosecutors who are more likely to protest against illegal instructions than a junior prosecutor who might fear for his career if s/he were to refuse such an instruction."*²⁷ Furthermore, *"the hierarchy can fill in required prosecutorial expertise in passing on the instruction down to lower prosecutors."*²⁸ There is a value in following hierarchical levels.

53. As such, there is no problem with a hierarchical organisation of the prosecution service²⁹ and indeed the Romanian Constitution provides for the hierarchical organisation of the public prosecutor's office. However, the General Prosecutor should not be able to bypass the prosecutorial hierarchy when s/he finds prosecutorial measures unlawful or unfounded. This does not mean that the General Prosecutor would not be able to remedy to a measure of a junior prosecutor, which is unlawful or unfounded. That should be possible, but this finding should be passed down through the hierarchy of prosecutors.

54. On the other hand, it is positive that the General Prosecutor does not have the power to refute the decisions of the prosecutors of the DNA or the DIICOT.³⁰ These decisions can only be challenged by the internal hierarchy of the DNA or the DIICOT respectively. The actions of anti-corruption and anti-organised crime prosecutors will thus be kept separate from the authority of the General Prosecutor, which is an important guarantee of the independence of prosecutors in these areas.

55. Furthermore, it is positive that control by the Minister of Justice may only concern managerial questions and *"may not concern the measures decided by the prosecutor during the criminal investigation and the adopted solutions"*.³¹ The conclusions of such a review have to be presented to the Prosecutors' Section of the SCM.³² The Minister can only give guidance to prosecutors in written form and *"on the measures to be taken for the effective prevention and fight against criminality"*,³³ which is not objectionable.³⁴

²⁷ Venice Commission, [CDL-AD\(2017\)028](#), Poland - Opinion on the Act on the Public Prosecutor's office, as amended, § 48, see also Venice Commission, [CDL-INF\(1996\)006](#), Opinion on the draft Constitution of Ukraine (text approved by the Constitutional Commission on 11 March 1996, [CDL\(1996\)015](#)), p. 14.

²⁸ Ibid, § 40.

²⁹ Venice Commission, [CDL-AD\(2010\)040](#), Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, §§ 29-33.

³⁰ Article 68 §4 of the Law on the Judicial Organisation.

³¹ Article 74 § 2 of the Law on the Judicial Organisation.

³² Ibid, § 3.

³³ Ibid, §4.

³⁴ Venice Commission, [CDL-AD\(2010\)040](#), Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, § 30.

F. Civil and disciplinary liability of magistrates – disciplinary liability for not following the case-law of the Constitutional Court.

56. During the meetings, the issue of the discipline of judges was also presented from the angle of the freedom of speech. The Venice Commission's Report on the Freedom of Expression of Judges examines these issues mainly from the viewpoint of expression other than adjudication itself (expression in private life, membership in political parties, etc.).³⁵

57. However, the Venice Commission notes that behind this discussion there seems to be an important issue, not directly related to the three new Laws, which concerns the application of EU Law by Romanian courts and the obligation to follow the case-law of the Romanian Constitutional Court. The Venice Commission cannot enter the discussion of with this complex matter in this opinion.

58. In general, it can only be pointed out that the case-law of Constitutional Courts should be binding on all state authorities. Conversely, the obligation for loyal cooperation between the EU and its Member States binds all institutions of the EU and of the Member States, including their courts.

G. Judicial Police

59. In Romania, the judicial police carry out the activity of criminal investigation on behalf of the prosecutors. Contrary to the previous situation, the Laws do not exclude the hierarchical subordination of the judicial police under the Minister of Interior. Some interlocutors of the Venice Commission saw in this a danger of influence of the executive power over the prosecution, via the judicial police. The criticism seems to be based on the fact that, in the past, prosecutors' offices could benefit from the secondment of judicial police officers who were thus removed from the administrative authority of the Ministry of the Interior.

60. However, Articles 3 and 67 of the Law on the Judicial Organisation provide very clearly that the prosecutors *"lead and supervise the criminal investigation activity performed by the judiciary police, according to the law"*³⁶ and that the public prosecutor *"conducts and oversees the criminal investigation activity of the judiciary police, conducts and controls the activity of other criminal investigation bodies"*.³⁷ Moreover, Article 70 § 2 of the Law on the Judicial Organisation provides that *"the judiciary police bodies carry out the activity of criminal investigation directly under the command and supervision of the prosecutor, being obliged to accomplish his/her orders."*

61. Therefore, the prosecutors will not lose control of the investigations conducted by the judicial police. As a consequence, this modification of an administrative rule alone cannot be regarded as an infringement of prosecutorial authority. As an additional safeguard, to avoid any doubts, the law should also provide that the judicial police do not report on their activity to the Minister of Interior.

³⁵ Venice Commission, [CDL-AD\(2015\)018](#), Report on the Freedom of expression of Judges.

³⁶ „*The prosecutor's offices function attached to the courts, lead and supervise the criminal investigation activity performed by the judiciary police, according to the law.*” (Article 3).

³⁷ *"The Public Ministry shall exercise, through prosecutors, the following attributions:*

...

b) conducts and oversees the criminal investigation activity of the judiciary police, conducts and controls the activity of other criminal investigation bodies;

... “ (Article 67).

62. The authorities point out that there are already sufficient guarantees against a reporting obligation of the judicial police to the Minister of Justice.³⁸ They also point out a new and special law dedicated to the judicial police is envisaged. A guarantee against such reporting obligations could be included in that law.

63. Finally, Article 158 of the Law on the Judicial Organisation specifically provides that for the officers and agents seconded within the DIICOT and the DNA, including within the Support Structure of the European Prosecutors delegated to Romania within the DNA, the provisions provided in the existing special laws remain applicable. This seems to exclude a danger of influence from the side of the Ministry of Interior over this important part of the judicial police.

H. Fight against corruption in the judiciary – Role of the DNA

64. In its March 2022 Opinion on the draft law on the dismantling of the Section for the Investigation of Criminal Offences within the Judiciary, the Venice Commission had insisted that “[d]ismantling the SIOJ should not be an objective in itself.” The Commission expressed doubts whether “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.”³⁹

65. The Venice Commission regrets that the legislator had not restored the competences prior to the establishment of the SIOJ and recommends restoring the DNA’s competences to also investigate and prosecute offences committed by judges and prosecutors.

66. The three new Laws do not affect the powers and composition of the DNA. Article 93 of the Law on the Judicial Organisation guarantees the autonomy of the DNA within the General Prosecutor’s Office of the High Court of Cassation and states that it “enjoys operational and functional independence”. The Chief Public Prosecutor of the DNA has the sole power to appoint the prosecutors of the DNA, after consultation with the Prosecutors’ Division of the SCM. This ensures, in principle, that there is no interference from a political authority in the selection of anti-corruption prosecutors.

67. There seem to be no indications of political obstruction to the DNA’s investigations and the Venice Commission’s delegation was informed that in recent months all requests for the lifting of parliamentary immunity submitted by its prosecutors have been granted. This shows a positive climate which contrasts with the past, which the Venice Commission welcomes.

68. However, the fact that the Laws bring about no significant changes as concerns the DNA, also means that the recommendations of the March 2022 opinion have not been followed.

69. During the discussions for this opinion, the authorities informed the Venice Commission’s delegation that since the entry into force of the Law on the dismantling of the Section for investigating criminal offences within the judiciary,⁴⁰ in three waves, 58 prosecutors in courts of appeal have been appointed to act as prosecutors for corruption among judges and prosecutors. Eventually, this number should grow to three prosecutors for each court of appeal. These prosecutors have to deal with corruption in the judiciary in addition to their other, ordinary prosecution tasks.

³⁸ Article 661 of Law no. 304/2004.

³⁹ Venice Commission, [CDL-AD\(2022\)003](#), Romania - Opinion on the draft law on the dismantling of the section for investigating criminal offences within the judiciary, § 37.

⁴⁰ [CDL-REF\(2022\)008](#).

70. The Commission's delegation was informed that in order to deal with the backlog of cases, these newly assigned prosecutors would currently be removing vexatious complaints (95%), which had not been dealt with by the now dismantled SIOJ. On the other hand, it seems that no new corruption indictments were brought against judges and prosecutors since March 2022.

71. The Venice Commission remains unconvinced that the solution chosen was appropriate. Practice will show whether the decentralised prosecutors will be efficient in tackling corruption in the judiciary.

VI. Conclusion

72. The Venice Commission regrets that the Romanian authorities did not request an opinion of the Venice Commission on the three draft Laws concerning the justice system of Romania: the Law on the Superior Council of Magistracy, the Law on the Judicial Organisation and the Law on the Status of Judges and Prosecutors, as had been announced by the authorities and that they left it to the Parliamentary Assembly of the Council of Europe to make that request but they then requested this opinion to be adopted under the urgent procedure.

73. Under the urgent procedure, it is not possible to cover all aspects of the three very detailed and lengthy Laws that were adopted on 17 October 2022. The complexity of the laws and their level of detail make it difficult to see how they can be applied in practice. Therefore, this opinion relates notably to topics that were also raised in Resolution 2466 of the Parliamentary Assembly of 13 October 2022.

74. Given that this is an urgent opinion, the Venice Commission cannot exclude that there are other issues in these three laws which may be problematic, but it seems that on the whole the laws seem to be heading in the right direction.

75. The Venice Commission notes several positive elements, first of all that there currently does not seem to be political interference in the work of the DNA. Even if the Laws were finally adopted in a rushed manner, under the emergency procedure, earlier preparations had included consultations with all stakeholders. As concerns the appointment and removal of high-ranking prosecutors, it is positive that this is now regulated on the level of the law, rather than through ministerial order and the involvement of several actors in these appointments provides a positive degree of transparency. It is also positive that instructions by prosecutors to subordinate prosecutors must be in writing and lawful, and that reasons must be given when they contradict a decision of a subordinate prosecutor. The General Prosecutor does not have the power to refute the decisions of the prosecutors of the DNA or the DIICOT. Finally, it is positive that control by the Minister of Justice may only relate to managerial questions.

76. The Venice Commission makes the following main recommendations for amending the Laws on the Judiciary:

1. a competitive selection should be introduced also for deputy managers, not only for presidents of courts and prosecution offices;
2. high ranking prosecutors, including the General Prosecutor, as well as the Chief Prosecutors of the DNA and the DIICOT and their deputies should be appointed for longer periods and without the possibility of renewal;
3. the General Prosecutor should not be able to bypass the prosecutorial hierarchy when s/he finds prosecutorial measures unlawful or unfounded. Such a finding should be passed down through the hierarchy of prosecutors;
4. it should be explicitly provided by law that the judicial police do not report on their activity to the Minister of Interior.

77. In any case, great importance has to be attached to the conditions of implementation of these texts. As in any country, laws on paper may not be being applied in practice. Institutions and well

formulated provisions can be ignored in practice or interpreted in way which diverges from their intended meaning. During the preparation of its series of opinions for Romania, the Venice Commission learned that there are sometimes quite different views about what are, or should be, factual issues. Therefore, it is essential that all actors relevant to the Romanian judiciary (judges, prosecutors, the Minister of Justice and the President of the Republic) work together in a spirit of loyal cooperation⁴¹ in order to ensure that justice is appropriately applied in Romania.

78. The Venice Commission remains at the disposal of the Romanian authorities and the Parliamentary Assembly for further assistance in this matter.

⁴¹ Venice Commission, [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, § 73 seq.