ASOCIAȚIA PROCURORILOR DIN ROMÂNIA

A.P.R.

January 17, 2020

To the Minister of Justice
Mr. Cătălin Marian Predoiu

Subject: The analysis of the 2019 CVM Report on Romania

Dear Mr. Minister,

Following the request from the Ministry of Justice, communicated on the 8th of January 2020, in which we were asked for an analysis of the most recent report of the European Commission on progress in Romania under the cooperation and verification mechanism, the Association of Romanian Magistrates, the National Union of Romanian Judges, the Association of Judges for the Defence of Human Rights and the Association of Romanian Prosecutors send these observations, formulated jointly by them.

As a preliminary note, we underline that before proposing concrete measures for fulfilling each recommendation in order for the CVM to be lifted, it is necessary for these recommendations to be founded on a correct analysis of the justice situation in Romania.

However, the European Commission's report on progress in Romania under the cooperation and verification mechanism published on the 22nd of October 2019 includes systematic errors of a gravity which should lead to its invalidation, as we will prove point-by-point in the following.

For this reason, we will address the European Commission to request the remake of the report so that its recommendations be based on correctly established hypotheses, as it is crucial for the fulfillment of the objectives of the cooperation and verification mechanism that the report reflects with accuracy, and not in a subjective and erroneous manner, the state of the Romanian justice system.

The following observations will concern both issues related to the methodology and sources of information used by the experts of the European Commission and the point-by-point analysis of the content of the two reports – the technical and the political one -, in matters regarding the judicial system or the legal status of judges and prosecutors.

I. Regarding the Methodology and Sources of Information Used by the Experts of the European Commission

The methodological issues and the sources of information which underlay the making of the report are described by the Commission's experts in the very preamble of the technical report

accompanying the report from the Commission to the European Parliament and Council on progress in Romania under the Cooperation and Verification Mechanism[1].

According to it, in essence, Commission experts base their report on information received from three sources: Romanian officials, NGO's and professional associations and reports of other international institutions[2].

1. The Contacts with the Romanian Officials

In the last two years, a series of European institutions – GRECO, the Venice Commission, the European Commission – have published reports regarding the state of the Romanian justice system, especially in relation to the amendments brought to the justice laws in the period 2018-2019.

A comparative analysis of their content reveal fundamental common errors, which can be found in all these reports. At least part of them used as a source the erroneous information transmitted by the Romanian authorities.

The clearest example of this is related to the issue of invalidating the solutions adopted by the prosecutor for reasons of unfoundedness also, not only of illegality.

Introduced in the amendments to the justice laws to correlate the provisions from the law on judicial organization with the ones already in force from the Criminal Procedure Code, the provision in question has long been exploited as an example of the legislator's intention to eliminate the independence of prosecutors.

This position was officially adopted, through press releases of the National Anti-corruption Directorate and the Public Ministry, the prosecutors maintaining that the invalidation of the solutions adopted by prosecutors for reasons of unfoundedness, not only of illegality, "will limit the functional independence of prosecutors"[3].

Despite the evidence furnished by the criminal procedural law in force, which regulated this procedure since a long time ago, the subject was revisited insistently with the consequence that in the first report on the new laws of justice – the initial legal opinion of the Venice Commission – the modification of the legal norm in question was included as a recommendation. Only later, as a result of the observations transmitted, the Venice Commission eliminated this recommendation from the final version of the report.

[1] https://ec.europa.eu/info/sites/info/files/technical-report-romania-2019-swd-2019-393_ro.pdf?fbclid=IwAR2SMQJQy_fvbSNkaLaHPn7nbQnKr2aEfX0myopMH9H1mGzejUuSaOVhvBY.

[2] "*This information has been collected from a variety of sources. The Commission has had the benefit of working closely with the relevant authorities in Romania, providing information on progress in detailed reports, as well as in face-to-face meetings, both in Brussels and Bucharest. Commission contacts with the Romanian administration and society across the full range of EU policies, including through the European Semester for economic governance, help to inform the CVM reports. In addition to official contacts with Romanian authorities, the Commission meets with non-governmental organisations active in the area of judicial reform and anti-corruption work, with professional associations of judges and prosecutors, and with representatives of other EU Member States in Romania. More generally, the Commission further draws on the various studies and reports that are available from international institutions and other independent observers in the field of judicial reform and the fight against corruption.3 The variety of opinions expressed by the different Romanian interlocutors is an important element for an open and transparent debate. The Commission bases its assessment on all sources available, also taking into account divergent views*.", according to the second paragraph, page 2, of the technical report.

[3] https://legestart.ro/dna-procurorii-anticoruptie-resping-majoritatea-propunerilor-de-modificare-legilor-justitiei/.

The error in question - even though it was obvious and admitted by the Venice Commission's experts – was however transplanted in other reports, such as the GRECO report, which proves that, at least partially, the information received by experts from the authorities are taken as such, without a minimum verification of the primary source.

Consequently, in July 2019, having proof that at least some information was transmitted erroneously to the European experts, we required the Ministry of Justice to communicate to us copies of all the reports, briefings and observations sent to the European experts in order to verify their accuracy. We received no answer, the authorities demonstrating a complete lack of transparency regarding this subject.

2. Meetings With Non-Governmental Organizations Active in the Field of Judicial Reform and Fight Against Corruption, With Professional Associations of Judges and Prosecutors

In the technical report it is shown that the experts met with representatives of the professional associations of magistrates, with an emphasis on the fact that the report is the result of an extensive consultation.

This "extensive consultation" did not include the professional associations/NGO's which had a more nuanced approach regarding the legislative amendments and the situation of the judicial reform, as only the professional associations which criticized these amendments/reforms were consulted.

Thus, associations such as the Association of Romanian Magistrates (ARM) - the oldest and largest association of magistrates, member of the International Union of Magistrates -, the National Union of Romanian Judges – member of MEDEL and traditional discussion partner with the European experts - and also the Association of Judges for the Defence of Human Rights (AJDHR) or the Association of Romanian Prosecutors (ARP) have not been invited to meetings with the representatives of the Commission since they started to display views that were not shared by them.

The Commission has thus founded its considerations and recommendations from the two reports only on the opinions of some professional associations which confirm unreservedly its theses and prejudgments, ignoring the professional associations of judges and prosecutors which express clear and well-founded criticism regarding the justice system in Romania, where it is necessary.

The Commission has not expressed any concern to listen to divergent opinions within the judicial system regarding some reforms or legislative amendments, the views which were not entirely critical towards the new legislative initiatives being completely ignored.

In conclusion, even though the Commission declared that "it bases its assessment on *all sources available*, *also taking into account divergent views*", the views publicly expressed and extensively reasoned by ARM, ARP, NURJ, AJDHR, regarding exactly the aspects indicated in the two CVM reports, were not even mentioned.

3. Reports Drawn up by Other International Institutions

These reports, which represent the third category of sources that underlay the CVM report, are characterized by the same subjectivism, given the fact that the sources used are similar.

Thus, a circular argument is created, the reports quoting each other, given the fact that the primary information is false or flawed.

For specific criticism regarding, for example, the GRECO report, we invite you to read the observations already sent to the Ministry of Justice.

In conclusion, the CVM report is based on information obtained from unilateral and subjective sources, which is why they have an evidently subjective and partisan character, which vitiates the entire content of the report and its conclusions.

II. Observations Regarding the Content of the Report

The observations will be presented point-by-point, in the order in which they appear in the CVM report. Whenever we will refer to the technical report, it will be mentioned accordingly.

1. **"*The debates on the cooperation agreements between the judicial institutions and the Romanian Intelligence Services ('secret protocols') continue to be divisive. A decision by the Constitutional Court has paved the way for the courts to deal with ongoing and future cases, but there is still uncertainty about the actual impact*".– point 2 "General Situation", page 4 para. 4 from the report[4].**

The cooperation between the secret services and the judicial system, organized and carried out illegally, as it ensues from the provisions of the declassified protocols and as it was established in a well-argued manner by the Constitutional Court, was not denounced neither by these CVM reports, nor by the previous ones.

On the contrary, the present report reiterated the specification from the CVM report 2018, trying to avoid discussing the essence of this fundamental subject for a European justice system, which gives a central place to the "rule of law". Thus, in the *technical report* it is mentioned that *"the operation of the intelligence services is not a matter for the EU and falls outside the CVM benchmarks" and that ,,it is the role of the courts to establish whether or not specific allegations of abuses are substantiated and an open and impartial investigation would be needed to establish whether there were systemic failures*." – page 13 of the tehnical report.

On one hand, we observe a false shift of the analysis, since the subject of the violations does not regard the manner in which the secret services operate, but the proved fact, by the content of the declassified protocols, that they have interfered illegaly with the administration of justice (with the collaboration of some persons belonging to the justice system), as the

[4] https://ec.europa.eu/info/sites/info/files/progress-report-romania-2019-com-2019-499_ro.pdf

Constitutional Court ascertained[5]. On the other hand, the manner in which the justice system operates is the main objective of the CVM. At the same time, the conclusion cited above does not make sense, since the Romanian courts lack the competence to order ”investigations” regarding ”systemic failures” concerning the activity of courts and prosecutor's offices.

The reference to the secret protocols concluded between the main judicial institutions and the Romanian Intelligence Service (RIS) as a mere source of disagreement for the public opinion, without any minimum reference to their impact, and the lack of any assessment of the consequences of the conclusion of these protocols on the rule of law, reflect a shocking superficiality in addressing an issue of a major importance for the independence of the judicial system, which calls into question its very role in defending fundamental rights and freedoms.

Moreover, instead of firmly condemning such practices, which have no equivalent in the EU states, the European Commission implicitly expresses its concern regarding the fate of the pending cases, indicating in the footnotes a singular decision of the Court of Appeal Suceava, which maintained the evidence administered in the case by the RIS, without mentioning that this case-law, including at the level of the High Court of Cassation and Justice (HCCJ), is completely different[6].

In conclusion, the European Commission is not concerned about the gravity of the conclusion and of the application, in an illegal manner, of secret protocols between institutions from the top of the judicial system and the secret services, or about the serious violation of fundamental rights generated by the said protocols, but is concerned about the fact that the decision of the Constitutional Court which declared these protocols illegal will negatively impact the fight against corruption: ”It is still early to determine *the full impact and consequences of the practical implementation of this decision, in particular on the fight against corruption*” – page 13 of the tehnical report. In other words, taking into account that this is the main concern regarding the effects of the protocols, the Commission seems to accept, in an unacceptable manner, abuses in the name of the fight against corruption!

2. **“*The Commission recalls its previous suggestion that expertise from other Member States could be valuable in building a stronger system for technical surveillance measures used by the prosecution and for the collaboration between the intelligence services and the prosecution essential for pursuing serious crime such as terrorism and cybercrime*”- point 2 “General Situation”, page 4 para. 4 final phrase from the report.**

The recommendation of the European Commission (page 3 from the Report) to build ”an (even) stronger” system of technical surveillance measures of the citizens, considering that Romania has tens of thousands of technical surveillance warrants required by prosecutor's offices and thousands of warrants based on the national security law, required by the secret

[5] Decision no. 26/2019 of the Constitutional Court from the 16th of January 2019 on the request to resolve the legal conflict of a constitutional nature between the Public Ministry – The Prosecutor's Office attached to the High Court of Cassation and Justice, the Romanian Parliament, the High Court of Cassation and Justice and the other courts. http://www.ccr.ro/jurisprudenta-deciziide-admitere/

[6] In the footnote no. 59 of the technical report it is shown that: “In a recent ruling by the Court of Appeal of Suceava, it was decided not to exclude evidence based on past interceptions. Judges considered here that the Constitutional Court itself stated that offer of technical support by the SRI is not equivalent to performing the act of criminal investigation”. Court of Appeal Suceava, Preliminary Ruling no. 15 from the 19th of March 2019, portal.just.ro.

services, almost all of them being granted each year by the courts, proves how cut off from the reality in Romania the European Commission's experts are.

According to a study published by a lawyer[7], in the period 2010-2015 – when Romania was monitored under the CVM – the prosecutor's offices required authorizations for telephone wiretapping 109, 946 times, 102, 729 of those requests being granted. The numbers are incomplete because many courts have refused to publish the information regarding wiretapping. HCCJ granted 4522 requests of a total of 4523, and six courts of appeal, among which the Court of Appeal Bucharest, the biggest of all, granted all requests.

Moreover, the Commission suggests that the creation of a stronger system of collaboration between the intelligence services and the prosecution authorities is necessary, but has not indicated any example of another Member State, in which such an interference has been allowed and in which this type of interference has led to the consolidation of the independence of the judiciary.

The conclusion of these protocols is not an issue pertaining exclusively to the manner of functioning of the intelligence services (which is not subject to verification under the CVM), but calls into question the independence of the judicial system, the impartiality of the investigations regarding common crimes (including corruption), the right to a fair trial of the accused persons who were never informed of the fact that some investigation acts were carried out by the intelligence services and not by prosecutor's offices or by the judicial police, the right of a fair trial of the persons who were unable to counter beliefs formed on the basis of secret acts, possibly shown to the judges, but not to the parties or their lawyers.

3. The Section for the Investigation of Offences Committed by Magistrates

3.1. In the Report it is shown that *"there are various examples where the Special Section exercised its powers to change the course of criminal investigations in a manner which raises serious doubts about its objectivity"* (page 5). In the footnotes (footnote 21) there is a reference to the investigation by SIOCM of the former NAD Chief Prosecutor, investigation which, in the opinion of the Commission, "seemed specifically designed to frustrate this candidacy".

In an objective approach, which should characterize a report of the European Commission, it would be required that expressions such as "seemed specifically designed" be accompanied by point-by-point strong arguments (to use a term from the report) and not by speculative arguments regarding the date on which the criminal case was "opened" or by generalizations without explanations (the fact that another case was registered involving the Prosecutor General "seemed to confirm the pattern of steps taken against senior magistrates – that is two - who were critical of the Section".

[7] https://raduchirita.com/bunicuto-de-ce-ai-urechile-atat-de-mari/

We reiterate that no CVM report has noted that in 2016, NAD indicted the former Prosecutor General of Romania, investigation which negatively affected his career in a serious manner, as it led to his resignation, after which, in 2018, NAD ordered the closing of the case, ultimately being proved that the actions imputed to the former Prosecutor General did not exist. Therefore, the highest representative of the Public Ministry was removed from office because of an investigation carried out under the hierarchical authority of the Chief Prosecutor of NAD, but no one answered for this failure; moreover, the European Commission praised unreservedly the activity of this structure.

Instead, the Commission is concerned about "a pattern of steps" taken by SIOCM, without detailing it or bringing any proof in this regard.

In the Report (page 5) it was also mentioned that „*these examples include cases where the Special Section launched investigations against judges and prosecutors who had opposed the current changes to the judicial system, as well as abrupt changes in the approach followed in pending cases, such as the withdrawal of appeals previously lodged by the DNA in high-level corruption cases*."

However, since 2014, the cases of judges and prosecutors who were investigated by the NAD for the decisions they adopted were publicly discussed and debated, evidence being presented in this regard, investigations by which the NAD prosecutors analyzed, blatantly violating the independence of justice, the alleged illegality and unfoundedness of the judgments pronounced by judges or of the orders/measures adopted by the prosecutors. These grave abuses were not mentioned in the CVM reports after 2014, even though they were reported by judges, prosecutors and professional associations, repeatedly and in a reasoned manner.

We underline, in this context, that SIOCM did not send for trial any judge or prosecutor for "crimes" resulting from the decisions pronounced in the cases they were invested with or for publicly expressing critical views regarding some of the amendments to the justice laws.

On the other hand, the NAD allowed itself to turn into a "super-court", above the courts of judicial review, for some decisions adopted by the magistrates, sending them for trial on the ground that, according to the evaluation of the NAD prosecutors, they were illegal and unfounded. Sending a magistrate for trial for his decisions does not have consequences only on his or her career, but creates an enormous potential for pressure and influence on fellow judges and prosecutors, having as a result a justice devoid of independence, namely a justice that can no longer serve the purpose for which it was created.

The allegations from the reports, previously presented, serve as proof of the lack of objectivity and the double standard applied by the European Commission.

3.2. Regarding the examination commission within the Superior Council of Magistracy (SCM) for the appointment of the prosecutors to SIOCM, in the technical Report it is noted: „*Government Emergency Ordinance 90/2018 weakened a number of guarantees, including the professional, management and ethical requirements for the candidates, and took away the necessity that high-ranking prosecutors*

participated in the selection panel and in the final appointment decision. The Ordinance made a one-off modification of the law in such a way as to ensure full control of the appointment process to a small panel consisting only of a few judges of the SCM." **(page 9).**

The Ordinance did not exclude the prosecutors from the examination commission, but has specified the number of members of the examination commission in whose presence it can exercise its duties established by law. A simple reading of the Ordinance proves the contrary of the statements found in the report.

It is incomprehensible that there was no interest in offering the correct/complete chronology of the facts that led to the adoption of this provision of the Ordinance, the need for such a legal provision being determined by the repeated refusal of the members of the Section for prosecutors of the Superior Council of Magistracy to appoint a representative to the examination commission, that is to fulfill the obligations imposed by a law in force, which was considered constitutional by the Constitutional Court. It is also incomprehensible how, from the level of the European forum represented by the persons who prepared the reports, conclusions are issued on erroneous or distorted bases, without even having read the Ordinance and without having sought information concerning facts and circumstances that caused the unblocking of the situation regarding the examination commission, in order for the law to be complied with.

The current reports, like the previous ones, for that matter, obstinately ignore that those who opposed and are opposing the creation of SIOCM hid the reality that such a structure already existed.

By the Order of the Chief Prosecutor of NAD no. 10/31.01.2014 the "Service for Combating Corruption in the Justice System" was established, which had the competence to investigate all corruption offenses allegedly committed by judges and prosecutors.

Subsequently, by the Order of the Minister of Justice no. 1643/C/2015, published in the Official Gazette on 21.05.2016, the Interior Order Regulation of NAD was approved, which provided for the existence of the service in question.

The Commission was not interested in this important issue, nor in the fact that the service within the NAD which investigated judges and prosecutors functioned from January 2014 until May 2015 without the existence of an Order of the Minister to regulate it.

Moreover, despite the repeated public positions that we have supported with clear and easily verifiable arguments, the European Commission said nothing about the fact that prosecutors were assigned to the Service for Combating Corruption on the basis of non-transparent criteria, by the Chief Prosecutor of NAD, who also proposed the chief prosecutor of this service, without a clear, predetermined procedure regarding these appointments. The law permitted the appointment to NAD of prosecutors with little seniority in magistracy, with a degree of a prosecutor's office attached to a district court, on the basis of a mere interview conducted before the NAD Chief Prosecutor, completely lacking in transparency. Prosecutors

recruited in this manner could carry out investigation acts of the highest competence, namely belonging to the competence of the Prosecutor's office attached to the High Court of Cassation and Justice, being empowered to investigate judges and prosecutors from the highest courts and prosecutor's offices.

Also, the reports did not record anything about the argument according to which the creation of SIOCM had the legitimate aim of protecting judges from the pressures, which can be reasonably presumed, that could be exercised by NAD prosecutors who, while they were participants in a criminal or civil case, had the legal possibility of investigating the judge of the case, even during its resolution.

At the same time, the reports express false concerns with regard to the fact that the Emergency Ordinance no. 90/2018 "*weakened a number of guarantees, including the professional, management and ethical requirements for the candidates*", given the fact that to accede to SIOCM a seniority of minimum 18 years as a prosecutor is required (prosecutors with a seniority of only 6 years could accede to the Service within the NAD), at least a degree of a court of appeal and an irreproachable career, and the organization and unfolding of the competition for leading and executive positions within SIOCM were given in the competence of the SCM Plenum, whose role in this regard, was saluted by the Venice Commission.

3.3. The Manner in Which the Cases Regarding Magistrates Were Managed Before the Creation of SIOCM

In the tehnical Report it is mentioned that *„proponents of the creation of the special section, including some in the judges section of the SCM, cited in particular a need to take corruption crimes involving magistrates outside the competence of the National Anti-Corruption Directorate (DNA). The argument was that the DNA had abused this competence by opening ex-officio investigations, with the intention of putting pressure on judges in DNA-prosecuted trials to obtain high conviction rates. These claims of systematic abuses by the DNA have been strongly disputed by the DNA and by the Public Ministry."* (page 8).

Without presenting and analyzing the submissions of the representatives of the judges of SCM, which are referred to in a general manner, the reports limit themselves to launching the conclusion that these "claims of systematic abuses (…) have been strongly disputed by the DNA and by the Public Ministry", ignoring the notorious cases of investigations followed by the closing of the cases and by acquittals, some of which were presented by us above.

The existence of systematic abuses against judges and prosecutors follows clearly from the content of the *Judicial Inspection's Report no. 5488/IJ/2510/DIJ/1365/DIP/2018 concerning "the conformation to the general principles governing the activity of the judicial authority in cases entering the competence of the National Anti-corruption Directorate regarding magistrates or in relation to them*", report which was approved by the Plenum Decision of the Superior Council of Magistracy no. 225 dated 15.10.2019.

The control covered by the Judicial Inspection's Report report refers to the period 01.01.2014-31.07.2018, and from the SCM decision regarding its approval the following key conclusions arise:

- In total, at the level of the central structure and at the level of the territorial structures of NAD, 1962 judges were targeted (351 in criminal matters and 1590 in civil matters – among which a judge of the Constitutional Court, 13 judges members or former members of the SCM and 16 judicial inspectors).

- In 113 cases regarding judges and in 163 cases regarding prosecutors, the investigations were opened *ex officio* by the NAD.

- In numerous cases, the duration of the investigations was manifestly excessive, reaching periods which frequently exceeded 3-5 years, and in one case the duration was of 12 years and 6 months!

- Officers of the Romanian Intelligence Service carried out acts specific to the criminal investigation activity in cases involving magistrates.

- NAD prosecutors acted *ex officio* especially against judges and investigated them for the decisions pronounced in different cases.

- Many cases were solved en masse, which were inactive, some of them for a long period of time, before the Section for the Investigation of Offences Committed by Magistrates started to operate. For example, a case opened *ex officio* in 2013 regarding prosecutors and judges from the SCM, in which technical surveillance measures were ordered, including regarding family members of the investigated magistrates, was closed in 2018[8]. A case regarding a judge from the Timiș Tribunal, registered in 2006, was closed in 2018, after 12 years. Other cases were in the same situation.

And the conclusions of the SCM Decision no. 225 of 15.10.2019, of the guarantor of the independence of justice, are devastating and should be followed by concrete measures for the defense of the independence of justice and of judges, beyond formal and principled statements.

Thus, the most crushing plea for the creation of the SIOCM can be found in the conclusions of the SCM decision:

"***The practices of the NAD prosecutors who handled cases involving judges in the manners described below represented forms of pressure on them, with direct consequences on the administration of justice.***

Thus, the technique of acting ex officio against judges and investigating them for the decisions pronounced in cases is an unacceptable fact, of an unprecedented seriousness, which undoubtedly represents a factor of pressure not only on the targeted judges, but on the whole professional body of judges.

The suspicions regarding the manner of working practiced by the prosecutors from the National Anticorruption Directorate are also amplified by the fact that files that have been left inactive for a long period of time, after technical surveillance measures had been ordered previously for significant periods of time, were solved en masse by not sending them to trial, just before the Section for the Investigation of Offences Committed by Magistrates started to operate.

Such a practice raises serious questions about the reasons that justified maintaining cases pending for periods of time amounting to years and causes legitimate suspicions regarding the creation, in this manner also, of a pressure factor on the activity of the magistrates and, finally, on the right to a fair trial of the parties.

The same approach can be seen in the practice of requesting files that are pending before various courts in order to evaluate the measures/decisions pronounced by judges from a possible criminal perspective. In fact, this manner of investigating represented a real intrusion in the discretionary power of the judge".

4. The Decisions of the Constitutional Court

In the Report it was noted: „*The Constitutional Court rulings directly impact ongoing high-level corruption cases, entailing delays and restarts of trials, and have allowed the re-opening of several final cases, under certain conditions. The full consequences are yet to unfold. This clear knock-on on the process of justice also raised broader doubts about the sustainability of the progress made so far by Romania in the fight against corruption – all the more so when coming at the same time as amendments on the criminal code and the criminal procedure code, which did not take into account the November 2018 recommendation on the need for compatibility with EU law and international anti-corruption instruments (see also Benchmark one).*" (page 16).

In the name of the values enshrined and guaranteed, as well as according to its competence conferred by the Constitution, the Constitutional Court declared as unconstitutional the secret protocols concluded between the Prosecutor's Office attached to the HCCJ and the RIS and analyzed the constitutionality of some provisions of civil and criminal law. This is, briefly stated, the mission of the Constitutional Court, and not that of combating corruption or of subordinating all the supreme values guaranteed by the Constitution to the fight against corruption, as the Commission seems to impose.

Moreover, this unilateral and unjustified approach of the CVM reports was criticized by us every year. In this regard, we showed that although they mentioned "important progress and a more and more irreversible character of the reforms", CVM reports have referred, mostly if not exclusively, to the fight against corruption and the preventive actions in the field of corruption, leaving the wrong impression that these objectives – whose importance cannot be denied – subdue all or most of the activitiy of the judiciary.

The absolutization of the achievements of the justice system only in regard to the segment of the fight against corruption represents an exaggerated presentation, and the exclusion of the references to the activity of the majority of the courts and prosecutor's offices proves a distorted understanding of the Romanian judicial phenomenon by the European Commission.

5. Public Criticism Regarding the Activity of the NAD or the Interferences of the Intelligence Services in the Justice System

In the technical Report it is mentioned: *„The public criticism of the DNA continued in 2019. Examples are the allegations of abuses in relation to cases of corruption involving magistrates, the collaboration with the Intelligence Services or general criticism on the cost of DNA."* (page 24).

It is unacceptable for a report of the European Commission to consider as invalid just and proven criticism regarding the prosecutorial structure which deals with combating corruption.

If it had done proper research, if it had also sought other opinions than those which unconditionally support their theses, the rapporteurs would have found out that the NAD orchestrated abuses against prosecutors and judges (some examples were given earlier) - see the Judicial Inspection's Report, approved by the Plenum of SCM of 15.10.2019 SCM – and collaborated illegally with the secret services, as stated by the Constitutional Court in its Decision no. 51/2016.

We reiterate that not reflecting the real situation of the judicial system, which is determined by a distorted approach of the issues, was caused by the procedure used during the years of monitoring, related to the non-transparent collection of information and to the balance necessary for such an approach.

In conclusion, we underline that in order to offer a correct and impartial perspective on the judicial system and on the evolution of the reforms to combat corruption, it had been necessary, at the level of the Cooperation and Verification Mechanism, to show special attention to the legislative context and to the proposed reforms by not treating lightly any proposed amendment, including those which were based on significant deviations from the role of each structure in the system and on legitimate concerns of the judiciary.

Therefore, only after the European Commission will adopt a new report which will provide an objective perspective on the justice system in Romania, the implementation of the CVM reccomendations can be discussed, aspect regarding which we assure you of our full availability in the context of this endeavor.

Best regards,

APR, AJADO, UNJR, APR

http://www.ajado.ro/2019/10/24/the-european-commission-wants-through-cvm-the-restoration-in-romania-of-an-abusive-justice-under-the-control-of-the-intelligence-services-and-the-transformation-of-romania-from-democracy-in-securocr/

The European Commission wants through CVM the restoration in Romania of an abusive justice, under the control of the intelligence services, and the transformation of Romania from democracy in securocracy

By ajado | October 24, 2019
0 Comment

The MCV report on Romania, published by the European Commission on October 22, 2019, proves, once again, both the subjectivism and prejudices of the European experts, as well as their disdain for the respect of fundamental rights by the repressive institutions of the Romanian state.

Among a series of unfounded recommendations and comments within the 2019 CVM report – which ignore both the real issues faced by the Romanian justice system, and the respect for the fundamental rights of Romanians, the Romanian Constitution and the EU Treaty -, **the European Commission recommends the transformation of Romania from "democracy" to "securocracy"**, where the intelligence services would surveille even "more robustly" the Romanians and where the justice system enters back under the control of the intelligence services, as it was during the communist period.

For those who are not familiar with the term, "**securocracy**" (also known as "counter-intelligence state") **refers to "the state where the state security service penetrates and permeates all societal institutions, including the military**". The term was applied by historians and political commentators when referring to the former Soviet Union, the former German Democratic Republic, Cuba after the 1959 revolution, Iraq under Saddam, post-Soviet Russia under Putin, South Africa in the 1980s, or South American countries, under the leadership of the various military "juntas".

The Association of Judges for the Defence of Human Rights (AJADO) will analyse in detail the CVM report and publish the conclusions, but until then, however, it draws public attention to the following recommendation of the European Commission, which is of great gravity for the internal context, with serious consequences on democracy, the rule of law and the fundamental human rights and freedoms.

"*The Commission recalls its previous suggestion that expertise from other Member States could be valuable in building a stronger system for technical surveillance measures used by*

the prosecution and for the collaboration between the intelligence services and the prosecution essential for pursuing serious crime such as terrorism and cybercrime", the CVM report stated.

What the European Commission recommends is the re-implementation of something that has been declared unconstitutional, since exactly under the pretext of fighting terrorism, cybercrimes and under the pretext of defending national security, the secret services in Romania were illegally involved in the administration of justice, as the Constitutional Court has ruled.

1. Creation of an even "more robust" system for mass surveillance of Romanians

In the context in which Romania has tens of thousands of technical surveillance mandates, requested by prosecutors, and thousands of national security surveillance mandates, requested by the intelligence services, requests which are almost entirely approved by judges (which proves that the judicial control by the courts is not effective), t**he recommendation of the European Commission to create an even more robust system of mass surveillance of Romanians**, in fact an even more brutal violation of the citizens' private life of, **demonstrates the disdain of this European institution for the rights and freedoms of Romanians.**

Instead of expressing concerns about the violation of the fundamental rights of the Romanians or the lack of independence of the courts in relation to the prosecutors or the intelligence services – since the judges admit almost 100% of the requests for surveillance mandates –, the European Commission recommends setting up an even more robust surveillance system than the current one.

We recall that, in the case of *Iordachi and others against Moldova*, the European Court of Human Rights stated the following:

"51. The Court notes further that in 2007 the Moldovan courts authorised virtually all the requests for interception made by the prosecuting authorities (see paragraph 13 above). Since this is an uncommonly high number of authorisations, the Court considers it necessary to stress that telephone tapping is a very serious interference with a person's rights and that only very serious reasons based on a reasonable suspicion that the person is involved in serious criminal activity should be taken as a basis for authorising it. […] In the Court's opinion, is a matter of concern when looked at against the very high percentage of authorisations issued by investigating judges. For the Court, this could reasonably be taken to indicate that the investigating judges do not address themselves to the existence of compelling justification for authorising measures of secret surveillance."

The situation is similar in Romania, which has tens of thousands of authorizations for technical surveillance requested by prosecutors and approved by the courts, to which are added thousands of authorizations for national security mandates issued, under state secrecy, at the request of intelligence services.

Through this recommendation, the European Commission demonstrates a clear disdain for respecting the fundamental rights of Romanians, without which there is neither democracy nor rule of law.

2. Collaboration between intelligence services and criminal prosecution bodies

After the European Commission washed its hands of the illegal and unconstitutional intrusion of the secret services in the justice system, on the grounds that "the functioning of the intelligence services does not fall within the competence of the EU and does not fall within the CVM's reference objectives", the same Commission comes and recommends that there should be "collaboration between the intelligence services and the criminal prosecution bodies", exactly as it was during the communist period and how it was perpetuated until 2018, when the Constitutional Court ruled that the secret protocols between Romanian Information Service (SRI) and Public Ministry were unconstitutional.

This recommendation addressed to Romania, which had one of the most oppressive communist regimes in Eastern Europe, proves the ignorance of the European Commission about the communist repression in Romania and its disdain for respecting the fundamental rights and freedoms of the people.

The European Commission claims that it is not within its competence to comment on the functioning of the intelligence services in Romania, when in fact the discussion is about the functioning of JUSTICE under the influence of the intelligence services.

Furthermore, the European Commission has not expressed, through the previous CVM reports, any concerns regarding the independence of a justice system which has signed with the SRI secret protocols at the highest level – through the SCM, High Court of Cassation and Justice, and the High Prosecutor Office -, although these protocols have affected in ways of an unprecedented gravity the independence of judges and prosecutors.

Also, no concerns were raised by the fact that the justice in Romania became a "tactical field" for the SRI, nor that the SRI maintained its interest until the end of each case.

Beyond the double standards and hypocrisy of the European experts, what the European Commission recommends to Romania, in addition to showing disdain for respecting human rights and fundamental freedoms, **will transform Romania from a democracy (as it still is) into a stated controlled by secret services, as is Russia today under Putin.**

Whoever does not learn from the mistakes of the past is doomed to repeat them! To applaud these recommendations of the European Commission for the restoration of collaboration between services and the justice system, in a country that has lived the experience of totalitarianism, has known the destructive role of the Securitate (the former communist secret police), and, recently, has known the profoundly harmful effects of the interference of the intelligence agencies in the judiciary, proves to have learned nothing nor from communist repression nor what democracy really means.

AJADO condemns such recommendations of the European Commission, which risks leading to the restoration of a totalitarian state in Romania, and calls on the competent Romanian institutions to officially take a stand against them.

AJADO will take any action within the limits provided by law to ensure that the rights and freedoms of Romanian citizens are respected and protected.

ASOCIAȚIA PROCURORILOR DIN ROMÂNIA

A.P.R.

Nr. 8/17.01.2020 Nr. 1/17.01.2020 Nr. 6/17.01.2020 Nr. 1/17.01.2020

To

Ursula von der Leyen
President of the European Commission

Didier Reynders
Commissioner for Justice

CC: European Parliament
European Council
European Court of Justice

Ref: fundamental errors contained in the written position of the European Commission submitted to ECJ in the joined cases C-83/19, C-127/19 and C-195/19

Dear President of the European Commission,
Dear Commissioner for Justice,

The Romanian judges and prosecutors associated in the following four professional associations of magistrates are requesting you to reconsider the position of the European Commission submitted to the European Court of Justice (ECJ) in the joined cases C-83/19, C-127/19 and C-195/19, in the part regarding the compatibility with the provisions of EU law of setting up the Section for the Investigating Crimes within Judiciary (SIIJ), due to the fact that the position of the European Commission is based on serious fundamental errors and justified on pseudo arguments that were part of a fakenews and disinformation campaign regarding the creation of SIIJ in Romania.

Thus, the position of the European Commission:

- refers to a state of fact that does not correspond to reality;
- is disregarding the provisions of the Constitution and the decisions of the Romanian Constitutional Court that restored the separation of powers in states, condemned the violation of the independence of justice and defended the fundamental rights and freedoms;
- wrongly invokes laws from the Romanian legislation;
- uses as arguments statements that have proven to be fakenews and part of a disinformation campaign regarding in particular the SIIJ;

- ignores the conclusions of the Judicial Inspection Report No. 5488 / IJ / 2510 / DIJ / 1365 / DIP / 2018 regarding the "compliance with the general principles governing the activity of the Judicial Authority in the National Anti-Corruption Directorate's (DNA) cases regarding magistrates or in relationship to them", report approved by the Decision of the Plenum of the Superior Council of Magistracy No. 225 from 15 October 2019, which revealed that DNA had kept opened thousands of cases with magistrates, some of them for years;[1]
- ostensibly ignores the serious pressures put on judges by the way in which the cases with magistrates had been previously investigated by DNA, including the investigations that looked exclusively at the judgments given by the judges.

Moreover, the European Commission ignored the Consultative Council of the European Judges' Opinion n° 21 (2018) *on preventing corruption among judges*[2], on two essential issues:

a) it is perfectly in accordance with the european principles to have in certain cases specialized structures to investigate judges and prosecutors: "*50. [...] Depending on a given country's history, traditions and administrative structure, as well as the actual extent of corruption inside the system, it might be necessary to establish specialised investigative bodies and specialised prosecutors to fight corruption among judges.*"

b) It is completly contrary to the european principles to have intelligence agencies involved in criminal investigations against magistrates: "*27. […] In no circumstances should the fight against corruption of judges lead to the interference by secret services in the administration of justice. Corruption.*"

For these reasons,

The Romanian Association of Magistrates (AMR), a non-governmental, apolitical, national and professional organization of judges and prosecutors, declared "of public utility" by Government's Decision No. 530 on 21 May 2008, with its headquarters in Bucharest, Regina Elisabeta Boulevard No. 53, sector 5 (email: amr@asociatia-magistratilor.ro), member of the International Association of Judges and of the European Association of Judges, legally represented by Judge Dr. Andreea Ciucă, acting as interim president,

The National Union of Romanian Judges (UNJR), with headquarters in Oradea, Pracul Traian No.10, Bihor county (email: office@unjr.ro) member of the Association of European Magistrates for Democracy and Freedom - MEDEL - represented by Judge Dana Gîrbovan, as president,
The Association of Judges for the Defense of Human Rights (AJADO), a non-governmental, apolitical and professional organization of judges, with headquarters in Oradea, str. Bradului, No.1 (email: contact@ajado.ro), legally represented by Judge Florica Roman, as president,

[1] http://old.csm1909.ro/csm/linkuri/08_01_2020__97031_ro.pdf
[2] https://rm.coe.int/ccje-2018-3e-avis-21-ccje-2018-prevent-corruption-amongst-judges/native/16808fd8dd

The Romanian Association of Public Prosecutors (APR), a non-governmental, apolitical, national and professional organization of prosecutors, based in Bucharest, Bd. Libertăţii No. 12-14, legally represented by prosecutor Elena Iordache, as president,

Will present hereinafter the main errors that vitiated the point of view of the European Commission submitted to ECJ, **and for these reasons we are requesting the reconsideration of the Commission's position on chapter "3. Preliminary questions regarding the establishment of the Section for the Investigating Crimes within Judiciary".**

We emphasize that this analysis is made based on the documents submitted by the European Commission to ECJ, as they were presented by the Romanian media.[3]

As a preliminary point, perfectly identical observations were sent by the European Commission to ECJ also in the case C291-19, on 24 October 2019. The date is important because it is after the date of 15 October 2019, when, by Decision 225, the Superior Council of Magistracy (SCM) in Romania validated the report – which was already public – of the Judicial Inspection regarding the way DNA handled cases with magistrates.

However, this decision of the SCM, which is an essential element for the correct and complete presentation of the facts regarding SIIJ, as we will demonstrate during the present letter, was completely ignored by the European Commission.

I. On the necessity to set up the Section for Investigating the Crimes within Judiciary (SIIJ)

In the analysis of this point, the European Commission starts from listing some correct principles regarding the independence of judges, underlining that:

"76. According to the Court of Justice, these guarantees of independence and impartiality postulate the existence of some rules, in particular as regards the composition of the court, the appointment of judges, the duration of the office, as well as the causes of abstention, recusal and dismissal of its members, ***which to allow the removal of any legitimate doubts, in the perception of the justiciable ones, regarding the impenetrability of that respective court with regard to external elements and its impartiality in relation to the interests it is faced with****."*

Or, the creation of SIIJ was determined precisely by the fact that, in order to make the judges accountable, "the necessary guarantees to avoid any risk of using such a regime as a system of political control of the content of judicial decisions" was needed, as the Court had also requested.

[3] https://www.stiripesurse.ro/documente-explozive-pozitia-comisiei-europene-privind-obligativitatea-mcv-si-desfiintarea-siij_1417027.html



ASOCIAȚIA PROCURORILOR DIN ROMÂNIA

A.P.R.

1. **Professional rank/degree and the experience of DNA prosecutors who have investigated magistrates**

We underline that, prior to the establishment of SIIJ, the competence of investigating the crimes committed by magistrates was the responsibility of the prosecutor's offices as following:

- The crimes for the competence of DNA and DIICOT were investigated by the prosecutors from these unites;
- For the other offenses, if the magistrate had the High Court of Cassation and Justice (HCCJ) rank, he was investigated by the Prosecutor's Office adjacent to HCCJ (PHCCJ), if he did not have that rank, he was investigated in the first phase by the prosecutor's offices adjacent to the courts of appeal.

The basic rule regarding the career of magistrates allowed the access to the higher levels of jurisdiction in the courts and prosecutors' offices only on the basis of competitions and taking into account seniority requirements, through all the professional degrees.

In the case of the prosecutors from DNA, which is the structure within the PHCCJ placed at the top of the Public Ministry, derogation from the above rules was made which allowed access in DNA, based on an untransparent interview with the DNA's chief-prosecutor, even of prosecutors with four years minimum experience.

This way, even if, theoretically, the judges should have been investigated only by prosecutors with a minimum rank of prosecutor's office adjacent to the court of appeal and at least 10 years of experience, in fact, by the derogation allowed in the DNA, hundreds of magistrates were investigated by prosecutors with the lowest rank and a minimum experience in the magistracy.

2. **A specialized structure for investigating magistrates already existed within the DNA from 2014**

It is also important to remember that within DNA it was operating since 2014 the "**Service of combating corruption within judiciary**", which was established by the DNA chief-prosecutor's Order No. 10 on 31 January 2014. This Service had the power to investigate all corruption offenses allegedly committed by judges and prosecutors.

The establishment of this service was made non-transparent, that order not being made public until recently.

Later, through the Order No. 1.643 /C on 15 May 2015 and as a result of the opinion given by the Prosecutors Section of the Superior Council of Magistracy, the Minister of Justice approved the "Regulation for Internal Order of the National Anticorruption Directorate".
In article 4 paragraph (2) lit. a) of the Regulation this Service is explicitly mentioned: *"At the central level, the National Anti-Corruption Directorate is organized into sections, services, offices and other activity compartments. Within the Section of combatting corruption there is*

*the Service for criminal investigation in corruption cases and the **Service of combating corruption within judiciary**".*

In conclusion, from 2014 until the establishment of SIIJ in 2018, there was already a specialized structure within the Public Ministry for criminally investigating corruption in cases with judges and prosecutors.

3. The abuses of DNA prosecutors against the magistrates documented by the Judicial Inspection and the SCM

The competence of that Service to investigate magistrates from DNA included the offenses of abuse of office and favoring the offenders, offenses that were interpreted in a broad sense, which went all the way to investigate judges for their rulings and prosecutors for their solutions.

Thus, prosecutors with the lowest professional rank and minimum experience in magistracy, who got into DNA based on a simple untransparent interview, ended up investigating judges from court of appeals or the High Court of Cassation and Justice for abuse of office because the prosecutors considered that the judges' decisions were not correct.

Moreover, by the way it was organized, that Service unit presented a series of structural deficiencies, which allowed DNA prosecutors to use criminal cases as a means of pressure and blackmail judges.

This conclusion results clearly from the Judicial Inspection Report No. 5488 / IJ / 2510 / DIJ / 1365 / DIP / 2018 regarding the "*compliance with the general principles governing the activity of the Judicial Authority in the National Anti-Corruption Directorate's (DNA) cases regarding magistrates or in relationship to them*", report approved on 15 October 2019 by the Decision No. 225 of the Plenum of the Superior Council of Magistracy.

The control targeted by the Judicial Inspection report covers the period 01 Janaury 2014 to 31 July 2018, and from the decision of the SCM Plenary for approving this report the following essential conclusions are drawn:

- In total, throughout all of its central and national structures, during that time DNA targeted 1962 judges (351 judges were in criminal matters and 1590 in civil matters; among them one was Constitutional Court judge, 13 judges were members / former members of the Superior Council of the Magistracy and 16 judges were judicial inspectors).
- In 113 files regarding the judges and in 163 files regarding the prosecutors, the investigations were opened *ex officio* by the DNA.
- In many cases, the duration of the investigations was excessive, reaching periods that frequently exceeded three to five years. <u>In one case the duration was 12 years and six months!</u>

- Officers of the Romanian Intelligence Service effectuated criminal investigative acts in cases with magistrates.[4]
- The DNA prosecutors opened *ex officio* investigations especially against the judges and investigated them for their rulings. In some cases the DNA prosecutors opened ex officio investigation against the judges that, at the same time, were judging DNA cases.
- Many cases that were left unresolved, even for a very long period of time, were resolved in bulk right before SIIJ was made operational. For example, a file opened in 2013 *ex officio* concerning prosecutors and judges from the SCM, in which technical surveilance measures were ordered even against their family members, was closed in 2018.[5] A file concerning a judge from the Timis Tribunal, opened in 2006, was closed in 2018, after 12 years. [6] Other files were in the same situation.

Based on all these data resulting from the control performed by the Judicial Inspection, the Superior Council of Magistracy concluded that: "**The practices of DNA prosecutors who have investigated cases with judges in the ways mentioned below have represented forms of pressure on them, with direct consequences in the way the justice act was executed.**"

4. The decision of the Romanian Constitutional Court

As a result of these abuses committed over time by the DNA prosecutors that clearly endangered the independence of justice, SIIJ was created as an additional means of guaranteeing the independence of the judges, a fact that was also expressly stated by the Romanian Constitutional Court in the Decision 33/2018:

"147. In regards to the establishing of the Section for the Investigation of Crimes within Judiciary, at the level of the highest national prosecutor's office, the Court notes that its purpose is to create a specialized structure, with a determined object of investigation, ***and constitutes a legal guarantee of the principle of independence of justice, in terms of its individual componence, the independence of the judge.*** *This way, it is assured adequate protection of the magistrates against the pressures exerted on them, against the abuses committed by arbitrary complains / denunciations and a unitary practice is ensured, at the level of this prosecutor's office, regarding the carrying out of the criminal prosecution acts for the offenses committed by magistrates."*

Therefore, the European Commission's conclusion that "*there does not seem to be an objective and plausible justification for setting up SIIJ*" is clearly unfounded and out of touch with the reality of the Romanian justice system.

[4] Information obtained by DNA about magistrates also was sent to the Romanian Intelligence Service (SRI). See pages 63-65 from SCM decision 225/2019
http://old.csm1909.ro/csm/linkuri/08_01_2020__97031_ro.pdf
[5] Pages 12-13 of the report, Penal cases No. 167/P/2013, opened *ex officio* on 4 June 2013, was closed on 13 July 2018.
[6] Penal case no. 37/P/2006, opened on 28 February 2006, was closed on 24 August 2018.

II. Erroneous arguments sent by the European Commission to ECJ, analyzed punctually

1. ***"83. The section is led by a chief prosecutor and a deputy chief prosecutor, appointed by the Superior Council of Magistracy. Although it was created within the Prosecutor's Office adjacent to the High Court of Cassation and Justice, the Section has acquired a large autonomy following the adoption of Emergency Government Ordinance No. 7/2019, which eliminated the hierarchical subordination of the Chief Prosecutor of the Section to the General Prosecutor of the Prosecutor's Office adjacent to the High Court of Cassation and Justice."***

The Commission's conclusion is erroneous, the chief prosecutor of SIIJ still being hierarchically subordinate to the General Prosecutor of the Prosecutor's Office adjacent to the High Court of Cassation and Justice.

Through Emergency Government Ordinance 7/2019 the article 88^1 from Law 304/2004 was amended, by introducing paragraph 6 which states that: "*Whenever the Criminal Procedure Code or other special laws refer to the «superior hierarchical prosecutor» in the case of offenses within the jurisdiction of SIIJ, this means the SIIJ chief-prosecutor, even in the cases resolved before SIIJ became operation*."

This change was generated by the following situation: The solutions or measures taken prior to the existence of SIIJ by the DNA prosecutors could no longer be censored by anyone, because the prosecutors in the SIIJ were not "hierarchically superior" to those in the DNA, and other prosecutors, than the ones in SIIJ, did not have jurisdiction to investigate magistrates. There was a deadlock that required legislative intervention to clarify this aspect.

At the same time, however, there were neither modified nor repealed texts that explicitly stated that SIIJ chief-prosecutor is hierarchically subordinated to the General Prosecutor of PHCCJ.

Thus, article 88^1 para. 1 of Law No. 304/2004 clearly states that the SIIJ is set up and operates within the Prosecutor's Office adjacent to the High Court of Cassation and Justice.

Moreover, SIIJ is covered in Title III, Chapter II of Law No. 304/2004, which refers to the "Organizing of the Public Prosecutor Services". This title has sections referring to the Public Prosecutor's Office attached to the HCCJ, the Terrorism and Organized Crime Investigative Directorate (DIICOT), the National Anticorruption Directorate (DNA), the Section for Investigating Infractions within the Judiciary (SIIJ), the public prosecutor's offices attached to the courts of appeal and county courts, the military prosecution services. All these structures are equally hierarchically subordinated to the Prosecutor General, without any exception regarding SIIJ.

Also, article 72 of Law 304/2004, which states that "*the General Prosecutor of the Prosecutor's Office adjacent to the High Court of Cassation and Justice exercised, directly or through specific designated prosecutors, the control over all the prosecutor's offices*", was neither modified nor repealed.

Furthermore, the Constitutional Court has already solved this problem, explicitly stating in the Decision 33/2018 that: "*149. From the joint analysis of all these legal norms, it results that the chief prosecutor of this specialized structure from within the Prosecutor's Office adjacent to the HCCJ is subordinated to the leader of this prosecutor's office. As stated above, SIIJ is a specialized structure within the Prosecutor's Office adjacent to the High Court of Cassation and Justice, so the SIIJ chief-prosecutor is hierarchically subordinated to the General Prosecutor of the Prosecutor's Office adjacent to the HCCJ.*"

As a result, any interpretation of the newly introduced text must be made in the light of this decision, and any other interpretation, such as that of the SIIJ is outside the hierarchical control, is clearly erroneous.

In conclusion, the hierarchical subordination of the SIIJ chief prosecutor to the general prosecutor of PHCCJ is obvious and results from reading the legal texts, some mentioned even in the observations submitted by the Commission to ECJ.

2. **"85. On the one hand, setting up a prosecutorial unit with competence 'ratione personae' covering any type of crimes committed by magistrates is likely to create the impression of a phenomenon of corruption and criminality widespread in the judicial system."**

The conclusion is purely speculative. Moreover, this conclusion ignores the reality existing in the judicial system at the time when SIIJ was established.

Thus, "the impression of a phenomenon of corruption and criminality widespread in the judicial system" was already created by the DNA, first of all through the hundreds of files opened *ex officio* against prosecutors and judges, which have been kept open for years by DNA.

Secondly, through the way these cases were publicly managed by DNA - extensive press releases announcing the start of investigations, leaking information to the press from files during the investigation period, including transcripts from wiretappings, images with magistrates in handcuffs[7] -, they have were the one creating the impression of a corrupt body of magistrates, even if they were at the end acquitted or the charges against them dropped.

[7] For example, images with an arrested Constitutional Court judge, later acquitted, were largely presented by the media
https://www.b1.ro/stiri/eveniment/toni-grebla-catuse-punga-de-plastic-223173.html

There was also a consolidated practice at the DNA level to give detailed press releases that included the names of the accused judges or prosecutors, a broad description of the alleged state of fact and of the offenses they were charged with, which were subsequently broadcasted by the press. However, if the accusations against those magistrates were later dropped or they were acquitted, DNA had not communicated this, so the public remained with the impression that the former accused magistrate is guilty. This practice was not only a breach of the presumption of innocence, but also brought serious harm to the image of justice.

In conclusion, no SIIJ would create the "*the impression of a phenomenon of corruption and criminality widespread in the judicial system*", but it was the DNA which has already done it so by investigating judges and prosecutors by violating the rules regarding the presumption of innocence, of the reasonable duration of the proceedings and the right to defense.

3. ***"85. (...). Thus, the Section is the first prosecutor's office specialized in criminal prosecution of a professional category (magistrates), representing an exception from the current practice, in the Romanian judicial system, of organizing specialized prosecutor's offices based on the type of crime investigated (ratione materiae). "***

This statement of the European Commission is completely wrong.

Traditionally, in the Romanian legal system, the competence in criminal law has been regulated both according to the quality of the person (in the case of the military, magistrates, parliamentarians, etc.), as well as according to the type of crime.

The Romanian Constitutional Court clarified this aspect in the Decision no. 33/2018, where it emphasized that "*the establishment of special jurisdiction rules regarding a certain category of persons is not an element of novelty in the current criminal procedural normative framework*".

The Constitutional Court refers both to the rules of competence aimed at the military, as well as to other norms that establish competence by the person, including in the case of magistrates.

The Constitutional Court also refers to a previous decision pronounced in 2009, in which it stated that "*the establishment of special jurisdiction rules regarding a certain category of persons – active military –, in the sense that in the cases regarding the crimes of corruption committed by them the criminal prosecution is carried out by military prosecutors within the National Anticorruption Directorate, regardless of the military rank that the investigated persons have, it is not contrary to the principle of equality before the law*".

In conclusion, SIIJ is not the first prosecutorial structure specialized in the criminal prosecution of certain categories of persons, a matter of fact found as such even by the Romanian Constitutional Court.

4. **"85. (…) This may, in the Commission's view, bring serious damage to the image of the magistrates' profession, which will affect the confidence of the citizens in the justice system."**

The statement is purely speculative and it does not have any factual basis.

As we have already shown in above point 2, serious damage to the image of the magistrates' profession has already been made by the way DNA conducted the penal investigation prior to the operationalization of SIIJ. This is proven by the continuing decrease of citizens' confidence in justice since 2015, when it started to become public both the abuses of the cases prosecuted by some DNA prosecutors, as well as the serious interference of the intelligence services in the justice system.

Thus, the decrease of confidence in the justice must be correlated with the decrease of confidence in DNA, since in the public eyes the justice system was identified with the fight against corruption.

At a confidence rate of 63% in 2015[8], DNA's confidence has dropped to 30% in 2018, for the reasons mentioned in the previous paragraph.

As such, the citizens' confidence in the justice system, and especially in the prosecutor's offices, at the time of the establishment of the SIIJ was already in dramatic decline.

Contrary to the opinion of the European Commission, the creation of SIIJ could have the effect of improving this confidence, since in a recent opinion poll most of the people who answered said that they are in favor of maintaining it.[9]

5. ***"86. On the other hand, an autonomous structure for investigating judges can be used as an instrument of intimidation and pressure on their activity, especially if it's taken into consideration the context in which the Section was created, as part of a complex legislative reform that has weakened the independence of the judiciary and the fight against corruption."***

Again, the Commission ignores the fact that, prior to the establishment of the SIIJ, the investigation of the judges was actually used as a mean to intimidate and pressure them. This is the context that the Commission must take into consideration.

For example, at the beginning of 2019 the discussion recorded between 5 DNA prosecutors from Oradea was made public, where they planned on how to open criminal investigations against judges in order "to put fear" in them and to set an example out of them for the other judges.

[8] https://www.digi24.ro/stiri/actualitate/social/sondaj-nivelul-de-incredere-in-dna-este-de-peste-60-369843
[9] https://www.stiripesurse.ro/sondaj-curs-semnal-de-alarma-pentru-guvernul-orban-doua-decizii-extrem-de-impopulare_1418027.html

Their plan was put into practice, as explained in a letter to SCM by a judge who was one of their targets:

"At the beginning of 2019 a recording with 5 prosecutors from DNA Oradea was made public. In this recording they were discussing in DNA Oradea offices, on 19.01.2018, about a series of criminal repressive methods to "scare" and "calm down" the judges of Oradea Court of Appeal and Bihor District Court. An important thing to be mentioned is that the 5 DNA prosecutors who took part in the respective discussion, that is Man Ciprian, Muntean Adrian, Ardelean Ciprian, Pantea Cosmin and Rus Lucian, did not contest the authenticity of the recording.

Once the recording was made public, a huge mechanism of media and political propaganda, supported also be a few prosecutors and judges, was set in motion in order to minimize the severity of what those 5 DNA prosecutors had said in the respective recording, under the pretext that the respective discussion inside the DNA Oradea was not followed by any acts or facts, it was just a simple talk, gossip between colleagues.

In reality, though, the discussions were not just preceded, but also followed by acts and facts of the respective DNA Oradea prosecutors."[10]

6. ***"86 (…) This creates an inhibitory effect on the judges and their activity, as well as a general suspicion regarding the possibility of external influences, especially of a political nature, on the content of judicial decisions, which can significantly affect the independence of justice, especially the appearance of independence of the judicial bodies in Romania. "***

SIIJ was established in response to the abusive criminal investigations of DNA, which were real and serious pressures against the judges and prosecutors. They were largely described in the report of the Judicial Inspection, approved by the Plenary of the Superior Council of Magistracy on 15.10. 2019.

In response to these pressures, it was imperative to provide additional guarantees of independence of the magistrates against arbitrary criminal investigations, and this was done by the creation of SIIJ.

Thus, by the way the prosecutors in SIIJ are selected, which is done only by the SCM, by the fact that the Section must submit annual reports to the SCM Plenum, and that, on one hand, the prosecutors have a limited mandate, and, on the other side, any political influence in the functioning of the SIIJ is excluded, the independence of the magistrates is being further guaranteed.

[10] https://floricaroman.wordpress.com/2019/01/28/letter-to-the-superior-council-of-magistracy-to-validate-the-results-for-appointing-the-new-chief-prosecutor-of-the-special-section-unit-to-investigate-crimes-within-judiciary/

Contrary to the statement of the European Commission from the above paragraph, the inhibiting effect on judges and prosecutors in the past was the way in which DNA instrumented thousands of files against the magistrates, an effect that had to categorically be removed and it was removed by the creation of SIIJ.

Ironically, however, the Commission that praised DNA for a long time, ignoring all its failures and abuses, even when they became public, proven and indisputable, criticizes now the new Section precisely for what it had to impute DNA for many years.

Moreover, *"**the possibility of external influences, especially of a political nature**"* is a completely unfounded statement, since SIIJ is the only prosecutorial structure in Romania in which no political entity has competence in appointing the prosecutors who compose it. The prosecutors who work in SIIJ are appointed by the SCM Plenum, following a competition organized exclusively by the SCM, and the conditions for being able to participate in the contest guarantee the professionalism of the participants.

7. **"89. Secondly, regarding the concrete necessity of setting up a specialized prosecutor's office regarding the professional category of judges and prosecutors, in Romania there does not seem to be a high criminality among magistrates, as the Venice Commission also observed. For example, according to the data available, in 2017, of 997 defendants sent to court for crimes of high corruption or assimilated to them, only 6 were magistrates - three judges and three prosecutors. "**

The figures mentioned by the Venice Commission and repeated by the European Commission cover precisely the essential problem that determined the establishment of the SIIJ: the opening of a very large number of ex-officio files by the DNA, not justified even from the perspective of the small number of files sent to court: **for a period of 5 years DNA has opened 276 ex-officio files, which means that, on average, every month, DNA opened 5 files targeting judges or prosecutors**!

These hundreds of *ex-officio* cases are added to the thousands of other cases opened against the magistrates by other procedural means and in which the investigations took long periods of time.

In this regard, the SCM says the following in the above mentioned decision:

*"Thus, **relevant is the large number of judges targeted by DNA in the criminal cases, viewed in correlation with the total number of judges from the respective courts, on the one hand, and with the fact that in the overwhelming majority of these cases the final solutions were to drop the charges.***

For example, at the High Court of Cassation and Justice, more than 75 judges were targeted (9 of them being investigated at the territorial services of Brasov, Oradea, Constanta), at the Bucharest Court of Appeal about 100 judges, at the Court of Appeal Oradea about 35 judges

(out of about 40 judges), at the Ploieşti Court of Appeal about 30 judges (out of about 50 judges), at the Brasov Court of Appeal about 25 judges, at the Iasi Court of Appeal about 20 judges (from about 45 judges), at the Constanta Court of Appeal more than 15 judges (out of about 40 judges), at the Timişoara Court of Appeal more than 15 judges (out of about 60 judges), at the Bucharest Court more than 85 of judges, in the Argeş Tribunal more than 25 judges (out of about 40 judges), in the Bihor Tribunal over 30 judges (out of about 40 judges), in the Dolj Court more than 25 judges (out of over 70 judges).

In total, at the level of the Central Structure and the territorial structures of the National Anticorruption Directorate, over 1900 judges were targeted."

When over 70% of HCCJ judges have had criminal records in 4 years, the credibility of the justice is obviously seriously affected.

8. ***"89. (…) Also, there does not appear to have been any specific data or evaluations to demonstrate the existence of structural problems in the justice system, which could justify such an initiative."***

This statement proves ignorance on the part of the European Commission, because at the time of sending the observations to ECJ, the Decision of the SCM Plenum for approving the report of the Judicial Inspection, following the DNA verification regarding the way in which the files with magistrates were instrumentalized, was already adopted.

The European Commission should therefore know that there are not only "specific data or evaluations", but even a decision in this regard given by the SCM, the only body in Romania that has the constitutional role to guarantee the independence of justice.

SCM outlined in the decision 225/15.10.2019 serious structural problems, which confirmed, in fact, the necessity of setting up SIIJ:

"The practices of DNA prosecutors who have handled cases with judges in the ways mentioned below have represented forms of pressure on them, with direct consequences regarding the execution of the justice act.

Thus, the technique of opening ex officio penal cases against the judges and investigating them for the solutions they adopted is unacceptable, of an unprecedented gravity, which undoubtedly represents a factor of pressure not only on those concerned, but on the entire professional body of judges.

The suspicions about the way of working of the DNA prosecutors are amplified by the fact that ***cases left open and not worked for a long period of time, after measures of technical surveillance were approved for significant periods, were closed in bulk, just before the operationalization of SIIJ****."*

9. ***"90. (…) The draft law on the establishment of the Section received a negative opinion from the SCM, which is the guarantor of the independence of justice in Romania by virtue of the provisions of article 133 (1) of the Romanian Constitution."***

The claim that the draft law to establish SIIJ received a negative opinion from the SCM is completely false.

The negative opinion from SCM concerned the draft law promoted by the former justice minister Tudorel Toader, which wanted to establish a Directorate for the investigation of "crimes committed by magistrates" whose chief prosecutor was to be appointed following political agreements, as in the case of other high ranking prosecutors.

Contrary to the Commission's statement, SIIJ was set up by the parliamentary initiative, offering ample guarantees of independence for the prosecutors operating within it, which was not the case of the draft law that SCM voted against.

Moreover, this issue is detailed and explained by the SCM itself, in the point of view of this institution regarding the errors in the GRECO report, published on the SCM website.[11]

10. ***"92. Also, a possible justification for setting up the Section on the grounds of efficiency of the judicial system is called into question by a series of arguments, submitted by the referring courts, regarding the insufficiency of the resources made available to the Section, in particular the small number of established prosecutors (15 prosecutors), lack of adequate investigative instruments (as opposed to other specialized prosecutor's offices) and lack of appropriate territorial structures at national level (all prosecutors of the Section are to carry out their activity in Bucharest). "***

The problems raised by the Commission are in fact false.

The number of prosecutors was established because it was taken into consideration the small number of cases sent to court, which shows that, despite the large number of files previously existing on the role of DNA, there is no criminal phenomenon among judges. Nobody knew at that time that DNA had kept opened thousands of cases with magistrates.

According to the law, based on the volume of activity, the number of positions in SIIJ can be modified by order of the General Prosecutor General of the PHCCJ, at the request of the chief prosecutor of the section, with the approval of the Plenary of the Superior Council of the Magistrates - art. 88 ^ 2 paragraph 4 of Law 304/2004.

[11] http://old.csm1909.ro/csm/linkuri/01_11_2019__96482_ro.pdf (see page 13, last paragraph)

Also, the Section benefits from all the investigative tools that other specialized prosecutors have, as it is stated in art. 88 ^ 10 and art.88 ^ 11 of Law 304/2004. [12]

11. ***"94. In this way, there is a risk that the new Section will be misused to circumvent certain sensitive causes (e.g. corruption) from the competence of DNA or other prosecutors and transfer them to the Special Section, which could be more predisposed to external interventions and pressures, of political order, than an institution consecrated and consolidated in time such as DNA. "***

This statement is false from several perspectives.

Firstly, the SIIJ prosecutors are shielded from any political pressure or interference, since no politician is involved in the appointment of any prosecutor in SIIJ.

Secondly, regarding the professionalism of the prosecutors from SIIJ, the law established more severe conditions for participating in the competition (requiring effective seniority in the position of prosecutor of at least 18 years) and a greater complexity of the procedure for the selection of prosecutors (including the evaluation of penal acts done by prosecutors during the last 5 years, at least 5 randomly chosen acts and other documents considered relevant by candidates). All these conditions are intended to contribute to increasing the quality of criminal investigations.

On top of the guarantees already shown, we also show that:

- the appointment of the prosecutors within the SIIJ is made for a period of 3 years, with the possibility of continuing the activity for a total period of maximum 9 years;
- the dismissal of the prosecutors from the section is made by the Plenary of the Superior Council of Magistracy, at the motivated request of the chief prosecutor of the section, in case of improper exercise of the attributions specific to the position or in case of receiving a disciplinary sanction;
- the section prepares an annual report on the activity carried out, which it submits, no later than February of the following year, to the Plenary of the Superior Council of Magistracy.

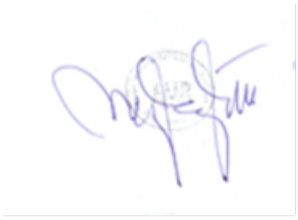
All these procedures allow the rapid identification of any skid or interference, which will also allow the possibility of correction in a timely manner.

In conclusion, the opinion expressed by the Commission in the sense that "the national provisions in question contravene the requirements of the law of the Union regarding the principle of effective judicial protection" is clearly based on unacceptable gross errors, which is why we request for them to be revisited by the Commission and to carry out a new analysis based on the facts and real data, not disinformation, fakenews and subjective appreciations.

[12] http://legislatie.just.ro/Public/DetaliiDocument/64951

ASOCIAȚIA PROCURORILOR DIN ROMÂNIA

A.P.R.

jud. dr. Andreea Ciucă AMR	jud. Florica Roman AJADO	jud. Dana Gîrbovan UNJR	proc. Elena Iordache APR
			

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2019 REPORT REGARDING THE ROMANIAN JUDICIARY

In 2018 the Parliament has adopted a serious of changes to the laws of the judiciary – Law 303/2004 regarding the Statute of the judges and prosecutors, Law 304/2004 regarding the judicial organization and Law 317/2004 regarding the Superior Council of the Magistracy –, changes that were examined by the Constitutional Court before they entered into force. The changes that were unconstitutional were eliminated by the Parliament, and the constitutional one entered into force.

Some of the changes included: all the acts/documents related to the administration of justice are of public interest and freely accessible to everybody; the secret intelligence agencies are banned from trying to recruit undercover agents among the magistrates, and if they do they are punishable with up to 15 years in jail; the nomination of the president of High Court of Cassation and Justice, vice-presidents and heads of sections is done by the Judges' Section of the Superior Council of Magistracy, not by the President anymore; a designated body, with high standards of accession for prosecutors, was created to investigate magistrates (this was done to avoid the abuses done in the past by the anticorruption prosecutors); etc.

The standing President, as well as some political parties that were in opposition, professional association of magistrates, NGOs and journalists who justified over the years the covert interference of intelligence agencies in the judiciary under the pretext of fighting corruption critised some of these changes, falsely claiming that they are reducing the power of the state to fight corruption (because the security services are not involved in penal investigation anymore) or that, in the case of the specialized body to investigate magistrates, it is affecting the independence of the judiciary (the Romanian Constitutional Court, to the contrary, stated that it is protecting the independence of the judges).

The opponents of the changes notified the Venice Commission, GRECO and European Commission. The reports on the changes made by these bodies contain a series of factual errors and significative inadvertences generated also by the subjectivism of the Romanian interlocutors. An analysis of these errors can be found in annex 1 (for GRECO Report), 2 & 3 (for CVM).

Immediately after the changes entered into force, the new provisions were modified by three emergency ordinances, action which accentuated not only the criticisms of the European institutions, but also of the associations of magistrates who supported the changes made by law, including the National Union of Romanian Judges (UNJR), which stated that the changes through one of emergency ordinance from January 2019 was done "tempestuously and without minimal consultation".[1]

[1] https://www.unjr.ro/2019/02/21/unjr-condamna-prevederile-din-oug-7-2019-de-modificare-a-legilor-justitiei-care-incalca-principiul-separarii-carierelor-si-solicita-guvernului-dancila-sa-revina-de-indata-asupra-lor/

The 2019 public agenda was dominated by three electoral debates (the ones for the Referendum, the ones for the European Parliament elections and the ones for the presidential election), which affected directly and seriously the issues of the judiciary and also the rights and freedoms of the citizens.

The technical and professional discussions about the changes to the justice laws could not take place professionally and objectively because the debate was suffocated by the populism of different candidates and parties, justice being, once again, used as a weapon in the political battle.

In October 2019, a month before the presidential election, the Government supported by the coalition which made the changes to the justice laws in 2018 was replaced by another one supported by the parties that were in opposition in 2018.

Shortly after the presidential elections, which was won for another term by the standing president, the new Government announced a series of measures which would affect directly the status of the judges and prosecutors, respectively the intention of reducing the salaries and the cancelation of the special retirement pension to which the judges and prosecutors are entitled to.

The intended measures generated opposing reactions of the magistrates across the country, the largest courts in the country - the Bucharest Tribunal and the Bucharest Court of Appeal - announcing the suspension of their activities.

In reply, some politicians now in power said that if judges or prosecutors don't like these measures, they are "free to leave the judicial system".

Meanwhile, the old problems of the judiciary are still unresolved, as we'll show below:

I. Old serious problems affecting the independence and efficiency of the judiciary

1. The human resources in the courts and prosecutor offices

By the end of 2019 a series of changes made in 2018 to the justice laws were to enter into force:

- judging panels composed of 3 judges in appeal (in Romania the appeal panels are composed of 2 judges);
- the possibility of an early retirement after 20 years in service for judges and prosecutors;
- the increase of the training at the National Institute of Magistracy from 2 to 4 years.

All these changes, the first two requested by the magistrates themselves, even if were well intended and had good reasons to be adopted, they had the potential to disbalance the still insufficient human resources from courts and prosecutor's offices.

The entering into force of these provisions was delayed with one year, but this doesn't solve the situation of insufficient human resources in the judicial system. The Ministry of Justice and the Superior Council seem incapable of elaborating and respecting a predictable and efficient, medium and long term, human resources strategy.

Besides the insufficient number of judges, an important problem, still pending, is represented by the unbalanced distribution of resources in the system: for example, in 2018 a judge from the Ilfov Tribunal had to solve 1436 files, compared to 346 files for a judge sitting in Arad Tribunal. [2]

Meanwhile many courts are facing serious infrastructure problems, including undersized space, improper conditions, poor material supplies.

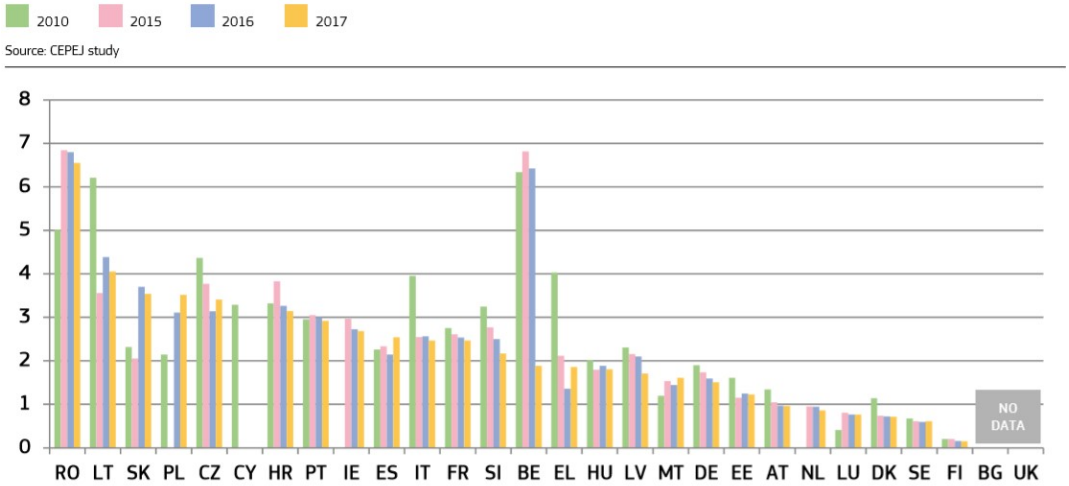
2. Congestion of the courts generated by the large number of disputes

In the last 10 years the number of cases pending before the courts grew constantly, reaching approximately 2 million cases in 2016 and approximately 3 million cases in 2018.

According to the data presented in the European Union Justice Score Board, published on 26.04.2019, in 2015 – 2017 Romania had the highest number of civil and commercial cases per 100 inhabitants, far away from the countries situated on the second place – page 11 of the report.[3]

Figure 3

Number of incoming civil and commercial litigious cases (*) (1st instance/per 100 inhabitants)



[2] https://www.csm1909.ro/267/3570/Rapoarte-privind-starea-justi%C5%A3iei
[3] https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2019_en.pdf

Despite this alarming situation, the Romanian authorities ignore the problem and take no action in order to solve the problem.

3. The amendments of the Criminal and Criminal Procedure Codes

In 2018, the Parliament adopted a series of changes to the Criminal Code and the Criminal Procedure Code, with the declared purpose of aligning the unconstitutional articles to the decisions of the Constitutional Court.

The adopted amendments were repeatedly challenged in front of the Constitutional Court and some of them were declared unconstitutional, which caused the legislative initiatives to go back to the Parliament for corrections. In the last two decisions on the issue, the Constitutional Court declared unconstitutional the legislative initiatives on the grounds that they did not implement all the decisions of the Constitutional Court.

These decisions (decision no. 466/2019 and decision no.467/2019) have no precedented in the case law of the Constitutional Court. It was for the first time when the Constitutional Court declared unconstitutional an entire legislative initiative on the grounds of an omission of the Parliament, stating that: "*the vice of unconstitutionality consists in the legislator's omission to legislate in accordance with the constitutional obligations provided by art.147 of the Constitution (putting the laws in accordance with the decisions of the Court)*". - par.170 of the Decision 467/2019.[4]

The omission of the Parliament to align the provisions of the Criminal and Criminal Procedure Code with the Constitutional Court decisions is very serious, affecting both the procedural rights of the parties and the activity of the courts in criminal matters, the lack of implementation of these decisions creating severe problems in the application and interpretation of the Criminal Code and Criminal Procedure Code.

4. The state institutions refuse to declassify and publish all the administrative acts that have targeted or affected the justice, despite the express provision introduced by the amendments to the justice laws and the decisions of the Constitutional Court

The Constitutional Court stated in the 252/2018 decision that "these acts (concerning or affecting judicial procedures) (...), currently classified, will have to be declassified, never hidden from the public's knowledge, precisely in the idea of increasing transparency in the way justice must be done". Despite this express provision, the decisions of the Supreme Council of Country's Defense, which have targeted or affected the justice are still secret.

[4] https://www.ccr.ro/download/decizii_de_admitere/Decizie_467_2019.pdf

We remind that since 2015, supported by MEDEL, UNJR makes constant efforts in order for these acts to be published, considering that the secrecy of any act regarding justice is incompatible with the European standards of the rule of law[5].

Details regarding the classified documents and others interferences of the intelligence services in the judiciary were presented to the European Commission in the document entitled "Report on the unlawful involvement of the Romanian secret intelligence agencies, through secret protocols, in the Romanian judiciary system" - Annex 4 and 5 to the report.

In May 2019 it was finalized the report of the Judicial Inspection regarding the implementation of the 20009 Cooperation protocol concluded between the General Prosecutor Office and the Romanian Intelligence. The Judicial Inspection report has 19 secret annexes.

In June 2019 UNJR and the Association of the Romanian Prosecutors urged the Superior Council to take the appropriate measures in order to declassify and publish the 19 annexes of the Judicial Inspection Report[6].

The two associations recalled the merits of Constitutional Court Decision no.26/2019 which stated that "a secret service has been intruded into the criminal prosecution" - par. 157 of the decision.

Despite all these actions, the annexes are still classified, their content remaining a secret.

II. The judiciary and the fundamental rights were affected by measures taken for electoral or populist purposes

1. Repeal of the compensatory recourse. The structural problem of the violation of art. 3 of the ECHR due to prison conditions

In the case of *Iacov Stanciu against Romania*, from July 24, 2012, the European Court of Human Rights found that overcrowding and improper conditions of detention are structural problems of the Romanian prison system. The Court also considered that it was necessary to set up an internal recourse that would provide a compensation for the damages suffered as a result of the improper conditions of detention, including financial compensation. In the years following the *Iacov Stanciu* decision, the number of similar cases increased steadily. Consequently, on

[5] https://www.medelnet.eu/index.php/activities/an-independent-judiciary/445-resolution-on-safeguarding-the-independence-of-the-romanian-judicial-system-from-secret-and-unlawful-interference-of-the-intelligence-agencies
[6] https://www.unjr.ro/2019/06/06/scrisoare-amr-si-unjr-catre-csm-pentru-declasificarea-si-publicarea-anexelor-raportului-ij-privind-protocolul-piccj-sri/

April 25, 2017, the Court decided to apply the pilot decision procedure in the related case *Rezmiveș and others against Romania*.

In these circumstances, the Romanian Parliament, with an overwhelming majority, voted Law 169/2017, which provided compensations in days for improper conditions in the penitentiary.

The law commonly known as ”the law of the compensatory recourse” became an intensely exploited theme in the election campaign, some candidates repeatedly claiming that it is the cause of rapes and murders committed by repeat offenders who were sooner released from prison, thus creating an important public pressure for its repeal.

Consequently, immediately after the 2019 presidential elections, the Parliament, which had the same componence as in 2017, repealed, with an overwhelming majority, the law mentioned above, which generated a harsh warning from the Council of Europei[7].

The fate of this law is a perfect example of how the Romanian State understands to address the problems of justice: populism, unpredictability, lack of vision and long-term policies, with violation of fundamental rights.

2. 25th of May 2019 Referendum

On April 25, 2019, the Romanian President convoked the so-called "justice" referendum, which was held on May 25, 2019, at the same time with the Europarliamentarian elections.

The referendum had two questions:

1. Do you agree with the prohibition to amnesty and pardon corruption offenses?
2. Do you agree with the prohibition of the Government to adopt emergency ordinances in the field of infractions, criminal punishments and judicial organization, and with the extension of the right to attack emergency ordinances directly to the Constitutional Court? [8]

[7] *“The Committee of Ministers of the Council of Europe is deeply concerned with the abrogation by the Romanian Parliament of the compensatory appeal law and with the fact that the authorities have not provided ways to compensate for the existing situation, so as to observe the requirements of the European Convention on Human Rights. The justice minister Catalin Predoiu has been in Strasbourg these days where he gave explanations about the Romanian authorities’ decision. In an official communiqué, the Committee of Ministers reminds of the ‘old structural problems’ of Romania related to prison overcrowding and inhuman and degrading detention conditions. The communiqué also shows that important progress has been made especially in reducing overcrowding. Strasbourg officials also announced that they took note of the explanations provided by the Romanian justice minister and hailed the Bucharest government’s pledge to draft a comprehensive action plan.”*
https://www.rri.ro/en_gb/december_6_2019_update-2608495

[8] This question, which is actually multiple questions under one, might seem complicated, but this is how it was formulated by the President. It was so complicated that even the President, when he tried to repeat it in a press conference, was not able to restate it accurately.

The referendum was voted by the vast majority of the participants and validated by the Constitutional Court.

After the vote, the Parliament adopted a law to amend the Constitution in line with the answer to the first question. However, the Constitutional Court declared that change unconstitutional because such an absolute prohibition violates the limits of the revision of the Constitution in terms of guaranteeing fundamental rights, violating human dignity and equality before the law.

As far as the second question, this has not been analyzed yet on its merits by the Romanian Constitutional Court, but the provision to prohibit the Government to adopt emergency ordinances in the field of "judicial organization" it has already created practical problems.

For example, the entrance into force of the provisions mentioned above at the section I.1. had to be postponed before the year end, otherwise they would have entered into force.

On one side, a regular legislative process through the Parliament takes time, and on the other side people voted, at the request of the President, to forbid the Government to adopt emergency ordinances in the field of "judicial organization".

The option left for the current Government was to use the "assuming responsibility" procedure before the Parliament to pass a law to postpone those provisions, which created other problems.

„Assuming responsibility" is a legislative procedure that completely excludes parliamentarian debates, so it is even more dangerous than the emergency ordinances, which must be presented to the Parliament to be debated (but after entering into force). This method of legislating is therefore, in principle, contrary to all recommendations issued by European bodies, including the European Commission.

In conclusion, the Romanian judiciary system is seriously affected, on one hand, by populist measures and, on the other hand, by the ignorance of serious and systemic problems, which the justice system had faced for years and were not resolved.

Judge Dana Girbovan
President, UNJR

https://www.stiripesurse.ro/cvm-report-on-romania-between-reality-and-fiction-the-list-of-20-factual-errors-and-subjective-assessments-in-the-report_1411112.html

CVM report on Romania, between reality and fiction: the list of 20 factual errors and subjective assessments in the report

The European Commission published on Tuesday, October 22, the CVM Report on Romania for 2019. The document reveals a gloomy landscape of the Romanian justice system as the European experts find regressions in almost all areas under review. However, the document also contains factual errors, subjective assessments and grave omissions which raises serious and legitimate doubts about the objectivity of the report.

Link to the 2019 CVM technical report in Romania:
https://ec.europa.eu/info/sites/info/files/technical-report-romania-2019-swd-2019-393_en.pdf

"*The variety of opinions expressed by the different Romanian interlocutors is an important element for an open and transparent debate. The Commission bases its assessment on all sources available, also taking into account divergent views*", the preamble to the MCV Report states.

However, on closer inspection, the whole document seems to be a compilation of press releases from several professional associations of magistrates close to the opposition parties (National Liberal Party, Save Romania Union Party), the so-called "activist magistrates".

Questions like who participated in the preparation of the CVM Report on Romania and why the document has a biased approach will, most likely, never find a full answer before the public opinion. We will never know why a country like Bulgaria, without any anti-corruption agency and with much greater problems related to the independence of justice, is more appreciated than Romania in Brussels.

But, despite this, a debate on the factual errors in the report is certainly needed.

STIRIPESURSE.RO has made a non-exhaustive list of 20 factual errors and subjective assessments contained in the CVM Report on Romania, which we present below, in the same order as they appear in the technical report.

The list of factual errors and subjective assessments in the CVM report on Romania:

1. The "Section for investigating infractions within the justice system" (SIIJ) is referred to in the report as the "*Special Section for investigating crimes committed by magistrates*".

Firstly, the label "special section" was used by the critics of SIIJ in order to be able to shorten it as "SS" and associate this investigative unit to the Nazi Schutzstaffel for propaganda reasons.

Secondly, during the debate in the Parliament the reference in the name of this unit to "crimes committed by magistrates" has been replaced with "infractions within the justice system", so the magistrates could not be labelled as a criminal group.

In conclusion, not only the name of this investigative unit is inaccurately mentioned in the CVM report, but the use of "special section" label proves the absolute bias of this report.

2. Technical report, page 6: "*(2) … in particular the prosecution section had no role in the appointments of prosecutors of the special section for investigating crimes committed by magistrates at the creation of the section;".*

This statement is false.

For a fact, the Prosecutors Section of the Superior Council of Magistracy (SCM) refused to take a role in the selection process of the SIIJ prosecutors because it refused to appoint a representative in the selection panel of SIIJ prosecutors.

As far as the appointment of the selected prosecutors in SIIJ is concerned, the members of the Prosecutors Section had the right to vote in the Plenary of the Superior Council of Magistracy on the appointment of SIIJ prosecutors and they exercised their right.

3. Page 7, paragraph 4: "*The first concern expressed has been that the creation of the special section specialising in investigating allegations of crimes (such as corruption or abuse in office) committed by magistrates would affect their public standing and reputation, as it singles magistrates out as a specific group deserving special treatment for crimes allegedly committed, putting them under a general suspicion*", as well as footnote 27: "*The specialised prosecution offices in Romania are competent for specific crimes committed by anybody and not just by a specific professional group*."

The concern is baseless, and the footnote is false.

For a fact, the Romanian law instituted military prosecutorial offices and tribunals, tasked with investigating exactly this specific professional group.

Furthermore, the competence of National Anticorruption Directorate (DNA) is specific to also certain professional groups (see, for example, art. 13 paragraph (1), letter b) of the Government Emergency Ordinance no. 43/2002).

4. Page 7, paragraph 4: "*These claims of systematic abuses by the DNA [against the judges and other prosecutors] have been strongly disputed by the DNA and by the Public Ministry*".

The CVM report is omitting to refer to the Report of the Judicial Inspection on the criminal cases opened by the DNA against judges and prosecutors, which documents numerous abusive practices employed by DNA prosecutors from all over the country against the magistrates. The report was approved by the Superior Council of Magistracy Plenary on October 15, 2019.

5. Page 7, footnote 28: "*In August 2018, numbers entered the public domain without verification, citing thousands of investigations initiated ex officio against magistrates by the DNA. Corroboration came from the Judicial Inspection, but this appeared to breach the*

confidentiality of an inspection being carried out in the DNA. The publication of figures from the DNA itself and the Public Ministry did not result in a rectification, even from official sources."

The information in the CVM Report is false. The Judicial Inspection had not provided any data regarding the number of files opened ex officio against any magistrates, before completing the verification and submitting the report to the Superior Council of Magistracy.

6. Page 7, footnote 29: "*As mentioned in the November 2018 CVM report, there were 2396 cases involving magistrates registered between by 2014 and 2018*."

The number of 2396 cases involving magistrates mentioned in the CVM report on Romania is false.

For a fact, according to the Judicial Inspection Report, approved by the Superior Council of Magistracy Plenary on October 15 2019, between 2014 and 2018 the DNA opened 2901 criminal cases against the magistrates, with 505 criminal cases more than the number mentioned in the CVM Report.

7. Page 8, paragraph 2: "*Government Emergency Ordinance 90/2018 weakened a number of guarantees, including the professional, management and ethical requirements for the candidates, and took away the necessity that high-ranking prosecutors participated in the selection panel and in the final appointment decision. The Ordinance made a one-off modification of the law in such a way as to ensure full control of the appointment process to a small panel consisting only of a few judges of the SCM*." And the reference to footnote 31: "*Throughout 2018-2019 the legislator and the Government oscillated between two models of appointment of top prosecutors: one involving the Plenary of the SCM and another the Prosecutors' Section. It is unclear why, for the transitional scheme of appointment of top prosecutors to the Section, the Government entrusted the function to the member of the Judges' Section*."

As mentioned previously, the statement that the SCM Prosecutors Section was eliminated from the selection process is false. For a fact, the Prosecutors Section refused to appoint a representative in the selection panel.

Furthermore, these were transitory rules, in force until the selection process mentioned by law was finalized. The urgency for that Emergency Ordinance was justified by the fact that the legal provisions establishing SIIJ, which granted this unit exclusive competence/jurisdiction to investigate criminal cases involving magistrates, entered into force, with the risk of SIIJ being in the impossibility to function.

8. Page 8, paragraph 2: "*The result was the appointment of a management team in a way which could not command the confidence of the public and the respect from within the judicial system, and which inevitably raised concerns about vulnerability to political influence*".

The above assertions in the CVM Report are deeply subjective, being mere speculations unsupported by arguments and facts.

Despite the fact that the European Commission and the Venice Commission have repeatedly recommended the appointment of high-ranking prosecutors by the SCM, without the involvement of the political factor, the CVM Report criticizes the procedure closest to those recommendations.

To raise concerns about "vulnerability to political influence" in this selection process is simply absurd, since no politician is involved in the selection process.

For a fact, the selection of SIIJ prosecutors is done by a panel composed of elected judges and prosecutors who are members of SCM, and the appointment of SIIJ prosecutors is done by the SCM Plenary.

9. Page 9, paragraph 1: "*In May 2019 the Section reopened a corruption investigation concerning a judge of the SCM which the DNA had closed in August 2018. The judge in question had regularly spoken publicly against the amendments to the justice law, including the special section."*

The reference here is to judge Bogdan Mateescu and the first phrase is inaccurate.

For a fact, the criminal case against judge Bogdan Mateescu was reopened by a judge from the High Court of Cassation and Justice because the DNA prosecutor closed the file illegally.

In respect of the second phrase, the fact that Bogdan Mateescu was a critic of SIIJ is irrelevant in the context, the CVM Report inducing a causal relationship impossible to prove. If such statement of the Commission could be even taken in consideration, then the allegations of many politicians who claimed that DNA opened criminal cases against them because they criticised DNA have also to be taken into consideration.

10. Page 9, paragraph 2: "*Such examples have led observers both within Romania [41] and outside to conclude that the concerns expressed at the establishment of the Section have been proved justified, [42] and to therefore call for the Special Section to be disbanded."* Referring to footnote 41: "*Magistrates associations (Forumul judecatorilor, AMASP, "Initiativa pentru justitie), civil society, Opposition parties*.", and footnote 42: "*A key example concerned a criminal case against the former Chief Prosecutor of the DNA who is also a candidate to be European Public Prosecutor. The timing of the opening of the criminal case and the calendar of summons seemed specifically designed to frustrate this candidacy, and a decision by the High Court of Cassation and Justice on the preventative measures applied qualified them as unlawful. Another example, at the same period, concerns a case opened against the former Prosecutor General for forming an organised crime group in relation to the drafting of the CVM reports.*"

First of all, invoking the positions of some associations of magistrates but ignoring other associations creates an obvious imbalance, while the critical positions of some political parties cannot be a criteria for evaluating a justice system.

In the case of Laura Codruta Kovesi, the CVM Report notes a "coincidence" in the opening of the criminal file, although, over the years, such coincidences in the activity of the DNA have never been mentioned in the reports (e. g. Victor Ponta was charged by the DNA on the day of reading the censorship motion in Parliament; Ludovic Orban was charged by the DNA just before the local elections).

The argument regarding the former General Prosecutor is simply false. The criminal file against the General Prosecutor was registered by DIICOT after a complaint from a person. According to the law, if a criminal complaint matches the formal criteria it has to be registered by the prosecutor's office before it can be investigated. Later on, the complaint was dismissed. This is a just an example where the CVM report is raising "concerns" on things done following the law.

11. Page 10, paragraph 3: "*A further issue were successive cases of ongoing disciplinary investigation documents appearing in the media – with a similar correlation to those critical of the amendments to the justice laws and the special section to investigate crimes committed by magistrates*".

This statement in the CVM Report is false.

There was no information leaked in the media during ongoing disciplinary investigations. The information "on the sources" appeared, in all the cases, only after the disciplinary actions were exercised and the documents were sent to SCM, other institutions and the magistrate who was disciplinary investigated.

The above statement is supported even by footnote 49, which lists some links to news articles about disciplinary investigations, which contains only the position of the magistrates under investigation.

On the same topic, footnote 50 states: "*A judge's association made an official request to the Judicial Inspection regarding the leaks. The Judicial inspection denied any wrongdoing*."

The association referred to here was "Forumul Judecatorilor" (Forum of Romanian Judges). In the response, the Judicial Inspection not only denied, but provided a detailed answer proving that the articles were written after they finalized the investigations and the documents were sent to other institutions or to the petitioner. Furthermore, the response from the Judicial Inspection was published by the Judges Forum on their website and it is available here: http://www.forumuljudecatorilor.ro/index.php/archives/3624

This is a clear example on how the CVM report is misleading.

12. Page 11, paragraph 1: "*The procedure managed by the SCM resulted in the appointment of the same chief inspector, despite the prevailing controversy. On 17 July, the SCM decision to validate the selected candidate was challenged in court*."

The CVM report not only criticizes the legal norm for appointing the chief inspector, but it also refers to subjective considerations, despite the fact that the case is before a court and has not been finalized yet. This could easily be interpreted as a form of pressure exerted on the court.

Nevertheless, the report omitted to specify that the chief inspector Lucian Netejoru was the only candidate, although nothing prevented others from entering the race.

13. Trying to justify the secret protocols between Romanian Information Service (SRI) and Public Ministry, the CVM on page 12, footnote 59 stated: "*In a recent ruling by the Court of*

Appeal of Suceava, it was decided not to exclude evidence based on past interceptions. Judges considered here that the Constitutional Court itself stated that offer of technical support by the SRI is not equivalent to performing the act of criminal investigation. Curtea de Apel Suceava, Încheierea de cameră preliminară nr. 15 din 19 martie 2019".

The Court of Appeal is referring to the Romanian Constitutional Court decision 26/2019, by which the 2009 secret protocol between SRI and Public Ministry was declared unconstitutional. It is unclear why the authors of the CVM Report have decided to choose a ruling disregarding the Constitutional Court decision, given that opposing court decisions are countless.

14. Page 12, paragraph 7: "*The Superior Council of Magistracy also informed the Commission that the Judicial Inspection has prepared a report on the protocol between the SRI and the Prosecution services. The report has been transmitted to the Council for debate and endorsement, but has not yet been made public. [61]*", completed by footnote 61 which stated: "*The report has however been leaked to the media*."

It is unclear who the European Commission is blaming for the leak.

For a fact, there is no legal provision that prohibits the publication of such a document after the phase of the investigations carried out by the Judicial Inspection is completed.

However, for the accuracy, the report was not published by the Judicial Inspection nor the SCM, but was leaked in the media after the document was sent to the courts and prosecutors' offices for observations.

15. Page 17, paragraph 5: "*This situation is also reflected in the new justice laws, and exacerbated by the government emergency ordinances on the justice laws, which made it possible for decisions on key issues to be determined by only a few SCM members. Examples already mentioned are the appointments of the management of the special section to investigate magistrates and of the chief inspector."*

The statement is inaccurate because, although the selecting panels are made of few judges and prosecutors, the appointment of the heads of the two structures is made by the Plenum of the SCM.

16. Page 17, last paragraph: "*Between November 2018 and June 2019, the SCM has taken only two decisions to defend the independence of the judicial system and 19 decisions to defend the professional reputation, independence and impartiality of magistrates.80 Furthermore, analysis finds that the time taken to take decisions has increased in the last two years, thereby decreasing the impact of the decisions of the SCM*."

The statements refer to footnote 81, which is pointing to a document elaborated by the "Forum of Romanian Judges" Association. The document has a deeply subjective character, the association having critical positions against the SCM leadership and having launched multiple lawsuits against the SCM.

Furthermore, the CVM report does not argue what would be the term of comparison against which it considers that the activity of the SCM in this area would have been insufficient.

17. Page 18, paragraph 1: "*Where the SCM has cited a defence of the independence of the judiciary, it has sometimes raised issues of potential political partiality*". Reference to footnote 83: " *For example statements condemning declarations (1) of the President of the European Parliament criticising the preventive measures taken by the special section to investigate magistrates preventing the EPPO candidate to attend the hearing at the European Parliament; (2) of the President of Romania rejecting the proposal for minister of justice made by the Prime Minister in August 2019*."

The CVM report contradicts in this paragraph precisely the claims made in the previous paragraph of the same document, mentioned in #16 above.

If previously the CVM Report denounced the SCM's low involvement in the defence of the judicial system's independence from political actions, in this paragraph it is criticizing precisely the defence of the judicial system's independence in the face of political interventions.

The authors of the MCV Report suggest, by using these double standards, that only certain political interventions affecting the independence of the judiciary are not ok, while others are, which is absurd.

18. Page 21, last paragraph: "*The public criticism of the DNA continued in 2019. Examples are the allegations of abuses in relation to cases of corruption involving magistrates, the collaboration with the Intelligence Services or general criticism on the cost of DNA*."

The CVM report does not mention that all three categories of examples offered objective reasons for public criticism.

The Judicial Inspection report on the criminal files opened by DNA against the magistrates, report approved by the SCM Plenary on October 15, proves and documents the DNA abusive practices. Furthermore, the collaboration of DNA with SRI was conducted on the basis of a secret protocol declared unconstitutional. Nevertheless, the issue of costs was also brought to the public's attention in a justified manner, given that some structures within the DNA worked on an extremely small number of criminal files in the last year (for example: Military Services, DNA Iasi, DNA Alba Iulia, DNA Timisoara).

19. On page 22, after mentioning the decision of the Constitutional Court regarding the panel of judges from the High Court of Cassation and Justice, according to which they have been operating illegally for many years, paragraph 3 reads: "*the Judicial Inspection filed a disciplinary file against the President of the HCCJ and the SCM judges section asked for its revocation in relation to these constitutional conflicts. These disciplinary actions were later dismissed, but in July 2019, the President of the High Court announced she would not apply for a second term, explicitly citing the pressure imposed by these steps.*"

Shockingly, the CVM report does not mention as a cause for concern the fact that the High Court violated the law in the way the panel of judges were formed, which - as stated by the Constitutional Court - was a very serious matter, but is limited to criticizing precisely the attempts to hold responsible those who have acted illegally for many years.

The deeply subjective and biased statement from above also contains a false assertion. The judges section of the SCM, as a body, has not taken any institutional steps to dismiss the

president of the High Court of Cassation and Justice. There was a such request from only one SCM member.

20. Last by not least, besides the many – too many – false, inaccurate, baseless or subjective statements contained in the 2019 CVM Report on Romania, it is worth mentioning the total absence of any references in the report about the violation of judicial independence done by the President of Romania, who called publicly for the resignation of the DIICOT chief prosecutor. This omission is even more disturbing if it's taken into account that the CVM report criticized the Minister of Justice for initiating the procedures prescribed by law to revoke the DNA chief prosecutor and the general prosecutor.

https://www.mediafax.ro/english/judge-girbovan-the-romanian-government-accepts-erroneous-recommendations-from-the-european-institutions-due-to-its-submissive-attitude-18768903

Judge Gîrbovan: The Romanian Government Accepts Erroneous Recommendations from the European Institutions Due to Its Submissive Attitude

Judge Dana Gîrbovan stated on January 24, 2020, in an interview for MEDIAFAX, that, from the level of the Romanian Government and the Ministry of Justice, are accepted "obvious" erroneous recommendations from the European institutions regarding the *Section for Investigating Crimes within Judiciary (SIIJ)*, which have negative consequences for the judicial system.

The main statements of Dana Gîrbovan, president of the National Union of Romanian Judges (NURJ):

"The hierarchical subordination of SIIJ to the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice (POHCCJ) is obvious and results clearly from the legal provisions cited above, some of which are mentioned, but paradoxically ignored in the very observations formulated by the European Commission".

"The problem with the reports of the European institutions – GRECO, CVM, the European Commission – consists not only in the false and unfounded arguments against SIIJ, but also in the clearly partisan, unprofessional and subjective manner in which they present the facts pertaining to the justice system in Romania and then evaluate them in order to draw conclusions".

"The Section for the Investigation Crimes within Judiciary (SIIJ) has been the object of a prolonged and continued disinformation campaign, internally and externally, and the assertion that SIIJ is not under the authority of the General Prosecutor was one of the false arguments used in this campaign".

Presented below is the full interview with judge Dana Gîrbovan, president of NURJ:

MEDIAFAX: In the point of view expressed by the European Commission and sent to the Court of Justice of the European Union (CJEU) it is shown, as you specified in the letter, that SIIJ is not under the authority of the General Prosecutor of POHCCJ. Why do you consider this error occurred? What information has the Commission received to that effect and from whom?

Dana Gîrbovan: This false argument, that SIIJ is not under the authority of the General Prosecutor, which was promoted by some professional associations and institutionally by the Ministry of Justice and by the Government, proves that we find ourselves in the post-truth era, in which facts and arguments do not matter anymore, but if a lie is repeated frequently enough and by many people, it becomes accepted as truth and the real state of fact, including by the European Commission. The *Section for Investigating Crimes within Judiciary (SIIJ)* has been the object of a prolonged and continued disinformation campaign, internally and externally, and the assertion that SIIJ is not under the authority of the General Prosecutor was one of the false arguments used in this disinformation campaign.

The hierarchical control of the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice (POHCCJ) over SIIJ results clearly from the Constitution and from the provisions of Law no. 304/2004.

I present for reference a series of articles from Law no. 304/2004 on judicial organization, which prove without a doubt that SIIJ is part of the Public Ministry, that it is a section part of the POHCCJ and that the prosecutors belonging to SIIJ are subordinated to the General Prosecutor of POHCCJ.

“Article 62 paragraph (1) - The Public Ministry exercises its powers according to law and is headed by the General Prosecutor of the Prosecutor’s Office attached to the High Court of Cassation and Justice.

Article 65 paragraph (1) - Prosecutors from each prosecutor’s office are subordinated to the chief prosecutor of that office.

Article 70 paragraph (2) - The Prosecutor’s Office attached to the High Court of Cassation and Justice is headed by the General Prosecutor of the Prosecutor’s Office attached to the High Court of Cassation and Justice, assisted by a first deputy and a deputy.

Article 72 - The General Prosecutor of the Prosecutor’s Office attached to the High Court of Cassation and Justice exercises, directly or through designated prosecutors, the control over all prosecutor’s offices.

Article 75 - The Prosecutor’s Office attached to the High Court of Cassation and Justice is structured into sections headed by chief prosecutors, which can be assisted by deputies. Within the sections can function services and bureaus, headed by chief prosecutors.

Article 88^1 paragraph (1) – Within the Prosecutor’s Office attached to the High Court of Cassation and Justice is established and will operate the Section for Investigating Crimes within Judiciary.

(5) The General Prosecutor of the Prosecutor’s Office attached to the High Court of Cassation and Justice resolves the conflicts of jurisdiction arising between the Section for the Investigating Crimes within Judiciary and other structures or unites within the Public Ministry.

Article 88^2 paragraph (1) - The Section for Investigating Crimes within Judiciary operates according to the principle of legality, impartiality and hierarchical control.”

After SIIJ started to operate, cases involving magistrates from all prosecutor’s offices, including from the National Anticorruption Directorate (NDA) and from the Directorate for Investigating Organized Crime and Terrorism (DIOCT), were sent to SIIJ. NDA, however, is the structure legally distinct and autonomous within the POHCCJ, hierarchically situated above sections within the POHCCJ.

Because of this, the situation had got to the point where the solutions or the measures taken before the existence of SIIJ by NDA prosecutors, some of them having leadership positions, could not be censored by anyone because the prosecutors from SIIJ were not “hierarchically superior” to them, whereas other prosecutors no longer had jurisdiction to investigate magistrates. Therefore, a blockage was created, which required urgent legislative intervention in order to clarify these aspects.

This is how the amendments to article 88^1 adopted by Emergency Ordinance no. 7/2019 appeared, which introduced paragraph (6) stating that: “Whenever the Criminal Procedure Code or other special laws refer to «the hierarchically superior prosecutor» in case of offences belonging to the jurisdiction of the Section for Investigating Crimes within Judiciary, the aforementioned term refers to the chief prosecutor of the section, including in regard to solutions adopted before the section started to operate”.

This legal provision must be interpreted in conjunction with the other norms previously mentioned. To take out of context this legal provision and present it individually, without the other accompanying legal provisions, with the aim of arguing that SIIJ is not under the control of the General Prosecutor is proof of the completely distorted manner in which the Section was presented to the European institutions.

The hierarchical subordination of the SIIJ to the General Prosecutor of the POHCCJ is obvious and results clearly from the legal provisions cited above, some of which are mentioned, but paradoxically ignored in the very observations formulated by the European Commission.

MEDIAFAX: Is keeping SIIJ likely to create the impression of a corruption phenomenon in the judiciary, as the European Commission points out? What are the arguments which refute these statements?

Dana Gîrbovan: Legal arguments cannot be based on "impressions"; they must be based on data and facts.

Data and facts prove the following aspects:

- In 2014, through a secret order, the chief prosecutor of NDA established the "Service for Combating Corruption in the Justice System".
- However, the investigations regarding magistrates were not carried out only by this service, but also by other services and subunits within NDA, across all territorial structures.
- In the period 2014-2018, according to a report of the Judicial Inspection, at the level of all the structures within the NDA there were 1.443 cases regarding 1.962 judges and 1.459 cases regarding prosecutors. Of these cases, some were kept open for years. In one situation, a case with a judge was kept opened for 12 years and 6 months and was closed by the NDA right before SIIJ started to operate.
- Before SIIJ started to operate, NDA closed numerous cases – including a case initiated *ex officio* in 2013 which concerned former members of the Superior Council of Magistracy (SCM) -, which proves that the establishment of the Section was necessary to put an end to this abusive practice.
- In the period 2014-2018, 276 cases against magistrates were initiated *ex officio* (163 cases initiated *ex officio* against prosecutors and 113 cases initiated *ex officio* against judges). This means that every month 5 or 6 cases against magistrates were initiated *ex officio*.
- If the number of cases against judges from a court are compared to the total number of judges from that court, we find out that approximately 70% judges from the High Court of Cassation and Justice, 60% of the judges from the Court of Appeal Ploiești, over 80% of the judges from the Court of Appeal Oradea, 45% of the judges from the Court of Appeal Bucharest, 40% of the judges from the Court of Appeal Iași etc. had open cases by NDA.

These facts and data prove that for the NDA the magistrates represented a real criminal segment, kept under surveillance for years. It is important to note that from the thousands of cases opened, only a few magistrates per year were sent to trial for corruption. Instead, however, many cases were kept inactive for long periods of time, even in cases in which it was obvious from the beginning that they had to be closed, the complaints against the magistrates being manifestly ill-founded or even not complying with minimum formal requirements to be considered valid to even open a case.

The phrase used by the European Commission that the creation of SIIJ "gives the impression of a corruption and criminal phenomenon well-spread within the judiciary" can also be identified in other reports of European institutions, such as the GRECO report. This phrase was also taken from the manipulative arguments used against SIIJ.

This pseudo-argument of the European Commission demonstrates not only its open partisanship, but also its obvious ignorance of statistical and factual data. Furthermore, this pseudo-argument disregards the conclusions of the Superior Council of Magistracy's Plenum which stated, after the verification performed by the Judicial Inspection at NDA, that: "The practices of the NDA prosecutors who investigated cases with judges in the manners specified in the Judicial Inspection's report represented forms of pressure on them, with direct consequences in terms of the administration of justice".

It results, thus, that for the European Commission the subjective impressions weighed more than concrete data and facts.

MEDIAFAX: Has the establishment of SIIJ affected the trust in the justice system?

Dana Gîrbovan: Trust/confidence in the justice system was negatively affected by the abuses of the NDA and by the interference of the secret services in the justice system, after they were made public starting with 2015, and the opinion surveys prove this fact.

Regarding SIIJ, if we take into consideration that after its establishment and operationalization, at the beginning of 2019, trust in the justice system started to slowly grow, it can be concluded that the creation of SIIJ positively influenced the trust in the justice system.

According to the Eurobarometer survey done by the European Commission across the EU, between 2015 and 2016, trust in the justice system in Romania decreased abruptly by 13%. It was the biggest decrease of trust in an institution across the entire EU in a single year.

Trust in the justice system must however also be correlated with trust in the NDA, given the fact that the Romanian justice system was publicly identified with the fight against corruption. Surveys from Romania show that in 2015 trust in the NDA was at 63%, whereas in 2018 trust in the NDA collapsed at 30%.

Therefore, citizens' trust in the justice system and especially in prosecutor's offices, at the time when SIIJ was established, in mid-2018, was already declining dramatically. Surveys from recent months show a slight increase of trust in the justice system.

Regarding SIIJ, it is important to note that a recent opinion survey shows that citizens do not support the abolition of SIIJ. Thus, 64% of the respondents to the CURS survey said that SIIJ should not be abolished. This survey confirms that citizens perceive SIIJ as a guarantee of judicial independence, as was also stated by the Romanian Constitutional Court.

MEDIAFAX: How do you explain the criticism expressed by the European institutions against SIIJ and how can the reputation of this structure be repaired?

Dana Gîrbovan: The problem with the reports of the European institutions – GRECO, CVM, the European Commission – consists not only in the false and unfounded arguments against SIIJ, but also in the clearly partisan, unprofessional and subjective manner in which they present the facts pertaining to the justice system in Romania and then evaluate them in order to draw conclusions. A comparative analysis of the positions of these institutions reveals fundamental common errors which are found in all these reports. At least part of these are based on the erroneous information given by the Romanian authorities. Taking this fact into consideration, in July 2019, we asked the Ministry of Justice to communicate to us copies of all the reports, briefings or observations sent to European

experts in order to verify their accuracy. We received no answer, the Romanian authorities demonstrating a complete lack of transparency regarding this subject.

Secondly, the European Commission stated in the CVM report that the "European experts" met with representatives of the professional associations of magistrates, emphasizing that the 2019 CVM report is the result of an extensive consultation.

In reality, this "extensive" consultation did not include the professional associations and the NGO's which had a more nuanced approach regarding the amendments to the laws concerning the justice system, the "European experts" consulting only the professional associations and the NGO's which have severely criticized the amendments in question.

Thus, professional associations such as the Association of Romanian Magistrates (ARM) – the oldest and largest association of magistrates, member of the International Union of Magistrates -, the National Union of Romanian Judges – member of MEDEL and traditional discussion partner with the European experts –, the Association of Judges for the Defense of Human Rights (AJDHR) or the Association of Romanian Prosecutors (ARP) have not been invited to meetings with the representatives of the European Commission, since they started to talk about the abuses in the justice system and the involvement of the secret services in the justice system.

The European Commission has thus founded its considerations and recommendations from the 2018 and 2019 CVM reports only on the opinions of some professional associations which confirm unreservedly its theses and prejudgments, ignoring the professional associations of judges and prosecutors which express, where it is necessary, clear and well-founded criticism regarding the justice system in Romania.

Thirdly, the European reports quote each other, which leads to a circular argument, given the fact that the primary information is false or flawed.

The most serious issue is, however, that the Romanian Government and the Ministry of Justice accept, due to their submissive attitude, even obvious erroneous recommendations. This has negative consequences not only for the justice system in Romania, but also at the national level, because of the position assumed by Romania in the European Union.

Eventually, CVM is, above all, a cooperation mechanism, not only a verification one, and Romania should assume more firmly the role of a partner who cooperates with another partner within the framework of a mechanism, role which obliges the Government to explain each time in an honest, open and well-argued manner the errors encountered in the CVM reports.

If these attitudes do not change, if the reports are not elaborated objectively and professionally, if the Romanian Government does not renounce to this auto-induced position of a simple doer and does not have a firm and dignified attitude to ask for the rectification of errors, when it is necessary, the effect will not only be the further decline of confidence in the justice system, but also the decline of confidence in the European institutions, with consequences whose gravity it appears very few are fully aware of.

https://medelnet.eu/index.php/news/europe/483-medel-letter-to-the-president-of-the-eu-commission-and-to-the-eu-commissioner-of-justice-about-the-cvm-report-on-bulgaria-and-romania

MEDEL letter to the President of the EU Commission and to the EU Commissioner of Justice about the CVM report on Bulgaria and Romania

18 december 2018

MEDEL – Magistrats Européens pour la Démocratie et les Libertés, has sent last Friday, December 14th, 2018, a letter to Mr. Jean-Claude Juncker (President of the European Commission) and Ms. Vera Jourová (European Commissioner of Justice, Consumers and Gender Equality), regarding the recently issued reports of the Cooperation and Verification Mechanism (CVM) on Bulgaria and Romania.

In that letter, MEDEL raises serious concerns regarding the conclusions expressed in those reports which, from its perspective, do not match the realities in both countries.

The letter points out concerns regarding:

- the lack of any reference to the interference of the Secret Services in the Romanian Judiciary;
- the independence of the judiciary, mainly in what regards the prevailing number of members appointed by the Parliament in the Bulgarian Judicial Chamber of the Supreme Judicial Council;
- the recurrent pressures faced by the president of the Bulgarian Supreme Court of Cassation (both through the media and from different institutions), threatening not only his career, but also his life and physical integrity;
- the lack of any reform in the prosecutor's office in Bulgaria, which has remained practically untouched in its substance, maintaining its Soviet-style structure, despite the criticisms coming both from inside and outside the country;
- the establishment of a new Anticorruption Agency in Bulgaria, incorporating, among others, a department previous belonging to the State Agency for National Security, with the competence to assist prosecutors in investigating high-level corruption suspects and extensive competences to carry out surveillance and intelligence measures, and that despite having such a great force, has a political leadership and has no explicit rules regarding its control.

In the letter, MEDEL urges the European Commission:

- to take into account all the facts and urgently ask the proper Romanian and Bulgarian authorities for further information and clarifications on the issues addressed;
- to urgently give full and close attention to the particular situation of Justice Lozan Panov, President of the Supreme Court of Cassation of Bulgaria.

To:

Mr. JEAN-CLAUDE JUNCKER

President of the European Commission

Ms. VERA JOUROVÁ

European Commissioner of Justice, Consumers and Gender Equality

December 14th, 2018.

Your Excellencies,

After the release of the Cooperation and Verification Mechanism (CVM) reports on Bulgaria and Romania, MEDEL – Magistrats Européens pour la Démocratie et les Libertés must raise serious concerns regarding the conclusions expressed in these reports which, from the perspective of our organization and its members, seem far off from the realities in both countries.

The force of this report should reside in its technicality and objectiveness, as well as in its ability to reflect relevant facts and to express, when necessary, conclusions issued after consulting divergent points of view on sensitive topics strictly based on legal, factual and non-partisan arguments.

Unfortunately, though, based on our observation, the CVM report failed to offer an objective analysis and to give valid recommendations in order to really support the two countries towards the progress of their judicial systems.

In the case of Romania, MEDEL has raised on numerous occasions the issue of the involvement of the intelligence services in criminal investigations and courts, stating clearly that this undermines the rule of law. We have not only addressed that issue on our statement approved on May 25th, 2018 (sent to the European Commission), but have also informed directly the DG Justice in a meeting held in that same month.

Unfortunately, the CVM Report on Romania covered the issue of the intelligence agencies' involvement in the judiciary superficially, ignoring the serious consequences that this fact has on the independence of the judiciary and the right to a fair trial. The credibility of the report is seriously affected when, by reading it, it results that words of politicians or journalists seem to be affecting the independence of judiciary more than covert actions of intelligence agencies.

As far as Bulgaria is concerned, we find it surprising that the European Commission discerns "steady progress" and declared three benchmarks "provisionally closed": judicial independence, the legal framework, and the fight against organized crime.

In the discussions with the experts of the European Commission, the Bulgarian Judges' Association (member of MEDEL) pointed out serious deficiencies in the judiciary, the severe and constant pressures on judges – specially against the president of the Supreme Court – and the disproportion of forces among judges and prosecutors, in a country where the prosecutors are still organized based on the Soviet model of "prokuratura".

All these observations and concerns from Bulgaria, supported by concrete examples, were ignored by European Commission's experts.

Here are some of their most important observations and concerns:

Concerns, regarding the independence of the judiciary

The Consultative Council of European Judges (a professional and independent body of the Council of Europe) points out, in its Opinion No. 1/2001, the standards concerning the independence of the judiciary. Amongst them, the Council recommends that, in respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers, in which composition at least one half of those who sit are judges elected by their peers, following methods guaranteeing the widest representation of the judiciary.

This highest standard is also pointed out in Recommendation No. R (94) 12 of UN on the Independence, Efficiency and Role of Judges, as well as in numerous reports of the Venice Commission.

Despite the constitutional reform in 2015, the members of the Judicial Chamber of the Supreme Judicial Council in Bulgaria elected by judges do not prevail over the members appointed by the Parliament. Thus each recruitment, appointment, career progress or termination of office of a judge in Bulgaria remains politically dominated.

The Council of Europe's Venice Commission issued an Opinion on October 9, 2017, in which it addressed the need for further judicial reforms in order to guarantee the independence of the courts.[1] These recommendations are still not fulfilled. The same is valid for recommendations issued by the Consultative Council of European Judges[2], the European Judges Association[3] and MEDEL[4]. In fact, they are completely ignored by the current political status quo.

The recurrent pressures faced by the president of the Supreme Court of Cassation

The President of the Supreme Court of Cassation, justice Lozan Panov, has been subjected to systematic harassment, both through the media and from different institutions, even the ones from within the judiciary. Things have degenerated so much that his life and physical integrity have been directly threatened: the bolts of the back tire of his official car were found to be loosened, and masked men "greeted" him at the door of the Supreme Judicial Council with freshly cut-off lamb heads – a threat usually used by the Sicilian mafia during the 1970's. No serious investigation has been conducted by the police in these cases.

These are just some of the many threats and pressures faced by the president of the Supreme Court of Bulgaria, a country which is praised by the European Commission in the CVM report for its great achievements in the fight against organized crime.

A very last example of the pressure towards the president of the Bulgarian Supreme Court of Cassation is the attempt of 10 members of the Supreme Judicial Council "to ask him for explanations" for the speech he gave on the international conference organized by MEDEL and the Bulgarian Judges' Association which took place in Sofia on November 16th this year. The letter of the same 10 members

[1] https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)018-e
[2] https://rm.coe.int/opinion-of-the-ccje-bureau-following-the-request-of-the-bulgarian-judg/16807630af
[3] https://www.iaj-uim.org/iuw/wp-content/uploads/2017/11/RESOLUTION-on-BULGARIA-12-NOVEMBER-2017.pdf
[4] https://medelnet.eu/index.php/news/europe/399-medel-communique-on-the-proposed-amendments-to-the-judiciary-act-of-bulgaria

of the Supreme Judicial Council to the president of the Supreme Court of Cassation contains unrevealed accusations of a "political speak" and there are concerns among judges in Bulgaria that these accusations will be used as a motive for justice Lozan Panov to be removed from his office.

The lack of any reform in the prosecutor's office

During the communist regime, the "Prokuratura" (Prosecutor's Office) represented the armed arm of law in the service of power, ready to "lawfully" remove or silence opponents of the regime.

After the communist regime changed in Bulgaria, the prosecutor's office remained practically untouched in its substance, maintaining its Soviet-style structure, despite the criticisms coming both from inside and outside the country. The Prosecutor General remains an extremely important power factor and trader, but without any accountability, like it used to be under communism.

This system has survived under the watch of the European Commission which, through the latest CVM report, is ready to recognize its legitimacy.

MEDEL finds this conclusion defiant and unacceptable, and totally against the recent Venice Commission recommendation.[5]

Furthermore, in its judgement in Kolevi vs. Bulgaria in 2009, the ECHR criticized the structure of the public prosecution by stating the following:

"This situation was apparently the result of a combination of factors including the impossibility of bringing charges against the Chief Public Prosecutor, the authoritarian style of the Chief Public Prosecutor, the apparently unlawful working methods he resorted to and also institutional deficiencies. In particular, the prosecutors' exclusive power to bring criminal charges against offenders, combined with the Chief Public Prosecutor's full control over each and every decision issued by a prosecutor or an investigator and the fact that the Chief Public Prosecutor can only be removed from office by decision of the Supreme Judicial Council, some of whose members are his subordinates, is an institutional arrangement that has been repeatedly criticized…"

Despite the findings of this respected international court, the institutional structure of the prosecutor's office remains unchanged.

The absolute power of the General Prosecutor in Bulgaria was denounced by the President of the Supreme Court of Cassation, attitude which had serious repercussions against him, as we already pointed out.

"Woe betides anyone who opposes the untouchable status of [Bulgaria's] Chief Prosecutor", the President of the Supreme Court of Cassation said, being quoted by the media. He also pointed out that in present day Bulgaria there is no mechanism for controlling the abuses of the General Prosecutor.[6]

[5] https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)018-e : "In sum, in the current Bulgarian system there is a weak structure for accountability of the PG who is essentially immune from criminal prosecution and is virtually irremovable by means of impeachment for other misconduct. This is problematic in itself, and in the system of judicial governance it distorts the balance of power as a strong PG sits as an ex officio member of the SJC while being the hierarchical superior to at least five its members".

[6] https://verfassungsblog.de/the-disheartening-speech-by-the-president-of-bulgarias-supreme-court-which-nobody-in- brussels-noticed/

The establishment of a New Anticorruption Agency

Bulgaria adopted in January 2018 a new anticorruption legislation, praised by the Commission: "the most significant single step was the adoption of the reform of the general anti-corruption framework in January 2018".

A new unified anti-corruption agency has been set up. The agency incorporates, among others, a department previous belonging to the State Agency for National Security and has the competence to assist prosecutors in investigating high-level corruption suspects. Although it has no competence to do criminal investigations itself, the agency has extensive competence to carry out surveillance and intelligence measures within its remit. It is the main agency responsible for the seizure and confiscation of illicit assets in Bulgaria.

The CVM report shows no concerns about the fact that an agency which has such a great force – from the tasks specific of the intelligence services to interceptions and confiscations – has a political leadership. Also, we must point out that there are no rules regarding the control of such an agency.

It is deeply troubling that this Commission has started its activity by summoning the President of the Supreme Court of Cassation. The judges complained that this could be used by the Prosecutor's Office to start an investigation, which, in the final analysis, may lead to the removal of Mr. Panov as President of the Supreme Court of Cassation.

The President of the Supreme Court of Cassation refused to appear before the Anti-Corruption Commission, arguing that such an approach violates the separation of powers and the essence of the rule of law.[7]

Moreover, the first professional analysis of the new law in respect with its provisions regarding the confiscation of illicitly acquired assets has shown that its fundamental principles are in serious contradiction with the European legislation – Directive 2014/42/EU of the European Parliament and of the Council. The seizure of assets without conviction under the Directive regulation is an absolute exception and is only applicable when the defendant is absconding the trial; the Directive does not allow confiscation of property which is not a direct benefit from criminal activity; the Directive does not allow confiscation of assets, obtained from the criminal by third parties in a good faith. The Bulgarian law contains provisions which do not comply with these principles enshrined in the Directive.

Meanwhile, when a judge from the Sofia City Court decided to temporarily suspend a confiscation case and refer to the Court of the EU with the abovementioned preliminary questions, the Chairman of the Anti-corruption agency publicly accused the judge of incompetence and malice. The Chief of the Anti-corruption agency made a public suggestion that the reporting judge was a liar and that referring to the EU Court would have serious consequences for Bulgaria.

This statement was followed by a series of extremely offensive publications in the media. These publications accused the judge of being heavily dependent of the criminals and called for a Polish model of judicial reform.

In this factual situation, the Judicial Chamber of the Supreme Judicial Council refused to protect the judge.

[7] http://www.bta.bg/en/c/DF/id/1904376

None of these serious issues appear in the CVM report, raising serious questions not only about its objectivity, but also about the actual knowledge of those who wrote it about what is actually happening in Bulgaria.

The Cooperation and Verification Mechanism was set up as a tool to help Bulgaria and Romania to fully respect the Copenhagen Criteria in the building of a modern and really independent Judicial System.

As guardian of the Treaties, it's an essential competence of the European Commission to fully assess and respect those criteria, so the reports are a vital instrument towards helping both States in their way to achieve that goal.

The CVM reports now presented, however, don't go in this direction, giving contradictory signs that can be misinterpreted and could be read in a very dangerous way, with effect in undermining the independence of the Romanian and Bulgarian Judicial systems.

For all these reasons, MEDEL hereby urges the European Commission:

- to take into account all of the above facts, and urgently ask the proper Romanian and Bulgarian authorities for further information and clarifications on the issues addressed;
- to urgently give full and close attention to the particular situation of Justice Lozan Panov, President of the Supreme Court of Cassation of Bulgaria, who is facing various serious pressures and

MEDEL remains fully available to offer to the Commission any further clarification, information or relevant expertise on the situation at hand in the judiciary in Romania and Bulgaria.

Yours Sincerely,

FILIPE MARQUES, m.p.

(President of MEDEL – Magistrats Européens pour la Démocratie et les Libertés)

EC Transparency Register nr. : 981119221130-18

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https://floricaroman.wordpress.com/2018/11/15/the-2018-cvm-report-on-romania-is-the-proof-the-brussels-bureaucrats-disdain-towards-the-obvious-abuses-of-the-romanian-justice-system/

THE 2018 CVM REPORT ON ROMANIA IS THE PROOF THE BRUSSELS BUREAUCRATS' DISDAIN TOWARDS THE OBVIOUS ABUSES OF THE ROMANIAN JUSTICE SYSTEM

November 15, 2018 · by floricaroman *· in Probleme justitie ·*

The CVM report published by the European Commission on 13.10.2018, on the "progress" of Romanian justice system, is written with such bad faith and disdain for respecting the democratic norms and human rights in Romania that any citizen who has had contact with the abuses of the justice system from the last years can only be totally sicken and profoundly revolted.

Contrary to the claims of some Romanian politicians who state that these unelected bureaucrats could be "misinformed" or that they do not know the reality in Romania, the content of the CVM Report demonstrate their bad faith, this report being a mockery to the people from the justice system or outside of it who know the judicial mechanisms, are of good faith and still believe in a fair and impartial justice for all Romanians.

All the criticisms made regarding the Superior Council of Magistracy, the Judicial Inspection, the establishment of the Section for the investigation of criminal offenses within judiciary, the illegal and proven intrusion of the secret services in the justice, the right of the citizens to criticize the abuses with which they come into contact, the appointments leading positions in the prosecutor's offices and in the courts, all these are not only unfounded, and some clearly undocumented, but they are quite tendentious, ignoring the obvious.

Even without legal studies, any person of good faith and interest in knowing the truth can refute almost every criticism from the report by simply using the internet for documentation.

The European Commission argues in the CVM report, in principle, that, as it worked until 2018, the justice was in an extraordinary and praisable "progress", a functional justice, worthy of a member state of the European Union, but that, suddenly, absolutely everything that has changed in the laws of justice and trying to change in the criminal codes is a "setback" of the judiciary, an attack on the independence of justice, the rule of law, which is why any changes must immediately stopped.

The European Commission is hiding behind an empty language and slogans, as if they are inspired from communism, the misery and abuses against Romanians committed by a justice subordinated to secret services, but which complains to Europe that its independence is violated if the Parliament has legislated to take the boot of the secret services from its neck.

All the miseries done by the justice system in recent years, the citizens whose right to defence and private life have been violated by leaking in the press some wiretappings in order to humiliate and disarm them, investigations that used handcuffs abusively, public presentation of those investigated as being already guilty, the trashing in the press of those investigated with the broad help of the investigators and institutions that should have prohibited such practices, all of these have seriously violated the presumption of innocence.

The shock part is that, while the CVM report was silent on these obvious abuses, it criticized Romania for not implemented yet the European directive on presumption of innocence.

The complete and total overlooking of the abuses committed by the justice in the last years is, in fact, the main theme of the CVM report.

The Romanian society is currently extremely divided, the main cause being the way the justice system works, the abuses that have occurred in recent years and the resistance within the system to bring justice to truly democratic modern standards.

On one hand, there are a number of politicians, magistrates, nongovernmental organizations and journalists who argue that nothing should be changed in justice system because it works very well, with the exception of some isolated abuses that are to be managed by the justice too.

On the other hand, though, there are those who expose the abuses, are scandalized by them, think that no abuse is tolerable and if any abuse has happened, the magistrates must answer for it. Also, in this group are those who argue that justice should be free from any influence of secret intelligence services.

Between the above two sides is a huge gap that the latest CVM report had just expanded.

The report completely ignores the abuses and unconditionally supports the side that until now has incited and instigated them. The same side now completely ignores the abuses or refers to them using "would be" or "alleged" abuses.

Instead for the European Union, through its power and influence, to take steps to reconcile the two sides, it chose with this report to widen the gap between the two sides and to radicalize them.

Those whose position is supported by the report will be even more radical, will ignore the abuses even more and will encourage them, relying on the position of the European Union and the content of the CVM report.

At the same time, those concerned about abuses or who suffered abuses will radicalize themselves too, condemning, based on arguments, the hypocrisy of the European Commission's bureaucrats and their blindness to the abuses in Romania, by this attitude the respective bureaucrats demonstrating that they do not care for the rights of the Romanians, as well as for the principles on which the European Union was founded: human dignity, with individual rights and freedoms, respect for the law, equality before the laws.

The effect of this obtuse and defiant attitude of the Brussels bureaucracy towards the breaches of human rights in Romania will feed the Eurosceptic current or will encourage even more radical positions.

Shortly, the latest CVM report shows not only how parallel and blind the bureaucracy in Brussels is with what is happening in Romania, but also raises reasonable suspicions that the EU agenda is distant and even divergent from that of the Romanian citizens.

As a judge, I feel offended by the aberrations in this report, which is why I will call off them in the next period.

This report is a shame for the European Commission, which claims that defends the fundamental values on which the European Union was built.

Briefing

Political Trends & Dynamics

Romania and Bulgaria's Membership in the EU: Progress, Challenges, Prospects

Volume 1|2019

SOE Dialog Südosteuropa

PTD INTRODUCES

Even before it started, Romania's six-month rotating presidency has been a very contentious matter in the EU. A growing row between the EU Commission and the Romanian government over alleged corruption, unconvincing judicial reforms, and growing nationalistic rhetoric has in fact become so real, that in discussions by some observers and analysts, the country is often placed in the same club with Poland, Hungary, and Slovakia as an actor pushing back against further reforms and the next in line for a procedure that may lead to the triggering of Article 7, an instrument devised to prevent member states from further developing policies that put democratic institutions under threat, including the rule of law. Having said that, many also view Romania's potential inclusion in the same group with Poland and Hungary as unfair to Bucharest since the country's democracy is not really endangered in the ways that this is manifested in its Central European neighbours. One thing that has since the very beginning been a critical feature of the Romania's changing relations with the EU is the rule of law. The idea of the Cooperation and Verification mechanism (CVM), stemming from the very moment when Romania joined the EU, was to achieve specific standards in the field of judicial reform and the fight against corruption, but the opinions on its necessity as well as success are very much divided. How contested the question of corruption in Romania is has been demonstrated on the streets of Romania, when the series of controversial decisions regarding the justice system led to massive street protests in 2017, on which we have written in one of the issues of Political Trends and Dynamics.[10]

While the EU commission issues the CVM reports regularly, their substance is subject to many disagreements. Since the very beginning, Romanian Ministers of Justice pointed at differences in opinion, but also at some problematic technical aspects, in particular related to the methodology used for the reporting. The European Commission also adopted and released a similar reporting system for Bulgaria. In 2018, Bulgaria's overall assessment was for the first time different from the Romanian one. In fact, for the first time since the beginning of reporting, the 2018 assessment evidenced a growing trust in Bulgaria to follow the CVM recommendations. The following contribution by Judge Dana Girbovan, the President of the National Union of Romanian Judges, is a detailed and critical review of the EU Commission monitoring mechanism in Romania. It elaborates on all aspects of this exercise, following the genesis of the reporting, its effects and its outcomes in the process of judicial reform in Romania.

Alida Vračić

The Cooperation and Verification Mechanism Report on the Romanian Justice System – A Critical Review

Dana Girbovan

Judge, President of the National Union of Romanian Judges

This article will provide a critical analysis of the functioning of the Cooperation and Verification Mechanism (CVM) report, instituted by the European Commission in Romania in 2007 in order to strengthen the judiciary. I will further elaborate on the transformation and implementation of the CVM and explain how the instrument has been perceived by the Romanian judicial authorities. The politicization of the CVM report has been highlighted by several Romanian ministers of justice since 2009, regardless of their political party affiliation. At the same time, over 85 % of Romanian courts adopted a Memorandum in 2016 in which they pointed out the report's lack of objectivity and urged the European Commission to publish the methodology, which has yet to happen. Unfortunately, this trend of politicization has become more and more pronounced, while the technical quality of reports has become weaker. The last report, released in the fall of 2018, is the clearest proof of the subjective character of the instrument, which contains, as I will demonstrate, unacceptable errors, inaccuracies, and misjudgements.

10 http://library.fes.de/pdf-files/bueros/sarajevo/12902/2017-02-03.pdf

The Establishment of the CVM

The European Commission, through its decision of 13 December 2006, established a Cooperation and Verification Mechanism to assess Romania's progress in achieving specific benchmarks in the field of judicial reform and the fight against corruption. The decision originally contained 4 objectives, which were clearly defined as follows:

> *"1. Ensure a more transparent, and efficient judicial process notably by enhancing the capacity and accountability of the Superior Council of Magistracy. Report and monitor the impact of the new civil and penal procedures codes.*
>
> *2. Establish, as foreseen, an integrity agency with responsibilities for verifying assets, incompatibilities and potential conflicts of interest, and for issuing mandatory decisions on the basis of which dissuasive sanctions can be taken.*
>
> *3. Building on progress already made, continue to conduct professional, non-partisan investigations into allegations of high-level corruption.*
>
> *4. Take further measures to prevent and fight against corruption, in particular within the local government."*[11]

The 2007 CVM report states that the Mechanism would improve the functioning of Romanian institutions and bring "administrative and judicial decisions, legislation and practices" in line with the EU.

First Signs of Politicization?

However, only two years after the CVM reporting scheme was established, the first signs that this would be more political than technical began to show when Romania was denied access to the Schengen zone due to alleged issues raised in the CVM report.

In 2009, Catalin Predoiu, the Minister of Justice at the time, responded that, "We will strongly defend in front of the experts every progress made by the magistrates and the system as a whole. The cooperation and verification mechanism should not be transformed into anything other than what it is. The benchmarks must not be extended, nor correlated with external elements of the mechanism itself."

One year later, the same Justice Minister again warned of this problem, calling the link between the CVM report and the acceptance of Romania into the Schengen Area an 'artificial' one.

The Derailment of CVM Report from Its Objectives and Scope

By 2012, the issue worsened, and the CVM report had moved even further away from its initial objectives, purposes, and scope, claiming "the objective of the mechanism is to help Romania reach standards comparable to those in other Member States." So the European Commission suddenly went from simply bringing Romania "in line" with the basic requirements of the rest of the EU (the initial aim of the CVM 2007) to the much broader goal of "reaching standards of other member states," failing to mention which member states were specifically meant by this.

In addition, to even consider such a new defined objective, the European Commission would have to have a similar mechanism of equally assessing the justice systems of all EU member states, and a mandate to do so, which the Commission does not, to date, have. In reality, such a system would even be impossible to create, due to the variety of justice systems in Europe. As such, the above statement from

11 https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32006D0928

the CVM report is simply a slogan, which is nevertheless increasingly used in the latest reports. The Romanian Minister of Justice Mona Pivniceru and the Vice President of the Superior Council of Magistracy (CSM) complained publically about this assessment of the report at the time.[12]

Reactions against the CVM Report from within the Justice System

Reactions were rife not just from politicians or the justice ministers, but also from Romanian judges. In 2016, in a Memorandum about the situation of the Romanian justice system, adopted by over 85 % of the general assemblies of the courts across the country, Romanian judges drew attention to "the reductive vision of justice, seen only through the perspective the 'fight against corruption', an error which was also assumed by the CVM report [at that time]."[13]

The judges urged, therefore, for "the full disclosure by the European Commission of the methodology it follows in writing the CVM report, the name of the experts consulted and of all the NGOs and institutions consulted on the justice system in Romania."[14]

As of February 2019, the European Commission has not yet disclosed the methodology or the name of the experts and NGOs consulted in writing the latest reports.

The 2017 CVM report did not bring any further clarification to the issues expressed in the Memorandum, but, to the contrary, it increased uncertainties by vaguely referring to the contribution of "other stakeholders, including Member States" to the respective report.[15] Thus a new factor was added to the equation, which further diluted the technicality, objectivity, and specificity of the methodology of the mechanism.

2018 CVM Report and the Loss of Touch with the Reality of the Romanian Judiciary

The technical quality of the CVM reports has continuously deteriorated, culminating with the 2018 report, which consists of serious factual errors, in addition to inexcusable judgmental errors. In the following section, I will address some of the most flagrant errors, inaccuracies, and judgmental errors that were included in the 2018 CVM report. I will first cite specific points of the CVM report and then offer my own assessment.

➔ *"One of such broader factors has been publicly-debated claims that cooperation agreements between the judicial institutions, notably the prosecution, and the Romanian Intelligence Services were the source of systemic abuse, in particular in corruption cases."*[16]

The problem of protocols is not a "claim" but a fact that has generated a constitutional conflict of unprecedented gravity. Practically, as the Romanian Constitutional Court has ruled, these protocols had prevented the courts from judging within the constitutional boundaries, something unimaginable in any state ruled by law. The other secret protocols, signed by the Romanian Information Service (SRI) with the Superior Council of Magistracy (SCM), Judicial Inspection (IJ) and the High Court of Cassation and Justice (ICCJ), are not even mentioned in the report.

➔ *"The amended Justice laws are now in force. They contain a number of measures weakening the legal guarantees for judicial independence."*

12 https://www.digi24.ro/stiri/actualitate/justitie/robert-cazanciuc-dupa-opt-ani-de-zile-mcv-risca-sa-devina-un-mecanism-mai-degraba-politic-381871.

13 https://www.unjr.ro/2016/09/08/memoriu-privind-situatia-justitiei-din-2016-votat-in-adunarile-generale/.

14 https://www.unjr.ro/2016/09/08/memoriu-privind-situatia-justitiei-din-2016-votat-in-adunarile-generale/.

15 https://ec.europa.eu/info/sites/info/files/comm-2017-751_en.pdf.

16 https://ec.europa.eu/info/sites/info/files/progress-report-romania-2018-com-2018-com-2018-851_en.pdf page 3.

On the contrary, the new laws reinforce and strengthen both the independence of the judges and the prosecutors. For example, according to the new laws the judges' careers are separated from those of the prosecutors, who both must be and seem to be independent of each other; the justice minister is no longer the holder of the disciplinary action; new evaluation criteria as well as the mandatory periodical psychological checking for judges and prosecutors was introduced; the verification if a judge or prosecutor is undercover agent of a secret service is done now individually, and the result is subject to the censorship of the court; it has instituted the public character of all the acts related to the administration of justice, etc.

The following are comments related to the key points highlighted by the author of this article.

➔ *"Extended grounds for revoking members of the Superior Council of Magistracy", which do not "correspond to CVM recommendations".*

➔ *"These assessments also underline that constitutionality checks are important but not the only issue at stake: they do not replace the necessity for a debate on the policy choices underlying major changes.*

➔ *"The Government adopted several Emergency Ordinances which accentuated some of the problems identified, for example by consolidating the authority of the Minister of Justice over prosecutors in particular through the triggering of disciplinary proceedings."*

The Minister of Justice can no longer initiate disciplinary proceedings against the judges or prosecutors. The Minister of Justice was able to initiate disciplinary proceedings after a change to the justice laws passed in 2012, and now, by the current changes the justice laws, that provision has been removed. At that time, in 2012, however, the Commission did not have a serious problem with this issue, despite the vehement criticism of the magistrates.

The Ordinance in discussion here just states that the Minister of Justice can only refer the issue of disciplinary investigation to the Judiciary Inspection, exactly like any other person can do.

➔ *"At the same time as the legal amendments, specific decisions have underlined the consequences of the concentration of power in the hands of the Minister of Justice. This was the case first with the dismissal of the Chief Prosecutor of the National Anti-Corruption Directorate (DNA) at the request of the Minister of Justice."*

The dismissal of the DNA Chief Prosecutor was an action generated by a series of violations of the Constitution, systematic violations of procedural rights by DNA prosecutors, increasing the number of acquittals, etc. The CVM report did not speak at all about these accusations.

➔ *"The Government also took the decision to refer the High Court of Cassation and Justice to the Constitutional Court. The convergence of action against these key judicial institutions has clear implications for judicial independence."*

It is mindboggling that the CVM report qualify the referral to the Constitutional Court as an action against the judiciary. In this case, the Romanian Constitutional Court ruled that there was a constitutional conflict generated by the High Court of Cassation and Justice, which has violated the Constitution and the law since 2014 in the way it formed the five judges' panels. The action that actually was directed against the judiciary was that of the High Court, but this fact was ignored by the CVM report.

➔ *"Even when the Council has come forward with a unanimous opinion, it has been ignored in significant cases." In the footnote, the report offered, for example, the "negative opinions on the legislative amendments on the Justice laws in September and November 2017."*

This is a gross factual error. The Superior Council of Magistracy had not given unanimous opinion on any of the amendments to the justice laws. On the contrary, the vote was always very tight.

➔ *"The National Anti-Corruption Directorate (DNA) has been a particular target in terms of pressure likely to damage its independence."*

Regarding the DNA, it is not the external criticism, but the failure of the anti-corruption criminal investigations done under the former Chief Prosecutor Laura Codruta Kövesi's leadership at the DNA that discredited and undermined that institution. Periodically more and more definitive acquittals are ruled by the courts, which speak louder about the lack of professionalism in the way those investigations were conducted than any criticism from outside the institution can.

In fact, if the European Commission, through the CVM report, had not ignored the abuses and the lack of professionalism in the criminal investigations done by the DNA under former Chief Prosecutor Kövesi's leadership, the current situation may have been avoided.

➔ *"In October, the Government adopted a new Emergency Ordinance which would modify the seniority requirements for DNA prosecutors, which could have further negative impacts on the operational capacity of the DNA."*

The DNA is a specialized Directorate within the General Prosecutor's office, which is at the top of the prosecutorial system. The reason why the DNA was placed there is because it investigates high ranking officials, which according to the Constitution can be investigated only by the prosecutors who are part of the General Prosecutor's office. In other words, it is contrary to the spirit of the law to staff this specialized structure at the top of the system with prosecutors with minimum years of experience, from the bottom of the system. This was the practice at large employed by Laura Codruta Kövesi, while she was the DNA chief prosecutor, which is one of the reasons why important anti-corruption investigations, including the ones related to the former Prime Minister and the former General Prosecutor had failed. For such investigations to hold in courts it requires that they be done by experienced prosecutors, with years of proven records, which is exactly the kind of prosecutors that Kövesi had not brought in the DNA.

Thus, contrary to the above-mentioned statement in the CVM report, staffing the DNA with more experienced prosecutors, would actually increase its operational capacity, not undermine it.

➔ *"The establishment of the new section for investigation of offences committed by magistrates in the amended Justice laws creates a specific concern with regard to the fight against corruption, as a new structure could be more vulnerable in terms of independence than has been the case so far with the DNA, as it could be used as an additional instrument to intimidate and put pressure on magistrates."*

This conclusion does not explain why the new section "could be more vulnerable in terms of independence than has been the case so far with the DNA." In fact, the organization and operation of the new section arguably ensures real independence of the judges and prosecutors and a real, efficient, and prompt criminal investigation for infractions committed by magistrates.

Conclusion

As detailed in my analysis, the Cooperation and Verification Mechanism has been transformed over time. Initially set as a technical tool designed to support the real efforts to reform and improve the Romanian justice system, in the view of Romanian authorities it has gradually converted into a political, rather than technical instrument. Thus, Romanian judicial experts call for the full and objective revision of the entire mechanism.

The Friedrich-Ebert-Stiftung in Southeast Europe

After more than two decades of engagement in southeastern Europe, the FES appreciates that the challenges and problems still facing this region can best be resolved through a shared regional framework. Our commitment to advancing our core interests in democratic consolidation, social and economic justice and peace through regional cooperation, has since 2015 been strengthened by establishing an infrastructure to coordinate the FES' regional work out of Sarajevo, Bosnia and Herzegovina: the Regional Dialogue Southeast Europe (Dialogue SOE).

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Friedrich-Ebert-Stiftung
Publisher: Friedrich-Ebert-Stiftung Dialogue Southeast Europe
Kupreška 20, 71 000 Sarajevo, Bosnia and Herzegovina
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Orders / Contact: info@fes-soe.org

Responsible: Felix Henkel, Director, Dialogue Southeast Europe
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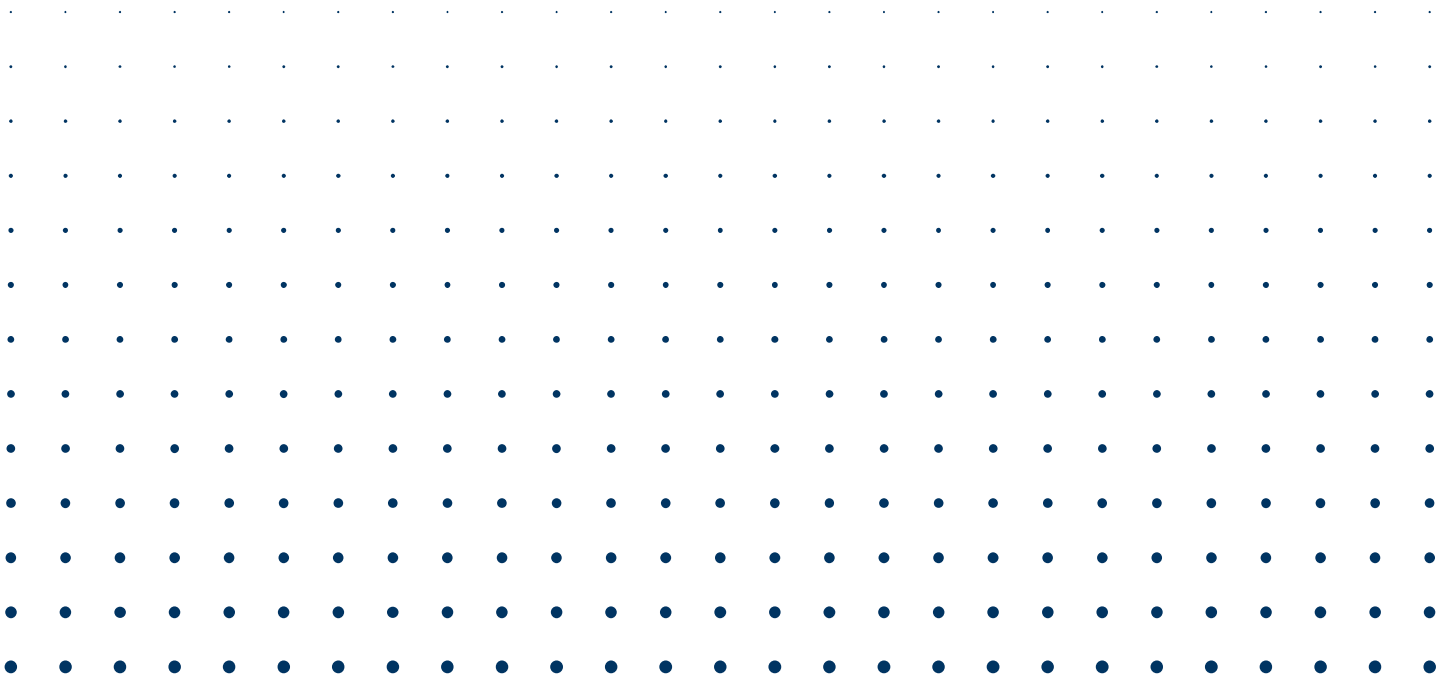
Editors: Alida Vračić, Jasmin Mujanović
Managing Editors: Felix Henkel, Denis Piplaš
Editorial Assistant: Tea Hadžiristić
Photos: Anadolu Agency (p. 12, 14, 16)
Design / Realization: pertext, Berlin

This publication has been produced in cooperation with:

BIRN CONSULTANCY
Helping you make sense of the Balkans



ISSN 2490-4082

ASOCIAȚIA MAGISTRAȚILOR DIN ROMÂNIA
Membru al Uniunii Internaționale a Magistraților • Membru al Asociației Europene a Magistraților • Membru al Alianței pentru o Justiție Europeană în România

ROMÂNIA 1918-2018 | SĂRBĂTORIM ÎMPREUNĂ

No. 227/10 October 2018

To

The Venice Commission of the Council of Europe

The Romanian Magistrates' Association (RMA) is a professional and national, apolitical, non-governmental organization, stated to be of „public utility" by the Government Decision no. 530/21 May 2008, with the headquarters in Bucharest, Regina Elisabeta Boulevard no. 53, District 5, tel./fax. 021.4076286, e-mail amr@asociatia-magistratilor.ro, tax registration code 11760036, bank account RON IBAN RO37RNCB0090000508620001, open at the Romanian Commercial Bank (BCR)-Lipscani branch – legally represented by Judge Dr. Andreea Ciucă, as Interim President.

Taking into consideration the Preliminary Opinion No. 924/2018 on the Draft 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, sends the following

OPEN LETTER

The documents of the Venice Commission are important for the Romanian judiciary and magistrates. The independence of justice is vital for any State abiding by the rule of law. The Romanian Magistrates' Association, in all its actions, has and is always keeping in mind this sine-qua-non reality.

Ever since 2015, The Romanian Magistrates' Association (RMA), has been an active participant in the dialogue aimed at amending the Laws of Justice. The whole activity carried out in this field has taken into account the purpose of RMA, as established by the Statute, in 1993. The article 5 of the Statute stipulates that the purpose of RMA is "to represent the interests of magistrates in relation to other domestic and international subjects of law". RMA also considered the objectives set out in the Statute to achieve this goal, namely the promotion of the liberty and dignity of the profession, the defense of the status of magistrates in the rule of law and the independence of the judiciary [Article 6 (2) of the Statute], the defense of the freedom, dignity and professional status of magistrates [Article 6 paragraph 4 of the Statute].

RMA points out that, as it has firmly stated in open letter no. 75/4 October 2017, addressed to the Prime Minister and to the Minister of Justice, the opening of the dialogue did not involve, in 2015, nor in 2016 or 2017, a "blind" agreement with the proposals made for amending the Laws of Justice, a "yes-man" reaction. Opening up the dialogue was the clear-cut statement of both positive and accepted elements for the judiciary and for magistrates contained in the successive forms of the Amending Bill of the three Laws of Justice as well as the obvious criticism of proposals with negative effects.

Consequently, RMA is directly interested that such an important document, as the Preliminary Report of the Venice Commission is, reflects fully and without errors the aspects it

refers to. Such an objective view is in the interest of the Romanian judiciary and magistrates. That is why we kindly ask to take into account the following concrete arguments:

1. *Concerning the possibility that the superior should invalidate the prosecutors' solutions for groundlessness reasons*

The Preliminary Report wrote:

"71. ... 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*** *(see Article 64 (3)).*

"73. ***The possibility, granted to the higher prosecutor, of invalidating a prosecutor's solution for being "ungrounded"****, has sparked criticism and* ***has been perceived as an interference with the prosecutors' independence in the exercise of their functions****. Fears have been expressed that, in conjunction with the increased role of the Ministry of Justice - who is politically appointed - in the appointment and dismissal procedures, this may open the possibility for the Ministry of Justice to influence criminal investigations through pressure on the Chief Prosecutors appointed on his/her proposal.29 Both the Prosecutor General and the Head of DNA, whose position would appear to be strengthened by this new power attributed to them, objected to this proposal in their meetings with the rapporteurs. In their view, this power would make it more difficult for them to resist pressure from politicians to interfere in individual cases, not least cases of corruption."*

We have to stress, without deepening the problem, that the possibility for the superior prosecutor to invalidate the prosecutors, solutions for reasons of groundlessness (the term used in the Romanian law is UNFOUNDED, FOUNDLESSNESS) **in not new in the Romanian legislation**, contrary to the conclusion of the Report. In this respect, RMA stresses that this possibility is already stipulated in the Code of Criminal Procedure, which came into force February 1st 2014.

According to the provision clearly stated in article 304 (1), *when the prosecutor ascertains that an act or a procedural measure does not observe the legal provisions or is UNFOUNDED, he/she invalidates it on his/her own initiative or following complaint of the interested person, and justifies the invalidation.* The superior prosecutor also has this possibility, under art. 304 (2): ***The provisions in para (1) also apply to the verifications made by the superior prosecutor on the acts of the hierarchically lower prosecutor****.*

The **Code of Criminal Procedure already stipulates** the verification of the legality and SOLIDITY of the prosecuting acts by the hierarchically higher prosecutor. The provisions in art. 264 (3), (4) allowed the hierarchically higher prosecutor to invalidate the indictment for reason of FOUNDLESSNESS.

Regarding the mention in the Preliminary Report (para 75) that, in the absence of a clear explanation of the meaning of the term „foundlessness", the risk of political interference in individual cases increases, we point out that both Romanian prosecutor and judges have a long experience, not only in criminal cases, but also in civil cases, in regard to the verification of acts on grounds of „foundlessness". Therefore, the Romanian magistrates know very well the meaning of this legal term and apply it, and have never ascertained such a „risk" in time.

Regarding the recommendation in the Report (para 75) on the elimination of the term „foundelessness" from art. 64 (3) of Law no. 303/2004, if its meaning is not clarified, RMA points out that such a solution would lead to the abolition of several legal institutions and to the annulment of several texts of law – aspects that the Commission ignored. In this respect, RMA insists that the legal terms „solidity"/ „foundlessness", „founded"/ „unfounded" are mentioned at least in the following texts of law:

- Art. 242 (12) Code of Criminal Procedure concerning „revoking the preventive measures and replacing a preventive measure with another preventive measure";
- Art. 265 (10) Code of Criminal Procedure concerning the „summons";
- Art. 304 (1), (2) Code of Criminal Procedure concerning „the invalidation of court or procedural acts";
- Art. 462 (4) Code of Criminal Procedure concerning „the solutions following retrial", when a revision is requested;
- Art. 464 Code of Criminal Procedure concerning „the effects of the rejection of the revision request";
- Art. 586 (6) Code of Criminal Procedure concerning „the replacement of the fine with prison";
- Art. 19 Code of Criminal Procedure concerning „the continuity" of the full court;
- Art. 22 Code of Criminal Procedure concerning „the judge's role in finding out the truth"; the important phrase used in this article is **„founded and legal decision"**;
- Art. 137 Code of Civil Procedure concerning the „evidence presented to a court lacking jurisdiction";
- Art. 143 (1) Code of Civil Procedure concerning „suspending the trial process";
- Art. 163 (3) g) Code of Civil Procedure concerning how the summons is communicated;
- Art. 186 (1) Code of Civil Procedure concerning „the term reinstatement";
- Art. 187 (1.1) a) and (2) Code of Civil Procedure concerning „the violation of the obligations regarding the trial. Sanctions";
- Art. 211 Code of Civil Procedure concerning „the purpose of the trial" – the text of law defines the purpose as being ***„the legal and founded solutioning"*** of the trial;
- Art. 213 (3) Code of Civil Procedure concerning „carrying out the process without the presence of public";
- Art. 214 (2) Code of Civil Procedure concerning „the continuity of the court";
- Art. 215 (4) Code of Civil Procedure concerning „the order of judging trials";
- Art. 22 (1) Code of Civil Procedure concerning „the postponement of trail due to lack of defense";
- Art. 229 (2.4.) Code of Civil Procedure concerning „the informed term";
- Art. 230 Code of Civil Procedure concerning „the changing of the trial term";
- Art. 238 (2) Code of Civil Procedure concerning „the estimated length of the trial";
- Art. 241 (2) Code of Civil Procedure on „ensuring celerity";
- Art. 338 (1) Code of Civil Procedure on „carrying out new tests";
- Art. 357 (1) Code of Civil Procedure concerning „the interrogation by a judge or a commission";
- Art. 358 Code of Civil Procedure concerning „the refuse to come to the interrogation and refuse to answer";
- Art. 386 (2) Code of Civil Procedure on „judging the case";
- Art. 484 (7) Code of Civil Procedure on „suspending the execution of sentence" during the appeal;

- Art. 524 (5) Code of Civil Procedure concerning „challenge on ground of trial delay";
- Art. 710 (1) Code of Civil Procedure concerning „the reinstatement of limitation";
- Art. 934 (3) Code of Civil Procedure concerning „the divorce";
- Art. 979 (7) Code of Civil Procedure concerning „provisional measures in the matter of intellectual property rights".

2. *Regarding the lack of legal empowerment of the intelligence services to make audio/ video recordings*

The Preliminary Report states:

"95. 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, the intelligence service having been, until the decision of the Constitutional Court in 2016, the only authority technically equipped for such measures and legally authorised to use the concerned technical means…"*

According to article 12 and article 13 of Law 14/1992 on the organization and the operation of the Romanian Intelligence Service (SRI), the competence of SRI was strictly limited to providing support, at the request of criminal investigation bodies, ONLY in case of "certain criminal investigation activities for offences regarding the national security". The threats to the national security are expressly defined in art. 3 of Law 51/1991 - Law on National Security of Romania.

Not only does the law not allows the involvement of the Service in other types of offenses, but expressly forbids it, by art. 13 of Law 14/1992, which states that "The bodies of the Romanian Intelligence Service may not carry out criminal investigation activities, they may not take a detention measure or preventive custody, nor dispose of their own arrest places".

In February 2016, the Constitutional Court (CCR) has declared unconstitutional article 142, para 1 of the Criminal Procedure Code that referred to the bodies of the state that can conduct the technical surveillance (communications, audio-video ambient wiretapping) because it was not specific enough. That article stated that "the prosecutor enforces the technical surveillance or may order it to be carried out by the criminal investigation body or by specialized workers of the police or by other specialized state bodies." CCR showed that the phrase "or other specialized state bodies" does not comply with the Constitution, because is not clear to whom it refers.

The Service conducted in 2014 "42,263 technical surveillance warrants and 2,410 ordinances from the Public Ministry and the National Anti-corruption Directorate (DNA)", stated the activity report submitted by SRI to the Parliament that year.

According to the Criminal Procedure Code (version in force in 2009) article 65, "it is the duty of the criminal investigation body and to the court to administer the evidence during the criminal trial."

Furthermore, Decision no. 51/2016 issued by the Constitutional Court clearly states that no law empowered SRI to put into effect the technical surveillance issued under the Criminal Procedure Code. In this respect, the Court said:

"28. According to art.143 paragraph (1) of the Criminal Procedure Code, the technical surveillance activity is recorded by the prosecutor or by the criminal investigation body, and a report is written for each and every technical surveillance activity... Likewise, according to art. 143 paragraph (4) of the Criminal Procedure Code, the communications or conversations secretly recorded, which concern the deed under investigation or help identify persons or their location, are rendered by the prosecutor or the criminal investigation body in a report that mentions the warrant issued allowing the technical surveillance, the phone numbers, the identification data of the 13 information systems or their points of access, the names of those communicating – if known -, the hour and date of each conversation or communication. According to the the same paragraph (4), the authenticity of the report is certified by the prosecutor."

The Constitutional Court also reminded that, under the old Criminal Procedure Code, issued in 1968 and in force until January 31st 2014, the provisions of art. 91^2 (1), first thesis, stated that the prosecutor should personally make the recordings or could ask the criminal investigation body to make them. Consequently, the prosecutor and the criminal investigation bodies were the only ones empowered to carry out surveillance.

According to the new Criminal Procedure Code that came into force on February 1st 2014, the recordings could have been made by other State bodies, as well. But, in Decision no. 51/2016, the Constitutional Court stated, in paragraph 47, that „*no provision in the National legislation in force, except those in art. 142 paragraph (1) of the Criminal Procedure Code, expressly empowers other State bodies than the criminal investigation bodies to make recordings, that is to execute a technical surveillance warrant."*

Consequently, **neither before nor after Decision no. 51/2016 of the Constitutional Court was issued, the Romanian Intelligence Service was NOT legally empowered to carry out technical surveillance**; that is why the phrase „other specialised State bodies" was deemed unconstitutional. In this context, an extremely important aspect should be mentioned, namely that the technical surveillance/ recording warrants carried out by SRI, following cooperation protocols signed with prosecutor's offices, ignored the legal provisions pointed out by the Constitutional Court.

3. *Regarding the existence of special rules concerning the power of magistrates to criminally investigate and the power to judge*

The Preliminary Report wrote:

"88. One may wonder whether the recourse to specialised anti-corruption prosecutors,33 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****."*

Practically, the recommendation at the end of paragraph 88 shatters the rules of competence applicable to the magistrates and overlooks the existence of special competences

presently provided for judges and prosecutors regarding the prosecution and trial, when they are accused of criminal offences. Therefore, a structure investigating criminal offences within the judiciary would only add to the list of special competences and would not „create" such competences for the first time.

The High Court of Cassation and Justice, in the exception of unconstitutionality regarding this structure, said that „The creation of this structure investigating criminal offences committed *exclussively by the professional category of magistrates, when in Romania there is no other professional category investigated by a specialised body* and without basing its creation on any objective and rational reason (with no studies showing the breadth of the criminal offences committed by magistrates is such as to justify the creation of a special structure to investigate them), represents an obvious discriminatory measure and violates the constitutional principle of equal rights."

Such a statement lacks any legal basis and is surprising, considering it was made by the highest court in the country. In fact, the Constitutional Court did not consider this argument legally founded.

Mention should be made that, by law, military prosecutor's offices and courts were created, **their jurisdiction refering to a professional category.** Their creation was challenged several times at the Constitutional Court, based on the same arguments brought by the High Court of Cassation and Justice in 2018 that were rejected as unfounded.

For instance, the Court said, in its Decision no. 273/2003: *„The author of the exception alleges that these provisions, according to which citizens belonging to a category are subject to the jurisdiction of special courts are contrary to the Constitution, namely the provisions in art. 4 para (2) regarding the equality criteria, in art. 16 regarding the equality of all citizens before the law and the authorities, in art. 21 regarding the free access to justice and in art. 49 paragraph (2) on restricting the exercise of some rights or freedoms. The author also alleges violation of art. 6 of the Convention for the protection of human rights and fundamental freedoms, regarding the right to a fair trial. After examining the exception of unconstitutionality, the Court considers it to be unfounded. The creation of military courts, whose jurisdiction is determined by the category of people – military or personnel of certain bodies – is recognised in all law systems and violates neither the principle of equal rights nor the procedural rights guaranteed by the Convention for the protection of human rights and fundamental freedoms."* Similar arguments were given by the Constitutional Court in Decision no. 375/2005.

Mention should also be made that **different rules of jurisdiction for criminal prosecution are set not only for judges and prosecutors, but for other categories as well.** For instance, article 72 paragraph (2) of the Constitution sets derogatory rules for the members of the two housed of Parliament.

In fact, Decision no. 33/2018 issued by the Constitutional Court reveals that **there are situations when judges and prosecutors are not subject to the common law jurisdiction with regard to criminal prosecution and trial:**

"137. When analysing the provisions laid out in the Constitution, the Court noticed that ***the Fundamental Law itself sets derogations from the usual jurisdiction of the prosecutor's offices, taking into account the person's quality.*** *Examples thereof are the provisions in art. 72 paragraph (2) second thesis, regarding the members of the Senate and Chamber of Deputies –* „*The criminal prosecution and indictment fall under the exclusive jurisdiction of the High Court of*

Cassation and Justice"- in art. 96 paragraph (4) first thesis, regarding the indictment of Romania's President, and in art. 109 paragraph (2) final thesis, regarding the ministers; in both latter cases, „the prosecuting competence belongs to the High Court of Cassation and Justice.

138. The ***Criminal Procedure Code*** *also establishes jurisdiction according to the quality of the person for the members of the courts of appeal - art. 38 paragrahp (1) letters c), d), e), f) and g), for* ***the judges of courts, tribunals, courts of appeal and the Military Court of Appeal and for the prosecutors of the prosecutor's offices acting in cooperation with these courts, for lawers, public notaries, bailiffs, auditors of the Audit Office, as well as external public auditors, heads of religious denominations and other high clerics – bishops or their equivalent and higher in the ecclesiastic hierarchy -, assisting magistrates with the High Court of Cassation and Justice, the chairman of the Legislative Council, the Ombudsman and his deputies; art. 40 paragraph (1\) refers to the members of the Romanian Parliament and the Romanian members of the European Parliament, the members of Government, the judges with the Constitutional Court, the members of the Superior Council of Magistracy, the judges of the High Court of Cassation and Justice and the prosecutors of the Prosecutor's Office with the High Court of Cassation and Justice.***

139. Considering the above mentioned constitutional and legal context, the new provisions establish the jurisdiction of the Prosecutor's Office with the High Court of Cassation and Justice, empowering it to criminally prosecute the criminal offences committed by „judges and prosecutors, including the military judges and prosecutors, as well as the members of the Superior Council of Magistracy". ***The comparative analysis of the legal contents of the provisions in art. 38 and art. 40 of the Criminal Procedure Code with the modifying norm led the Court to state that the latter completes the jurisdiction of the Prosecutor's Office with the High Court of Cassation and Justice, empowering it to prosecute the criminal offences committed by the judges in courts, tribunals, military tribunals, courts of appeal and the Military Ciourt of Appeal and by the prosecutors in the prosecutor's offices with these courts. As far as the members of the Superior Council of Magistracy, the judges of the High Court of Cassation and Justice and the prosecutors of the Prosecutor's Office with the High Court of Cassation and Justice are concerned, the criminal offences committed by them are prosecuted by the Prosecutor's Office with the High Court of Cassation and Justice, as stipulated by the legal provisions in force.***

*142. In fact****, setting special rules of jurisdiction for certain categories is not something new in the current legal framework of criminal procedure …****".*

Consequently, to make a reality of the recommendation that judges and prosecutors should be subject to the common law jurisdiction for other criminal offences than those of corruption, *similarly to all the other Romanian citizens,* would mean to change all the above listed rules of special jurisdiction, whose constitutionality has not been challenged.

4. *Regarding the revocation of the members of the Superior Council of Magistracy, if the majority of judges and prosecutors in the courts or prosecutor's offices those members represent withdraw their vote of confidence*

The Preliminary Report writes:

"142. 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 52 CDL-AD(2010)040, para. 65, CDL-AD(2014)010, para. 188. 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. - 27 - CDL-PI(2018)007 independently..."

The Venice Commission, in supporting this argument, refers to its previous opinions, mainly CDL-AD(2014)029 – Notice on the suggested amendment of the Law regarding the State Council of Prosecutors in Serbia, paragraph 56.

The Commission does not recognise though there is a fundamental difference between the two revocation procedures, the one included in the amendements to Law 317/2004 regarding the Superior Council of Magistracy (SCM) in Romania and the one in Serbia. While in Romania the SCM members can be revoked ONLY by the majority of judges/ prosecutors who had elected them, in Serbia it is the National Assembly who decides the revocation. Therefore, the allegation that the revocation determined by „withdrawal of confidence" affects the idependence of the members of the Superior Council of Magistracy seems fully justified, considering the obvious political component of the procedure in Serbia. Nontheless, such a conclusion is invalidated by the amendments to Law no. 317/2004 regarding the Superior Council of Magistracy (SCM) in Romania, since the procedure is the prerogative of the judiciary, specifically of the magistrates who gave their vote of confidence to the SCM members, when they elected these members.

Art. 1 (2) in Law no. 317/2004 clearly states that „the members of the Superior Council of Magistracy answer to the judges and prosecutors for their activity while exerting their mandate". This principle is justified and necessary because, if it did not exist, the Superior Council of Magistracy would become a body lacking accountability; it would not be accountable to either the other State powers or to the citizens or their own professional body. Should we take into account the length of the SCM members' mandate (6 years), the legislator's decision to set up an efficient mechanism for their revocation does not seem to be unjustified. The procedure adopted includes concrete guarantees that do not allow for it to be abusively used – guarantees welcomed by the Commission. We therefore believe this procedure does not limit the independence of the SCM members, but contributes to the increase in accountability and professionalism of this body which, according to the Constitution, is „the guarantor of the independence of justice".

5. *Regarding the contestation of the amendments to the Laws of Justice before the Constitutional Court, by the High Court of Cassation and Justice*

The Preliminary Report writes:

"25. 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 for the country, 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."*

The statement is not accurate. The notification of the Constitutional Court in 2018, by the High Court of Cassation and Justice, on the changes to the Laws of Justice, was not a sole event.

In this regard, we refer to the fact that in 2005, the High Court of Cassation and Justice contested before the Constitutional Court the Law regarding the judicial reform. The referral no. 116 June 24th 2005 concerned the amendments to Law no. 303/2004 on the statute of judges and prosecutors and to Law 317/2007 on the organization and functioning of the Superior Council for Magistracy. The referral presented by th High Court of Cassation and Justice in order to exercise a prior control of constitutionality was analysed by the Constitutional Court in Decision no. 375/2005, published in the Official Gazette of Romania no. 591/2005.

Romanian Magistrates' Association
Interim Chairperson,
Judge dr. Andreea Ciucă

No. 143/ July 29, 2019

To Minister of Justice, Ms. Ana Birchall

Sent by email: dpc@just.ro

Subject: point of view regarding the two reports adopted by GRECO at Strasbourg, during the 83rd Plenary Meeting

Dear Madam Minister,

Following the address of the Ministry of Justice, received on July 17, 2019, by which we were asked for a point of view regarding the two reports adopted by GRECO at Strasbourg, during the 83rd Plenary Meeting, Romanian Magistrates Association (AMR) and the National Union of Romanian Judges (UNJR) present you the following observations, jointly adopted.

The observation set includes issues regarding the methodology and information sources used by the GRECO experts and it also contains the detailed analysis of the two reports content. The basis of the following observations is represented by matters regarding the judicial system or the status of judges and prosecutors.

I. regarding the methodology and information sources used by the GRECO experts for the ad-hoc report

The main way of collecting information for the GRECO reports (evaluation, compliance or ad-hoc ones) is based on the field visits in that country. GRECO experts discuss with stakeholders, such as representatives of state authorities, representatives of professional associations, as well as representatives of non-governmental organizations.[1]

This way of collecting information from primary sources contributes, at least in theory, to the quality and credibility of that kind of reports. Such a visit also took place on the occasion of the ad-hoc report adopted at the March 2018 plenary meeting. Details regarding the meetings that took place and attended by GRECO experts can be found in the 3rd paragraph of the report. During the visit in Romania, GRECO experts also met the Romanian Magistrates Association (AMR), the National Union of Romanian Judges (UNJR) and the Romanian Prosecutors Association (APR). Those professional organizations have expressed their views on the draft regarding the laws of justice, including on matters related to the prosecutor status. It was also debated that the verification for reasons of groundlessness (not only of illegality) of the case prosecutor's solutions is a provision existing for many years in the Criminal Procedure Code.

[1] For more information regarding the country visits and the manner of carrying out the action – see the 13th and 14th article from the Statute Of The Group Of States Against Corruption (Greco) - and also see the rules no. 27,28 and 34 from the GRECO Rules Of Procedure.

The new rules regarding the access in magistracy or the retirement of the magistrates were also a topic of discussion.

We presented in detail to the experts the reasons that led to the establishment of the *Section for the Investigation of Offences in the Judiciary*, with concrete examples of pressures exerted in the past on judges by criminal investigations and we also presented them the references to the new guarantees of independence and professionalism established by law for the newly established section.

The methodology that guides the processing, analysis and integration of the data collected after the country visits is not specified in the documents regarding the organization and functioning of GRECO and neither in the ad-hoc report, although it is supposed to be the basis for GRECO's expert analysis. However, it is assumed that in the context of this process, expert reporters are guided by certain essential principles, including impartiality and objectivity. It is noted that there is a lack of a clear methodology for analyzing and integrating the data collected from primary sources. We also noticed that many of the argued views of AMR and UNJR are not found in the ad-hoc report, while those of other interlocutors are integrated, their arguments being taken as such, without any checks. The most conclusive and simplest example in this case is the one regarding the verification of the prosecutor's solutions based on reasons of groundlessness. The impartiality of GRECO experts and also the objectivity of the ad-hoc report are thus questioned.

Within the GRECO experts meeting (happened on February 20, 2018) with the professional associations of magistrates, as well as thereafter, including through publicly transmitted points of view, UNJR and AMR have clarified the chronology of the projects implemented from 2015 to modify the Laws of Justice. We also presented our point of view regarding the meaning of the *Justice Laws* concept.

AMR and UNJR presented the provisions regarding the status of the prosecutors, in the context of preserving his independence, by reference to the constitutional norms, to the opinions of the Consultative Council of the European Prosecutors and to the hierarchical system of organization of the Public Ministry - the latter being one of the systems of organization of the prosecutor's offices, at European level, included in the Rome Charter.[2] Also, there were presented specific arguments regarding the establishment of the *Section for the Investigation of Offences in the*

[2] It is indicated in the section XIV of the Rome Charter that: *The organisation of most prosecution services is based on a hierarchical structure. Relationships between the different layers of the hierarchy should be governed by clear, unambiguous and well-balanced regulations. The assignment and the re-assignment of cases should meet requirements of impartiality.* Point 40 of the detailed explanatory note on the principles set out in the Charter states that: *A hierarchical structure is a common aspect of most public prosecution services, given the nature of the tasks they perform. Relationships between the different layers of the hierarchy must be governed by clear, unambiguous and well-balanced regulations, and an adequate system of checks and balances must be provided for.*

Judiciary, with special reference to the need of provide solid guarantees of independence and professionalism of the prosecutors that are operating within it.

In the same sense, through the open letter no. 107/23 April 2018, sent to GRECO, the Romanian Magistrates Association (AMR) presented in detail the following aspects: i) the chronology of the legislative process for amending Justice Laws, starting with 2015; ii) the view of the Superior Council of Magistracy; iii) judges independence – operational and functional independence of the prosecutors; iv) the Section for the Investigation of Offences in the Judiciary compared to the *Service for combating criminal offenses in justice*, within DNA; v) Judiciary Inspection situation, by comparing it with the Justice Laws modifications; vi) material liability of judges and prosecutors, respectively the promotion of judges and prosecutors in execution positions - pointing out the issues that, justly, dissatisfy the magistrates' body, as well as the need to remedy them, by correcting / eliminating some legal provisions.

In the open letter it was emphasized that the way in which the independence of the prosecutors is affirmed and reaffirmed by the modifications of the Justice Laws implements the principles contained in the Opinion no. 9 (2014) of the Consultative Council of European Prosecutors (CCPE), adopted on December 17, 2014. Specifically, are implemented the following principles:

- ensure the independence and effective autonomy of prosecutors and to establish proper safeguards - pct. 2 (par 7) from the explanatory note contained by Opinion no. 9 (2014);

- independence of prosecutors – which is essential for the rule of law - must be guaranteed by law - pct. 3.1. (par. 33) from the explanatory note contained by Opinion no. 9 (2014);

- independence of prosecutors is not a prerogative or privilege conferred in the interest of the prosecutors, but a guarantee in the interest of a fair, impartial and effective justice that protects both public and private interests of the persons concerned - pct. 3.1. (par. 35) from the explanatory note contained by Opinion no. 9 (2014);

- modification regarding the selection of prosecutors in the specialized directions (by a transparent contest procedure) responds to the requirement established by Opinion no. 9 (2014) according to which: the prosecutors should, at all times, conduct themselves in a professional manner and strive to be and be seen as independent and impartial - pct. 3.4.2. (par. 80) contained by Opinion no. 9 (2014).

The previously mentioned arguments were ignored by GRECO experts or presented in a timid and passing way, despite the detailed and punctual motivation of these important aspects, as this motivation was exposed / transmitted to GRECO.

An extremely worrying aspect of the GRECO report is that, both in the contextual information part and in the other one that includes the reporting experts' analysis, are found **no less than 23 references to secondary sources, such as press articles** (the total number of footnotes is 40).[3] Although some of these articles are limited to only reporting certain events, so that they can be considered as objective, many of them analyze or purely express some subjective opinions about the events that led to the ad hoc report.[4] The abundant use of such secondary sources, as well as the omission to include views obtained during the country visit from certain primary sources, have inserted a high dose of subjectivism in an analysis that should have been objective. The credibility of this report was thus compromised.

II. Interim compliance report regarding Romania, published in the 4th assessment round - Corruption prevention in respect of members of parliament, judges and prosecutors

a. The xi recommendation regarding the integrity risks

"61. GRECO recommended that the justice system be made more responsive to risks for the integrity of judges and prosecutors, in particular by i) having the Supreme Council of Magistracy and the Judicial Inspectorate play a more active role in terms of analyses, information and advice and ii) by reinforcing the role and effectiveness of those performing managerial functions at the head of courts and public prosecution services, without impinging on the independence of judges and prosecutors.

62. GRECO recalls that this recommendation was partly implemented in the Compliance Report. In particular, GRECO noted that the Romanian authorities began implementing the first part of the recommendation by developing the Integrity Plan of the judiciary to the National Anti-Corruption Strategy (NAS) for 2016-2020 and by drawing up analytical reports by the Prosecutor's Office. However, no measures had been taken to implement the second part of the recommendation."

As such, GRECO reconfirms that the first part of this recommendation has been well implemented, although the recommendation involves taking measures by the Superior Council of

[3] To be compared, for example, with those eight references to such secondary sources found in the first GRECO compliance report in 2018, a reference found in the 2019 GRECO interim compliance report. To have a different vision of how other monitoring reports launched by the Council of Europe are being drafted - in the last report of the Commissioner for Human Rights on the situation in Romania, there is no reference found to such secondary sources, the report being based almost exclusively on primary sources: https://rm.coe.int/report-on-the-visit-to-romania-from-12-to-16-november-2018-by-dunjami/1680925d71.

[4] For more information regarding the country visits and the manner of carrying out the action – see the 13th and 14th article from the Statute Of The Group Of States Against Corruption (Greco) - and also see the rules no. 27,28 and 34 from the GRECO Rules Of Procedure.

Magistracy in order for the justice system to better respond to the integrity risks of judges and prosecutors, without affecting their independence.

This latter conditionality is NOT analysed in any way by GRECO experts, although they were the ones who considered that the recommendation was implemented – ignoring the fact that *having the Supreme Council of Magistracy and the Judicial Inspectorate play a more active role in terms of analyses, information and advice* was achieved though ways that that have seriously undermined the independence of justice.

From the date of the previous compliance report, adopted by GRECO at the 78th Plenary Meeting on December 8, 2017, two protocols concluded by the Superior Council of Magistracy and, respectively, by the Judicial Inspectorate with the Romanian Intelligence Service were declassified and published. GRECO experts do not mention anything about this aspect.

> a1) the collaboration protocol concluded between the Superior Council of Magistracy and the Romanian Intelligence Service

On May 4, 2018, the Superior Council of Magistracy (CSM) published the collaboration protocol signed in 2012 with the Romanian Intelligence Service (SRI). The protocol had the purpose to „ensure the independence and the justice functionality".

The protocol included issues as "early identification" and "removal of the facts that could affect national justice or security; mutual notifications with the data and information held by each party; the exchange of materials; works and data useful to the other party."

The protocol also stipulated that "In complex cases, the effective cooperation is realized on the basis of common plans, approved by the management of the two institutions, specifying the tasks of each party", which opened the possibility of direct, illegal and inadmissible involvement of SRI in the magistrates career.

This protocol was used as basis for the possibility to insert data and information sent by SRI in the disciplinary investigation cases started by CSM. These data and information were kept confidential, so there was a very serious consequence – the judge or the prosecutor investigated had no knowledge of this data nor about the protocol itself.

This protocol was implemented, so the CSM president declared, right after the publishing, that *„there were documents sent by the Romanian Intelligence Service, but they followed the regime of the classified documents*".[5]

[5] http://www.ziare.com/stiri/csm/sefa-csm-face-primele-declaratii-despre-protocolul-cu-sri-1522097

The use of classified information (to which the investigated person did not have and do not have access) in the magistrates' career management, which also involves the appointment of positions at the highest level represents a direct interference of an information service in the judicial sphere. Serious violations of the separation of powers in the state and the independence of justice have been done.

a2) the collaboration protocol concluded between the Judiciary Inspection and the Romanian Intelligence Service

On October 9, 2018 was published the protocol regarding the collaboration management between the Romanian Intelligence Service and the Judiciary Inspection that function within CSM. The protocol was concluded on February 29, 2016.

Based on this protocol, "the Romanian Intelligence Service send: a) at solicitation, any information regarding the cases on Judicial Inspection role: b) *ex officio*, any information referring to susceptible facts and acts that seems to be framed as disciplinary offenses committed by magistrates".

In other words, starting from 2016, the verification of the integrity of judges and prosecutors, which, according to the law, was within the competence of the Judicial Inspection, was done by secret and completely out of law involvement of the Romanian Intelligence Service.[6]

Moreover, according to article 4 of the protocol "The Judicial Inspection, after carrying out its own prior checks, according to the law, will communicate within a reasonable time the usefulness of the data and information transmitted by the SRI and, respectively, their mode of valorization".

In other words, the SRI has acquired the competence to track and gather information about judges and prosecutors, information that could be used in investigations or verifications carried out by the Judicial Inspection, without the investigated judges or prosecutors having access to them and without even knowing about the existence of this procedure. Moreover, the Judicial Inspection is obliged to report to the SRI on the ongoing proceedings concerning the magistrates, although they are confidential.

[6] According to the law, the Judicial Inspection has, among other things, the following attributions: carrying out checks, following notifications *ex officio* or those addressed to the Judicial Inspection in connection with the activity or improper conduct or in connection with the breach of professional obligations, the disposition and the conduct of the disciplinary investigation, in order to exercise the disciplinary action; carrying out verifications regarding the violation of the norms of conduct regulated by the Code of ethics of judges and prosecutors; conducting checks on the condition of good reputation for the judges in office; conducting verifications regarding the conduct, deontology and integrity of the judges applying for the position of judge at the High Court of Cassation and Justice. https://www.avocatura.com/ll879-regulament-inspectia-judiciara.html#ixzz5uHghORKi

a3) The CCJE's recommendations regarding the involvement of the secret services in procedures on the integrity of judges

Opinion no. 21 (2018) regarding the corruption prevention among the judges, adopted by the Consultative Council of the European Judges, includes firm recommendations on the information services involvement in the procedures regarding the integrity of the magistrates. This opinion, which is based, according to the preamble, in particular on the findings and recommendations of the Group of States against Corruption (GRECO) of the Council of Europe, including its report on "Preventing Corruption on Members of Parliament, Judges and Prosecutors - Conclusions and Trends "(Fourth round of evaluation of GRECO)"[7], provides the following standards:

- checks are not recommended that go beyond the generally accepted check of a candidate's criminal record and financial situation;
- in the countries where detailed checks of a candidate are carried out, through the security services, they should be carried out according to criteria that can be objectively evaluated;
- candidates should have the right to access any information obtained;
- a candidate rejected on the basis of such control must have the right to appeal to an independent body and, for this purpose, have access to the results of such control;
- the checks made through the security services CANNOT target the judges in office;
- in no way should the fight against corruption among judges be conducive to the interference of a secret service in justice.[8]

The CCJE therefore highlights the respect of the independence of the judges in the proceedings regarding integrity issues or the fight against corruption, and therefore, strongly requesting the exclusion, in any circumstance and under any pretext, of the interference of a secret service in justice.

a4. GRECO's position regarding the existence and consequences of the two protocols

During the evaluation carried out by GRECO in an area that was expressly the object of the evaluation - the prevention and combating of the risks of integrity among judges and prosecutors -, the Romanian state "ensured" the integrity of the magistrates through the active involvement of

[7] https://rm.coe.int/avis-no-21-du-ccje-en-roumain/168093ed29

[8] „26. The CCJE strongly advises against background checks that go beyond the generally accepted checks of a candidate's criminal record and financial situation. In countries where such checks occur, they should be made according to criteria that can be objectively assessed. Candidates should have the right to have access to any information obtained. A distinction should be made between candidate judges entering the judiciary and serving judges. 27. A distinction should be made between the judges who apply to enter the judicial system and the judges in office. Under no circumstances should the fight against corruption among judges be conducive to the interference of a secret service in justice. "

the Romanian Intelligence Service, thus violating the law, the European recommendations in the matter and thus affecting the independence of justice.

These protocols raise legitimate questions related to a possible mass supervision of the magistrates by the Romanian Intelligence Service, which should give rise to serious concerns from the GRECO regarding the independence of Romanian judges and prosecutors.

However, the existence and application of secret protocols concluded by the CSM and the Judicial Inspection with an intelligence service did not raise any concerns for the GRECO experts.

In the conditions in which the object of the recommendation concerned exactly this aspect, of increasing the capacity of the CSM and IJ to ensure the integrity of magistrates, GRECO implicitly validated, by finding that the recommendation was well implemented, the SRI interference both in the disciplinary procedures and in the competence of the CSM.

This interference of the SRI in justice, however, was done outside the law, in secret and it targeted judges in function who did not have access to this information that could directly and seriously affect their career, thus being violated in flagrantly the minimum standards of independence of the judicial system.

b) Recommendation xiii regarding the procedure for appointment in high positions in the Public Prosecutor's Office

"70. GRECO recommended that the procedure for the appointment and revocation for the most senior prosecutorial functions other than the Prosecutor General, under article 54 of Law 303/2004, include a process that is both transparent and based on objective criteria, and that the Supreme Council of Magistracy is given a stronger role in this procedure."

Following the evaluation, GRECO experts conclude that the recommendation was not even partially implemented.

b1) Regarding transparency and objectivity in the selection procedure

The GRECO experts *"highlight that an interview for presenting a project regarding the exercise of the specific attributions of the position of high ranking prosecutor only informs the candidates about the methodology used in the selection procedure. The law does not provide information on the criteria applied in evaluating these interviews. The authorities did not provide further clarifications in this regard, so GRECO concludes that this part of the recommendation has not been implemented."*

It is explicitly clear that the Romanian authorities have failed to provide the experts with essential information in this regard.

On the Ministry of Justice website are published both the standards of evaluation of the interview held within the selection of prosecutors in order to make the nomination proposals in the management positions provided by art. 54 paragraph (1) of Law no. 303/2004 regarding the status of judges and prosecutors, republished, with the subsequent amendments and completions, as well as the standards of organization and conduct of the selection of prosecutors in order to carry out the nomination proposal in the management positions provided by art. 54 paragraph (1) of Law no. 303/2004.[9]

In the evaluation standards of the interview, the evaluation criteria are explicitly and in detail, regarding:

- supporting the project regarding the exercise of the specific duties of the management position;
- verification of managerial and communication skills;
- presentation of the vision on how he/she understands to organize the institution in order to fulfill the constitutional tasks of promoting the general interests of the society and defending the order of law, as well as the rights and freedoms of citizens;
- presentation of the vision regarding the attributions of the function for which he/she participates in the selection regarding the coordination of the activities for preventing and combating crime in general and of certain phenomena: organized crime, corruption, tax evasion, etc.;
- verification of the knowledge specific to the function for which the selection is made;
- aspects related to motivation, conduct, integrity and professional deontology, as well as other circumstances resulting from the analysis of the documents submitted by the prosecutors participating in the selection.

These criteria are developed by reference to the aspects to be considered when evaluating them.

However, GRECO experts do not refer in any way to these documents, to assess whether or not they comply with the standards followed, which means that their conclusion regarding the non-implementation of the recommendation is based on incomplete information provided by the Romanian authorities.

b2. Increase the role of the CSM in the procedure for appointing high-ranking prosecutors

[9] http://www.just.ro/anuntul-privind-selectia-procurorilor-in-vederea-efectuarii-propunerilor-de-numire-pentru-douafunctii-de-procurori-sefi-sectie-din-cadrul-directiei-nationale-anticoruptie/

GRECO is concerned that the supreme authority regarding recruitment decisions within the judicial system remains with the executive - the Minister of Justice. In addition, this already unequal distribution of decision-making roles is intensified by limiting the President's right to refuse to nominate the proposed candidates only once for opportunity reasons.

In a footnote, GRECO experts refer to the Decision 358/2018 of the Constitutional Court, which resolved the legal conflict of constitutional nature arising between the Minister of Justice and the President of Romania, in relation to his refusal to follow the proposal of the Constitutional Court. The conflict started following his refusal to follow the proposal of the Minister to dismiss the chief prosecutor of the National Anticorruption Directorate (DNA).

However, GRECO experts do not analyze the considerations of the Constitutional Court, in order to conclude and argue why, in their opinion, they do not comply with the general standards in this matter at European level.

This fact is important because, as the Constitutional Court points out in the said decision, there is no European rule regarding the manner of appointment at the top of the prosecutor's offices. There is a tendency, but not a general European rule for a public ministry to be more independent than one subordinate or related to the executive.

This approach, as a tendency, not as a rule, appears even in reports adopted by GRECO within the same evaluation procedure, for example in the case of Croatia.

On December 7, 2018, GRECO adopts the second compliance report on Croatia, in which it finds that the recommendation regarding the appointment of the Prosecutor General has been "satisfactorily" implemented, in the conditions in which the GRECO experts themselves acknowledged that the role of the Superior Council of Prosecutors is still a formal one, the decisive role being shared between the Government and the Parliament.

The contents of this report include:

"36. GRECO takes note of the new Act on the State Attorney's Office establishing additional transparency requirements in the system of selection of the Prosecutor General, as well as limiting mandate renewal. In light of the above, GRECO accepts that the issue at stake has been considered with legislative changes occurring thereafter. Consequently, recommendation ix is to be regarded as complied with.

37. Having said that, GRECO is, however, of the view that further transparency and objectivity assurances are to be infused in the system of selection and appointment of the Prosecutor General. While GRECO recognised that the participation of the executive/legislative in the appointment process of a Prosecutor General is not uncommon in Europe, it also stressed its

preference for a selection procedure where professional/non-political expertise is involved with a view to preventing risks of improper political influence or pressure. In this connection, GRECO specifically called for decisive involvement of the State Prosecutorial Council. With the new law, the State Prosecutorial Council is merely given a depositary role: it is to announce the public call, gather the submitted CVs and submit the list of candidates – in no order or ranking – to Government. The subsequent selection and appointment procedures in the hands of Parliament and the Government remain as they were during the on-site evaluation visit. At the time, GRECO already expressed its misgivings regarding the need for greater clarity of the Government proposal and the criteria upon which it is based. In light of the foregoing considerations, GRECO can only encourage the authorities to further advance in their efforts to increase the transparency and minimise risks of improper political influence in the appointment of the Prosecutor General."[10]

In other words, compared to the procedure provided by the Romanian law, in the case of Croatia the GRECO experts considered a method of appointment in prosecutor's offices with lower standards, as regards the role of the Superior Council of Magistracy (which should not even offer an advisory opinion, but fulfills rather the role of secretariat), as well as regarding transparency (there are no criteria depending on the Government selects the candidate).

The standards imposed as obligations in the case of Romania are presented only as aspirations in the case of Croatia - in the conditions in which, although they are far from being fulfilled, the recommendation is considered implemented - which implies, at least apparently, a double measure in the evaluation procedure, which must be clarified by GRECO experts.

c. GRECO concerns regarding the general situation in Romania, from the perspective of the efficiency of the fight against corruption

[10] According to the report, the procedure for appointment of the Prosecutor General of Croatia is as follows: *The authorities of Croatia refer to the new Act on the State Attorney's Office (Articles 22 to 28) geared towards increasing the transparency of the selection process by putting in place fixed deadlines, uniform procedural stages and publication requirements, as well as involving the State Prosecutorial Council in this process. In particular, the State Prosecutorial Council is responsible for making a public call for candidatures and gathering thereafter the received CVs and proposed work programmes of each individual candidate. It subsequently sends to the Government the list of candidates (in no ranking order). The Government is then to make its choice; it may consult the Judiciary Committee of Parliament for a prior non-binding opinion (the opinion is publicly announced). Formal appointment of the Prosecutor General is referred to Parliament on the basis of the Government's proposal. Parliament could in theory reject the Government's choice (and the Government should then choose another person from the pre-established list of 7 candidates), but has never done so to date. No one can be elected to the position of Prosecutor General more than twice. The Act on the State Attorney's Office was adopted on 25 July 2018 and entered into force on 1 September 2018. The authorities recognise that additional retuning/further implementing regulations may well be needed in this domain once experience with the new rules is gathered.* https://rm.coe.int/fourth%E2%80%90evaluation%E2%80%90round%E2%80%90corruption%E2%80%90prevention%E2%80%90in%E2%80%90respect%E2%80%90of%E2%80%90members%E2%80%90of/1680920114

It is highlighted that "*82. GRECO is concerned over the continuing political tensions in Romania over the reforms in the justice system, with its potentially detrimental consequences to combating corruption."*

On the 18th footnote is added: *GRECO also notes with regret that the recent publication of classified protocols concluded between the National Prosecutor's Office and Romanian Intelligence Service raised questions as to the independence of the prosecution and the admissibility of evidence obtained in numerous anti-corruption cases, thus undermining the credibility of previously highly-praised anti-corruption efforts. GRECO refers to the Constitutional Court decision No. 26/2019 of 16 January 2019, where it is noted that such practices infringe upon the legal security of citizens and ordered all prosecutors' offices and courts of the land to verify in all pending trials if criminal procedural rules have been observed and "to take appropriate legal measures".*

First of all, UNJR and AMR find, with surprise and concern, that the signing of the secret protocols between the General Prosecutor's Office and SRI is not seen by the GRECO experts as a threat to the independence of justice in Romania and as a real danger of the right to a fair trial, but only as a minor matter, which is not worth mentioning in the actual content of the report, but only in a passing way, as the footnote.

From the two paragraphs it results that the GRECO experts are mainly concerned with political "tensions" and "potentially harmful" consequences, instead of being concerned of a **fact that had extremely serious consequences, including the fight against corruption.**

Secondly, much more serious, GRECO considers it "regrettable" to publish the secret protocols signed by the General Prosecutor's Office and the Romanian Intelligence Service, instead of considering the fact of signing them as wrong and blameworthy.

The regret of the anti-corruption experts was not generated by the fact that based on a secret protocol for almost 10 years, "*the criminal prosecution is carried out jointly by prosecutors and representatives of the secret service, with the non-observance of the separation of competences between the two structures and of the constitutional, respectively legal role of each individual"* (quoted from Dec. CCR 26/2019). Their regret was based on the fact that this protocol became public.

Regarding the severity of these protocols effects in the rule of law and respect for fundamental rights, the conclusion of the GRECO experts is unacceptable.

Third, GRECO regrets that the publication of these protocols has undermined "the credibility of previous highly-regarded anti-corruption efforts." Or, it cannot be pretended or expected the

credibility of the efforts of the anti-corruption fight if it is not carried out strictly with respect for the law and the standards of a fair trial.

Fourth, GRECO experts regret the CCR's decision and its consequences, but made no reference to the content of these protocols or to the prosecutor's and SRI's actions, although these were the cause that led to the existence of a constitutional conflict solved by the Constitutional Court through the Decision 26/2019.

III. The compliance report adopted in the ad-hoc procedure

a) Risks related to the departures from the judiciary and arbitrary promotions

"16. In the Ad hoc Report, GRECO recommended that (i) the impact of the changes on the future staff structure of the courts and prosecution services be properly assessed so that the necessary transitional measures be taken and ii) the implementing rules to be adopted by the SCM for the future decisions on appointments of judges and prosecutors to a higher position provide for adequate, objective and clear criteria taking into account the actual merit and qualifications (recommendation i)."

a1. Retirement after 20 years of activity

GRECO mention in the ad-hoc report "*that magistrates would be able to retire early, after just 20 years of service without any condition of age (with pensions which could amount to 75 % of the last gross salary, i.e. up to 120% of the last net salary in exceptional cases).*"[11]

The Superior Council of Magistracy has presented statistical data which results that only one third of the number of judges and prosecutors who achieved the retirement criteria is retired. However, GRECO concludes that "*the assumption that the proportion of judges and prosecutors effectively retiring will remain similar to the one observed in previous years may no longer be applicable, once the new retirement arrangements enter into force, because they offer new incentives, which currently are not in place."* (par 21).

The GRECO opinion is based on a wrong premise, respectively, that the law would provide new retirement incentives that do not currently exist. The hypothesis is wrong, because, in fact, the law stimulates staying in the system and after reaching the age of 25 years of activity.

According to the article 82 paragraph (4) of Law 303/2004 on the status of judges and prosecutors, "For each year that exceeds the seniority in the magistracy provided in paragraph (1)

[11] 30th point of the https://rm.coe.int/raportul-ad-hoc-privind-romania-regula-34-adoptat-de-greco-la-cea-dea/16807b7b7f

and (2) to the amount of the pension, add 1% of the calculation base provided in paragraph (1), without being able to overcome it".[12]

As such, there is no logical explanation to support the opinion of GRECO experts, but on the contrary: the judges and prosecutors, in proportion of 2/3 do not retire even though they have 25 years of experience, so the conclusion is that, with less, they will not retire if they turn 20 years of activity, in less favorable financial conditions.

Moreover, one of the explanations for which the Romanian judges and prosecutors do not retire, although they fulfill the conditions of retirement, is that in the activity they have a safe allowance, in a reasonable amount. The occupational pension is unpredictable on the long term, periodically being the subject of political debates, in terms of either the amount or even its abrogation (in 2009 the Government repealed the service pensions, a measure declared unconstitutional regarding the magistrates. Currently, a draft law on the taxation of special / service pensions is again under discussion, which would have the effect of drastically reducing the pensions of magistrates).

a2. Regarding promotions

GRECO report mention: "22. Regarding the second part of the recommendation, while preparatory work **appears** to be on-going, no rules have been adopted so far by the SCM as regards appointment of judges and prosecutors to higher positions, which would provide for the implementation of adequate, objective and clear criteria, taking into account merit and qualifications."

First of all, GRECO experts question the very existence of a draft regulation of the CSM, using the phrase "seems to be in progress", despite the fact that, as it is clear from the contents of the report, the draft of the project has already been finalized, being already discussed by the judges' section from CSM on May 3 2019, and also by the prosecutors' section on June 9 2019.

Instead of analyzing the actual content of the project and verifying to what extent it offers "adequate, objective and clear criteria, taking into account the worth and qualifications", GRECO experts summarize that procedure seem to exist, wrong concluding that the recommendation is not even partially implemented.

Such a conclusion contradicts even the practice of GRECO, to analyze on the basis of legislative solutions not yet adopted and to ascertain, to the extent that they are in accordance with GRECO's recommendations, which the implementation is partially carried out.[13]

[12] http://legislatie.just.ro/Public/DetaliiDocument/64928

Secondly, the recommendation refers to the appointment of judges and prosecutors "in high positions", although the changes referred to in the contents concern the promotion of judges and prosecutors in execution positions.

GRECO experts do not specify what they mean by the phrase "in high positions", respectively if it refers to all the promotions (although the promotion in an execution position in a court rank is difficult to equate with a high function) or it refers to the promotion only at the level of the High Court of Cassation and Justice or when it refers to the promoting in management positions.
Moreover, in the case of prosecutors, the phrase "high functions" is used in the reports of the European institutions for the management positions at the top of the Public Ministry, which rise much more confusion.

Therefore, there is an important distinction between the content of the recommendation (that refers at "high function") and the GRECO analysis from the recommendation (which refers to the regulations regarding the actual promotion, but excluding the promotion to the High Court of Cassation and Justice that is exactly the "high function" in the common sense). This fact shows a possible confusion in which the GRECO experts are, which should be clarified in advance.

b. The new Section for the Investigation of Offences in the Judiciary (SIIJ)

In the report, GRECO experts "insist that the Section for the Investigation of Offences in the Judiciary be abolished", based on the following arguments:

1. the section is an "anomaly of the existing institutional framework";
2. the existence of the section could lead to conflicts of competence;
3. the section could be used inappropriately and subject to unjustified interference in the criminal justice process;
4. the section is placed outside the hierarchical structure of the criminal prosecution bodies;
5. judicial police officers would investigate cases against judges and prosecutors, and such an evolution may represent an additional risk for the functional independence of the judicial system;
6. The number of prosecutors and judicial officers operating in the section is inadequate, related to the number of cases in the section.

All these arguments are devoid of legal and factual basis, as we will argue our view in the following rows:

[13] For example, see the VII recommendation from the evaluation report (4th round) regarding Portugal, paragraphs 49 – 54 related to the judges selection

1. The Section is an "anomaly of the existing institutional framework"

The GRECO conclusion comes in serious contradiction both with the institutional framework already existing in Romania - within the DNA was functioning, at the date of the modification of the law, a service that had essentially the same purpose - as well as with the European recommendations in the matter.

The Consultative Council of European Judges, in the Opinion no. 21 (2018) regarding the prevention of corruption among judges, opinion based especially on GRECO's findings and recommendations, includes the following recommendations:

"Depending on a given country's history, traditions and administrative structure, as well as the actual extent of corruption inside the system, it might be necessary to establish specialised investigative bodies and specialised prosecutors to fight corruption among judges."[14]

As such, specialised structures for investigating judges not only do not represent "anomalies", but they are even recommended to be set up in certain circumstances by European bodies, which base their opinion exactly on GRECO's findings and recommendations.

Moreover, in Romania, the creation of the new section was determined, on the one hand, by the already existing administrative structure - The Service to fight corruption in justice within the DNA - corroborated with the need to provide additional guarantees of independence of the judges from the criminal investigations which constituted pressures against the judges, materialized by:

- investigations that focused exclusively on the judgments;
- violation of the secret of deliberation in investigations;
- multiple unprofessional investigations completed by rankings or acquittals, but which led to the function suspension of the judges concerned, including at the high level: General Prosecutor, CCR judge, CSM members, judges and prosecutors with the rank of court of appeal or ICCJ and management positions.

Service to fight corruption in justice within DNA

By the Order no.10/31of the chief prosecutor of the National Anticorruption Directorate, on January 2014, was set up "The Service to fight corruption in justice", which had the power to investigate all corruption offenses alleged to be committed by judges and prosecutors.

[14] https://rm.coe.int/ccje-2018-3e-avis-21-ccje-2018-prevent-corruption-amongst-judges/16808fd8dd#_ftn26 - lit. C par. 3 from the document

Subsequently, through the Order of the Minister of Justice no.1.643 / C of May 15, 2015 and as a result of the opinion given by the Section for prosecutors from the Superior Council of Magistracy (CSM), the "Internal Order Regulation of the National Anticorruption Directorate" was approved.

In the article 4, paragraph (2) letter a) of the Regulation explicitly mentions this Service: “At the central level, DNA is organized in sections, services, departments and others activity compartments. Within the Anti-corruption Section are functioning *the Service for carrying out criminal prosecution in corruption cases* and *the Service to fight corruption in justice*.”

As such, from 2014 until the establishment of the SIIJ, there is already a specialized structure within the Public Ministry for criminal prosecution in corruption cases regarding judges and prosecutors.

The competence of that service included the offenses of abuse in the service and the favoring of the offenders, offenses that were interpreted in a broad sense, respectively that their material element represented even the pronouncement of the court decision or the solution given by a prosecutor.

By the way it was organized, the service presented a series of structural deficiencies, which allowed the use of files as a means of pressure against judges, as we will exemplify in concrete.

Among these deficiencies of the specialized service within the DNA were:

a) *the lack of transparency regarding the establishment and functioning service*

The service was established through the non-public order of the DNA chief prosecutor, without any public consultation and without a motivation, being discreetly passed through the governing board of DNA, by inserting it as a last point on the meeting agenda.

b) *The appointment of prosecutors within the service was made by the political nominee prosecutor as DNA chief prosecutor, through a non-transparent interview and without any verifiable criterion based on professionalism and integrity.*
c) *Prosecutors depended on the DNA chief prosecutor, who could be easily removed from office.*

Appointment as DNA prosecutor meant, for prosecutors who were active at the level of judges and with minimum age in the system, an extraordinary leap in career, reaching over night to work at the level of the highest rank. This means not only public and professional recognition, but also great financial incentives, being paid at the highest level.

This fact created a special ascendant of the chief prosecutor of the structure over the prosecutors, especially the young ones, in conditions where their dismissal from office could be easily done by the DNA chief prosecutor. The revocation would have meant the loss of the professional prestige by the prosecutors, the return to the prosecutor's office where they came from and substantially reduced financial benefits.

A concrete example for the revocation used as a tool for eliminating from the section of the prosecutors who became uncomfortable is the case of the prosecutors Iorga, Moraru and Tulus, revocation which was subsequently annulled by a final court decision.[15]

d) Total lack of transparency regarding the prosecutors who worked in the section, including their experience and professionalism

UNJR and AMR sent a request, based on access to information of public interest law, through which they requested:

- the names of all the prosecutors who worked in the former Service to fight corruption in justice within DNA, the period in which they worked within it, as well as their experience and their professional rank at the time of starting the activity within the service;
- the names of the chief prosecutors of this service, the period in which they were in office and the manner in which they were appointed to the position, distinctly for each of them, with the indication of the appointment document.

The response received from DNA was that the requested information cannot be made public.

As such, according to the DNA response, neither the citizens nor the judges have the right to know even the skills and experience of prosecutors who have, for 4 years, filed hundreds of files targeting judges and prosecutors.

e) The existence of conflicts of interest between the prosecutors within the DNA that were investigating corruption files and the judges who were judging such files

The pressure placed on DNA prosecutors to obtain convictions in corruption files and thus maintain the track record required by the European Commission has determined that prosecutors, in their turn, put pressure on judges, through criminal cases, to pronounce their decisions considered "legal" by prosecutors.

Such a mechanism was revealed by the interceptions of some conversations between the Oradea DNA prosecutors; they were discussing in the Oradea DNA headquarters, on 19.01.2018, about a

[15] https://www.juridice.ro/628499/curtea-de-apel-bucuresti-a-anulat-ordinul-de-revocare-din-dna-a-mihaieleimoraru-iorga.html

series of criminal repressive methods for "frightening" and "quieting" the judges from the Oradea Court of Appeal and the Bihor Court.

The context of the discussion and the concrete files referred to in the discussion were detailed by Judge Florica Roman, from the Oradea Court of Appeal, in a letter addressed to CSM requesting the validation of the results of the contest for appointment as the chief prosecutor of Section for the Investigation of Offences in the Judiciary.[16]

In the letter, the judge argues with concrete examples why this Section is "the only remedy at this time to ensure the effective independence of judges in pronouncing the solutions, given that some DNA prosecutors, using their power abusively, have investigated judges with the purpose of securing their desired solution in the files that were also solved by them."

The pressures exerted on the judges of the Oradea Court of Appeal, by the DNA prosecutors, were expressed, specifically, by the judge Florica Roman also at the meeting of the experts of the Venice Commission with the professional associations, from June 11, 2018.

In another case, DNA prosecutors obtained the interception of the case judge, the defendant and his lawyer, in a file that was in the role of the judge concerned, with great media impact. The case was reported by the press, showing that: Oradea DNA ordered the monitoring and interception during the trial of the defendant Alexandru Kiss, of his lawyer Razvan Doseanu and of the judge Antik Levente of the Oradea Court of Appeal, who was the chairman of the trial court. Basically, in this way, DNA was able to find out both the strategy of defense of the defendant Kiss, as well as the discussions on file by the judge Antik with his colleague completely. The surveillance operation was performed in a file that was kept in the DNA drawer for three years and was closed on the grounds that the deed did not exist."[17]

All these factors competed for the DNA service to become an increasingly dangerous instrument of pressure against judges.

The way in which DNA handled the files flagrantly violated the independence of the judges, a fact retained by final decisions of the Supreme Court:

- **Violation of the secret of deliberation**

By Completion 231/2016 of the ICCJ it was held that: "Witness xx, judge, who was part of the full court which solved together with the defendants xx and xx, the annulment appeals filed in

[16] https://floricaroman.wordpress.com/2019/01/28/solicitare%E2%80%90plenului%E2%80%90csm%E2%80%90sa%E2%80%90valideze%E2%80%90concursul%E2%80%90privind%E2%80%90ocuparea%E2%80%90functiei%E2%80%90de%E2%80%90procuror%E2%80%90sef%E2%80%90a%E2%80%90sectiei%E2%80%90pentru%E2%80%90investigarea%E2%80%90infractiunilor%E2%80%90din%E2%80%90justitie/

[17] https://www.cotidianul.ro/politie-politica-sadea-marca-dna/

the file 4672/111/2010 of the Bihor Tribunal, was questioned on 27.09.2013 and 11.03.2014. The witness's statements show that the object of the surveillance was the way in which the judges from the composition of the panel decided on the solution."

- **Investigating judges for pronounced judgments**

"The manner in which the judge interprets and applies the law in a particular case is not susceptible to censorship except in the system of remedies. The criminal prosecution body has no powers to control the judgments and cannot substitute the hierarchical control court. The censorship of a court decision in the course of a criminal investigation against the judge represents a violation of the principle of judicial independence. What needs to be specified is that the court decision, in itself, cannot be the basis for engaging in criminal liability. The legality and soundness of the solutions delivered by judges cannot be analyzed in a criminal investigation", is shown in the motivation of the decision to acquit four judges from the High Court of Cassation and Justice.

- **Investigating the judges and prosecutors at the top of the judicial system for unfounded facts, the investigations extending over long periods of time**

The best known example is the one of the former Prosecutor General Tiberiu Nitu. He resigned in 2016 after being accused by DNA of committing the crime of abuse of office, so that later, at the end of 2019, the High Court of Cassation and Justice will modify the basis of the classification, remembering that the act of which the former was accused Prosecutor General does not exist.

However, the report published by the Judicial Inspection shows that a much larger number of magistrates at the top of the judicial system were targeted by DNA files.

"These DNA files concerned 13 judges or former members of the SCM and two members who were prosecutors, two members or former members of the Superior Council of Magistracy.", declared the head of the Judicial Inspection.[18]

All these concrete situations were explained to the GRECO experts at the meeting attended by the representatives of the UNJR, AMR and APR, factual arguments that were completely ignored by GRECO experts.

The creation of the new Section came as a solution to the extremely serious problems mentioned above: the specialization of the structure was maintained, but solid guarantees of independence

[18] https://www.mediafax.ro/social/la-dna-intre-2014-2018-au-fost-aproape-1-500-de-dosare-vizand-peste-2-000-demagistrati-seful-inspectiei-judiciare-au-fost-supravegheati-cu-varf-si-indesat-neregulile-gasite-18092270

and professionalism of the prosecutors working within it were created, the section being removed from political control.

Thus, the law established more severe conditions for participation in the competition (having required effective seniority in the position of prosecutor of at least 18 years) and a greater complexity of the procedure for selecting prosecutors (including the evaluation of documents drafted by prosecutors in the last 5 years, at least 5 randomly chosen candidates and other documents considered relevant by candidates). All of these are intended to contribute to increasing the quality of criminal prosecution files.

In addition, the Section is required to submit annual activity reports to the CSM Plenum, in order to avoid that files targeting judges or prosecutors are kept open for long periods of time, in which they represent real means of pressure for judges and prosecutors.

2. The existence of the section could lead to conflicts of competence

Conflicts of competence are procedural incidents inherent in the judicial process, which is why there are criminal procedural rules designed to resolve them. The possibility of such conflicts of competence is not specified by the SIIJ.

Conflicts of competence between different directions and structures within the prosecutor's office exist even today, but without anyone ever asking the problem of the cancellation of these directions and structures because conflicts of competence are created!

3. The section could be used inappropriately and subject to unjustified interference in the criminal justice process

First of all, it can be seen that GRECO experts are more concerned with possible / possible future problems, and not with the already proven interference of DNA prosecutors in the independence of judges.

As we have shown in point 1, such interference already existed during the period when a similar structure operates within the DNA.

Additionally, we also show that:

- the appointment of prosecutors within the section is made for a period of 3 years, with the possibility of continuing the activity for a total period of maximum 9 years;

- the dismissal of the prosecutors from the section is made by the Plenary of the Superior Council of Magistracy, at the motivated request of the chief prosecutor of the section, in case of improper exercise of the attributions specific to the position or in case of applying a disciplinary sanction;

- the section prepares an annual report on the activity carried out, submitted no later than February of the following year, to the Plenary of the Superior Council of Magistracy.

All these procedures allow the rapid identification of any slip or interference, which will also allow the possibility of correction in a short time.

4. The section is placed outside the hierarchical structure of the criminal prosecution bodies

The statement is completely devoid of any legal and factual support.

According to article 88, 2 paragraph (1) of Law 304/2004, the Section for the investigation of criminal offenses of justice carries out its activity in accordance with the principle of legality, impartiality and hierarchical control.

The section is directly subordinated to the General Prosecutor of the ICCJ Prosecutor's Office, which exercises hierarchical control over the prosecutors in the section.

Moreover, the current Prosecutor General Bogdan Licu has publicly assumed this attribution repeatedly, so that it cannot be credibly maintained that the section would be placed outside the hierarchical structure.[19]

This type of statement, completely without support, seriously affects the credibility of the report.

5. judicial police officers would investigate cases against judges and prosecutors, and such an evolution may represent an additional risk for the functional independence of the judicial system;

The argument is a false one. There is no "evolution" by using the judicial police officers in such cases.

Article 324 paragraph 3 The Criminal Code explicitly stipulates that: "In cases where the prosecutor carries out the criminal prosecution, he/she may delegate, through the ordinance, the criminal investigation bodies to perform some criminal prosecution documents."

Moreover, the use of judicial police officers in criminal cases concerning magistrates was a common practice within the DNA.

[19] https://www.stiripesurse.ro/bogdan-licu-se-impune-si-face-ordine-la-siij---nu-se-mai-pune-problema-retragerii-niciunuiapel-
din-dosare-_1366875.html

6. The number of prosecutors and judicial officers operating in the section is inadequate, related to the number of cases in the section.

The number of prosecutors and judicial officers operating in the section is not a fixed one, which cannot be modified.

According to the article 88 ^ 2 of Law 304/2004, "the number of positions of the Section for investigating criminal offenses in justice can be modified, depending on the volume of activity, by order of the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice, upon request to the section chief prosecutor, with the assent of the Plenary of the Superior Council of Magistracy."

In conclusion, the insistence of the GRECO experts on the dissolution of the section has no factual and legal basis, at the same time contravening the CCJE recommendations contained in the opinion No. 21 (2018) regarding the prevention of corporations among judges.

c) The risks of weakening the status of prosecutors, especially their independence

"32. In its Ad hoc Report, GRECO recommended i) ensuring that the independence of the prosecution service is – to the largest extent possible – guaranteed by law, and ii) assessing the impact of the intended changes on the future operational independence of prosecutors so that additional safeguards be taken, as necessary, to guard against interference (recommendation iii)."

GRECO experts mention that:

1. The prosecutors' independence is weakened, being limited only to the adoption of solutions

GRECO experts note that "the adopted amendments continue to contain provisions that weaken the previous level of operational independence of the prosecutors. (…) The modified version of the Law no. 303/2004 reduces the prosecutor's independence at the disposal of the solutions."

Operational independence is exactly independence in pronouncing solutions. As such, as long as the prosecutor is fully independent in the provision of solutions, his functional independence is fully guaranteed.

In this regard, the Charter of Rome (adopted following Opinion No. 9 of 2014 of the Consultative Council of European Prosecutors to the Committee of Ministers of the Council of Europe) shows in points IV and V: *Prosecutors should be autonomous in their decision-making and should perform their duties free from external pressure or interference, having regard to the principles of separation of powers and accountability.*

ALL of these guarantees are expressly found in the Laws of Justice, as amended.

Specifically, the prosecutors' independence is provided in the following texts:

Article 3 paragraph (11) of Law no. 303/2004 regarding the statute of judges and prosecutors: “The prosecutors are independent in the disposition of the solutions, under the conditions provided by Law no. 304/2004 regarding the judicial organization, republished, with the subsequent modifications and completions."

Article 64 paragraph (2) of Law no. 304/2004 regarding the statute of judges and prosecutors: “In the ordered solutions, the prosecutor is independent, under the conditions provided by law. The prosecutor can appeal to the section for prosecutors of the Superior Council of Magistracy, within the procedure of checking the conduct of judges and prosecutors, the intervention of the superior hierarchical prosecutor, in any form, in carrying out the criminal prosecution or in adopting the solution."

Article 64 paragraph (5) of Law no. 304/2004 regarding the judicial organization: "The prosecutor can appeal to the section for prosecutors of the Superior Council of Magistracy, within the procedure of checking the conduct of prosecutors, the measure ordered, according to paragraph (4), by the hierarchically superior prosecutor."

Art. 67 paragraph (2) of Law no. 304/2004 regarding the judicial organization: “The prosecutor is free to present in court the conclusions he considers to be founded, according to the law, taking into account the evidence administered in the case. The prosecutor may appeal to the section for prosecutors of the Superior Council of Magistracy the intervention of the superior hierarchical prosecutor, for influencing in any form the conclusions."

Article 30 paragraph (1) of Law no. 317/2004 regarding the Superior Council of Magistracy: “The corresponding sections of the Superior Council of Magistracy have the right, respectively the correlative obligation, to be notified *ex officio* to defend (…) the impartiality or independence of the prosecutors in ordering the solutions, according to Law no. 304/2004 regarding the judicial organization, republished, with the subsequent amendments and completions, as well as against any act that would create suspicions about them."

Article 30 paragraph (2) of Law no. 317/2004 regarding the Superior Council of Magistracy: “The Plenary of the Superior Council of Magistracy, the sections, the president and the vice-president of the Superior Council of Magistracy, *ex officio* or at the notification of the judge or the prosecutor, notifies the Judicial Inspection for carrying out verifications, in order to defend the independence, impartiality and the professional reputation of judges and prosecutors."

Article 30 paragraph (4) of Law no. 317/2004 regarding the Superior Council of Magistracy: "The judge or prosecutor who considers that his independence, impartiality or professional reputation is affected in any way can be addressed to the Superior Council of Magistracy (...)".

As a result, there are numerous guarantees regarding the functional independence of prosecutors, as well as concrete procedures for defending when it is violated.

All these legal texts were ignored by GRECO experts, who did not show in concrete what deficiencies these texts present, in order to be able to analyze in concrete the reason for their support.

2. Broadening the possibilities of hierarchically senior prosecutors to override the decisions taken by prosecutors, not only when they are illegal, but also when they are unfounded risks further reducing the operational independence of prosecutors.

There is no such "broadening" of the possibility of overriding prosecutors' decisions.

The possibility of disallowing the prosecutor's solutions, by the superior hierarchical prosecutor on grounds of unreasonableness (the term used in the Romanian law is "ungrounded", "unfounded") is not a novelty in the Romanian legislation, contrary to the conclusion that emerges from the Report. In this regard, AMR and UNJR emphasize that this possibility is already provided for in the Code of Criminal Procedure, which is implemented from February 1, 2014.

According to the clear provision of the article 304 paragraph (1) from the Penal Code, "when the prosecutor finds that an act or a procedural measure of the criminal investigation body is not given in compliance with the legal provisions or is UNFOUNDED, a reasoned denial, ex officio or at the complaint of the interested person".

This possibility is also expressly given to the superior hierarchical prosecutor, according to art. 304 paragraph (2): „The provisions of para. (1) also applies in the case of the verification carried out by the superior hierarchical prosecutor regarding the acts of the inferior hierarchical prosecutor.”

The verification of the acts of criminal prosecution under the aspect of legality and solidity by the superior hierarchical prosecutor was provided for in the previous Code of criminal procedure. Article 264 para. (3) - (4) of the Code of 1968 gave the possibility of the superior hierarchical prosecutor to deny the indictment on grounds of groundlessness.

More serious, to support their position, GRECO experts use the opinion of the Venice Commission truncated, as is evident from the contents of the reports.

Therefore, in point 38 of the GRECO Follow-up Report, it is showed that:

38. As regards the second part of this recommendation, GRECO already alerted the Romanian authorities in its Ad hoc Report to the fact that allowing hierarchically superior prosecutors to invalidate prosecutorial solutions on the basis of them being ungrounded (in addition to unlawful), in conjunction with the reduced general independence of prosecutors, risks to have consequences on their possibilities to investigate/prosecute offences (including corruption) without undue interference. In this respect, GRECO again refers to the observations of the Venice Commission from its latest Opinion regarding the amendments to the three justice laws, which states that "the addition of the word "ungrounded" in Article 64 of the law on judicial organisation as a reason for the higher prosecutor, in addition to unlawfulness, for invalidating a prosecutor's solution, has raised fears that the increased role of the Ministry of Justice - 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."[20]

But, in the final opinion of the Venice Commission, it no longer claimed that there would be a problem related to control over "groundlessness".

Thus, there were two opinions of the Venice Commission regarding the laws of justice: a preliminary opinion, adopted on July 13, 2018 and a definitive opinion, adopted on October 20, 2018.

The preliminary opinion included the recommendation that the provisions that allow the superior hierarchical prosecutor to invalidate for reasons of unexplained reasons the solutions of the case prosecutor to be eliminated or better defined.[21]

The recommendation has aroused wide criticism, given that the provision has already been regulated for many years in the Code of Criminal Procedure, there being no novelty under this aspect, but only a correlation of norms under different laws. Also, Laura Codruta Kovesi herself issued an internal order in DNA for the hierarchically superior prosecutors to verify the legality and solidity of the subordinate prosecutors' acts. UNJR detailed explained the problem at that time.[22]

[20] https://rm.coe.int/raport-de-follow-up-referitor-la-raportul-ad-hoc-privind-romania-regul/1680965689
[21] https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2018)007-e
[22]www.unjr.ro/2017/09/01/pozitia-unjr-cu-privire-la-posibilitatea-procurorului-ierarhic-superior-de-a-infirmasolutii-apreciate-ca-netemeinice/

As a consequence, in the final report of the Venice Commission this recommendation no longer appears, the Commission itself admitting implicitly the error in the first report.

However, it is absolutely surprising that the GRECO experts actually ignore this situation.

They cite from the final opinion only the part in which the Venice Commission expresses the THEMES of the Prosecutor General and the Chief Prosecutor of the DNA at that time, while excluding precisely the conclusion of the Venice Commission, according to which: "However, the Commission understands the reference though in fact, it was indeed added to the previous form of Law 304/2014, the principle was already stipulated in the Criminal Procedure Code."[23]

In consequence, as we have already pointed out, the Venice Commission has removed the reference to "unreasonable" in the final opinion on the laws of justice, taking into account the mistake, which was deliberately ignored by GRECO experts in this report.

CONCLUSION

The GRECO reports in question are devoid of scientific rigor, being based on subjective opinions and clearly biased, not on professional and technical analyzes of the law.

Thus, in the case of the ad-hoc report it cites in proportion of over 50% secondary sources and opinions from the press that have no legal and factual basis, the report being compromised from the point of view of scientific rigor.

Moreover, the same report presents conclusions and recommendations that have no logical, factual and legal basis. In the simplest example, GRECO experts claim that the dismissal of the prosecutor's solution and for reasons of "unreasonableness", by the superior hierarchical prosecutor, would deprive him of independence, although such a provision exists both in the old and in the new Code of criminal procedure.

Also, experts argue that the Section for the Investigation of Crimes in Justice is a new structure, despite the fact that such a structure, however already exists within the DNA, but in a form lacking transparency.

These examples are more than sufficient to disrupt the credibility of such a report.

Regarding the evaluation report, the GRECO experts ignore serious factual data that have affected the independence of justice, such as the protocols concluded by the Prosecutor's Office

[23] "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." https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2018)017-e

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attached to the High Court of Cassation and Justice, the Superior Council of Magistracy and the Judicial Inspection with the Romanian Intelligence Service.

In the opinion of GRECO experts, the existence of these protocols is not the problem, but the fact that the protocols have been made public is a problem. Such a support simply challenges the democratic values of a state, being inadmissible to be included in a report at such a level.

- We, therefore, request the Ministry of Justice to take the necessary actions for the correct information of the GRECO experts and for correcting the particularly serious legal and factual errors in these reports.

- We also ask the Ministry of Justice to send a letter of protest to the Parliamentary Assembly of the Council of Europe, denouncing, in a concrete and argued manner, the errors in these reports.

- The Ministry of Justice has the obligation to write to all the countries that are part of GRECO to **point out** the inconsistencies in this report and to underline the need for their correction by the authors of the report.

Romanian Magistrates Association (AMR),
Through Interim President
Judge Dr. Andreea Ciucă

National Union of Romanian Judges (UNJR),
Through President
Judge Dana Gîrbovan

Superior Council of Magistracy
Section for Judges

Open letter
for defending the independence of justice against political pressures carried out on the national judge invested with a judicial proceeding concerning Ms Laura Codruța Kovesi

In view of the fact that the statements and public actions of politicians from the European Parliament have increased in the last few days, with express reference to the judicial proceedings involving Ms Laura Codruța Kovesi, statements that have the potential to interfere with the proceedings with which the Romanian judges are invested, separately from the political support for her appointment as Chief Prosecutor of the European Public Prosecutor's Office, the Section for Judges of the Superior Council of Magistracy, pursuant to Articles 126 (1) and 133 (1) of the Constitution and the provisions of Law No 317/2004, republished and amended, hereby adopts this public position:

The fundamental principles of the European Union, as set out in the Treaties, require that the foundations of the Union and the competences of the authorities of the Member States and the European institutions be respected. Loyal cooperation between the levels of decision-making must be based on strict respect of competences and on the pursuit of the values laid down by the Union's primary law and the Member States' constitutions.

The Treaty on European Union states in Article 2 that the rule of law and the independent judiciary are part of the shared values of the Member States which must be respected by all European officials and institutions and must be guaranteed and ensured in all of the Member States. It is also established that, in matters concerning the judiciary, the competence belongs to the Member States, according to the principle of autonomy of decision-making and that the standards for both functional and personal independence of magistrates must be respected.

The Romanian Constitution sets out, with relevance in the present situation, in Articles 124-126, 131 (1) and 132 (2) the framework for the organization of justice, with respect to independence, impartiality, legality and accountability and, in Article 133, it establishes the exclusive competence of the Superior Council of Magistracy to guarantee the independence of the judiciary, which is exercised in accordance with the provisions of Law No 317/2004 on the Superior Council of Magistracy.

International standards (such as, but not limited to, those of the Commission for Democracy through Law — the Venice Commission or the European Network of Councils for the Judiciary) define the concept of functional and personal independence of justice and magistrates, and the constant jurisprudence of the Romanian Constitutional Court defines the actual application of these standards to the model of judicial organisation in Romania. Such standards require that, ***in the judicial activity, judicial authorities and judges may not be subjected to any form of direct or indirect pressure, whether public or non-public, concerning cases brought before them and which they have to settle in different stages of the proceedings***. It follows that this is a general guarantee with the correlative obligation for any person or institution with different decision-making power, regardless who they

are, to refrain from acting so that pressure be imposed on judicial institution or magistrates concerning specific causes.

To conclude, the statements and actions of certain European officials, unconcealed and beyond their statutory powers, have affected the independence of the judiciary in Romania in relation to a judicial proceeding pending before the Criminal Section of the High Court of Cassation and Justice, concerning Ms Laura Codruța Kovesi.

I. Statement by Mr Manfred Weber, Chair of the European People's Party group in the European Parliament

The MEP and chair of the political group mentioned above has directly and unequivocally requested that the legal proceedings ongoing at Prosecutor's Office attached to the High Court of Cassation and Justice, as well as the measures taken on Ms Laura Codruța Kovesi immediately cease to apply. In this respect, we present the full declaration published on Tweeter on 29.03.2019 in English and the translation into Romanian:

> "If the legal proceedings against Ms Kövesi are not undone, we will ask for a debate in the next plenary session of the European Parliament. We also urgently call on the @PES_PSE and @ALDEParty to speak out against their sister parties in the Romanian government"
> "Dacă procedurile legale împotriva dnei Kovesi nu vor fi revocate/reconsiderate vom cere o dezbatere în următoarea sesiune plenară a Parlamentului European. Facem, de asemenea, apel la @PES_PSE şi @ALDEParty să ia poziţie publică împotrivă partidelor surori din Guvernul României."

Thus, taking into account that Ms Laura Codruța Kovesi challenged, before the High Court of Cassation and Justice, the measures taken by the prosecutor leading the investigation, therefore as long as the judge of rights and freedoms was invested with the complaint, the request of the European official for revoking, without delay, the measures taken under the threat of a debate on the justice system in Romania in the Plenary of the European Parliament, unequivocally constitutes an element of pressure on the national judge.

In the light of the principles of the rule of law and the separation of powers, the imperative request of the above-mentioned politician represents a violation of the values stated in Article 2 of the Treaty related to the independence of the judiciary in Romania.

II. Statement by Mr Guy Verhofstadt, Chair of the ALDE Group in the European Parliament

> "The ongoing Rule of Law backsliding in #Romania cannot be tolerated and the EU should stand up for anti-corruption fighter Laura Codruta Kovesi, who is now abusively under judicial control on a politically instrumented file and banned to leave the country."
> "Actuala direcție a statului de drept în #Romania nu poate fi tolerată și UE ar trebui să ia poziție în favoarea luptătoarei împotriva corupției Laura Codruța Kovesi, care se află acum abuziv sub control judiciar într-un dosar instrumentat politic și îi este interzisă părăsirea țării"

Although the allegations concerning aspects that are now the subject of legal proceedings were presented to the public long before the submission of Ms Kovesi application, the Romanian

authorities are requested to take the necessary measures so that all legal proceedings be stopped, in view of the administrative procedures at Union level.

In this respect, it should be noted that it is inadmissible to consider that national authorities belonging to the executive or legislative branches could give orders in matters concerning the activities that fall within the competence of national courts to control the legality of the procedural measures adopted by prosecutors. It is also unconceivable, based on the principles of the rule of law and the independence of the judiciary, that national courts carry out their activities in relation to other criteria than the law or to condition the exercise of their duties by the activity of other political authorities, belonging to the Member State or the European Union.

The settlement of cases with which the magistrates are invested is carried out independently from the political calendar, the agenda and the activity of other institutions, as it has been constantly reaffirmed in numerous SCM decisions. Concerning this aspect, the political leader's claim that the judicial proceeding be suspended until the European Public Prosecutor's appointment political procedures are finalized represents a demarche that is likely to affect the independence of national courts. In this context, the Section for Judges of the Superior Council of Magistracy considers that such conduct represents a way of impairing the independence of justice in Romania.

III. Decision of Mr Tajani, President of the European Parliament, to include in the agenda of the Conference of the Political Leaders the topic concerning a pending judicial procedure

On Monday 01.04.2019, Mr Antonio Tajani summoned the Conference of Presidents (Committee of the Political Leaders in the European Parliament), meeting to be held on 3 April 2019 in order to discuss the legal situation of Ms Laura Codruța Kovesi. On the same date, 3 April 2019, the complaint against the preventive measure in the case of Ms Kovesi is analyzed at the High Court of Cassation and Justice.

The initiative to discuss this issue in the governing body of the European Parliament, which is eminently political and also has the competence to determine the issues of debate regarding the situations in the Member States, in particular after Mr Manfred Weber statement, shows a concerted pressure on ongoing investigations and on rulings that are expected from the national judge.

After the meeting which took place on 3 April 2019, although Mr Antonio Tajani referred to the principle of non-interference, he mentioned that he would send a letter showing the concern regarding the judicial measures. It does not fall within the scope of the principle of independence of justice to receive letters from political authorities or to receive indications from national authorities when the letter agreed upon in the Conference of Presidents (Committee of political leaders of the European Parliament) is addressed to the government of the Member State. The letter mentioned above was announced the moment when the national judge was conducting the court proceeding.

To conclude, President Tajani mentioned that he wished to discuss the measure of the judicial control on Ms Kovesi in relation to other administrative procedures in the European Parliament exactly on 03.04.2019, in the Conference of Presidents, Mr Manfred Weber asked for a debate in the Parliament's plenary, should the investigations concerning Ms Kovesi were not stopped and Mr Guy Verhofstadt considered that the Romanian judicial authorities were carrying out an abusive political investigation, although censoring such aspects lies solely within the competence of the national judge.

In so far as it is publicly stated that it is an investigation on which the authorities have to intervene, the principles of independent functioning of justice and separation of powers are questioned by high European officials.

Therefore, discussing judicial situations by one of the governing bodies of the European Parliament, which does not have any kind of competence according to the Treaty on these matters, publicly announced for the same date when a judge in one Member State is expected to settle a case is clearly an element of pressure on national courts.

When the interference is related to a specific case and it comes from a person which is in a position implying national or European political responsibility, it represents a violation of the independence of justice and cannot be assimilated to the right to an opinion or to a general system analysis.

Regarding its impact on the independence of the judiciary, in the decisions adopted by the SCM, as well as in the documents covering the relevant international standards, it has been shown that there is no need to demonstrate whether or not the action through which pressure was inflicted had a specific result, in order for it to be considered as affecting the independence of the judiciary.

Thus, by analyzing the solutions of the Superior Council of Magistracy in Romania on the interpretation of situations likely to inflict pressure on judicial institutions and on magistrates, with the consequence of undermining the independence of the judiciary as a whole, as defined by Article 126 (1) of the Constitution, the way in which the SCM has interpreted and sanctioned statements and actions of politicians or institutions belonging to other powers, it is necessary to establish that the situations reported are significantly more severe in terms of the positions held by of those who have generated them and their impact on Romanian society.

According to the competences established by the Treaties of the European Union, the independence of the judiciary is guaranteed in accordance with the constitutional mechanisms of the Member States, and, in the present case, as unlawful pressure was created on judges and judicial institutions in Romania, on the basis of Article 133 of the Constitution, the Section for Judges of the Superior Council of Magistracy will implement the legal provisions concerning the defense of the independence of the judiciary.

The Section for Judges of the Superior Council of the Magistracy examines with impartiality and objectivity the conduct of politicians in relation to the independence of the judiciary, regardless of their level of national or European representativeness, because only through an impartial, objective and non-selective action the European values of judicial independence and the rule of law can be fully promoted, by identifying deviations and correcting them.

In view of the above, the Section for Judges of the Superior Council of Magistracy finds that, through their declarations and actions, Mr Manfred Weber, Mr Guy Verhofstadt and Mr Antonio Hajiani, acted in a way in a manner to put pressure on the national judge invested with the settlement of the case, with the consequence of undermining the independence of justice, carried out by the High Court of Cassation and Justice and the other courts.

Section for Judges of the Superior Council of Magistracy

Translation from Romanian to English

ROMANIA

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The Inspection Directorate for Prosecutors

Work no: 19-2355

Date: May 28, 2019

Report

On the control regarding the compliance with the legal provisions and regulations referring to registration and solving in the case of criminal complaint filed against Mr. XX, First Vice President of European Commission

I. General data on the control

The way in which the control was set and its objective

Fallowing the Decision of the Section for Prosecutors no. 218 from 4th of April 2019, by the Order of the Chief Inspector no. 81 from 8th of May 2019, amended by Order no. 86 from 20th of May 2019, a thematic control was order at the Section for the Investigating Crimes within Judiciary (SIIJ) with the objective of verifying the compliance with legal provisions and regulations referring to registration and solving in the case of criminal complaint filed against Mr. XX, First Vice President of European Commission.

The control was carried out between 20th and 22nd of May 2019, at the SIIJ's headquarter, by a team of judicial inspectors made of Monica Plesa and Carmen Constanta Herciu.

II. The problems identified during the control, considering the objective set

1. Analysing the method of referral in the identified criminal file

The criminal case having as an object the criminal complaint filed against Mr. XX, First Vice President of European Commission, by the … represented by …, was registered as SIIJ on 8th of February 2019. Previously, the complaint was received by the prosecutor from the Directorate for Investigating Organized Crime and Terrorism (DIOCT) who provided public hearings on the 30th

of January 2019, receiving the registration no. …/30.01.2019 in the public hearings' registry. Subsequent, the complaint was registered at the same Directorate, under the no. …/31.01.2019, and on 1st of February 2019 was sent, by a forwarding address, to competent resolution at SIIJ, where, on 7th of February 2019, a resolution was applied on it and then assigned to prosecutor …

The complaint was filed against …, …, …, and the team who drafted the CVM Report, requesting their criminal investigation for committing the criminal offences of abuse in service, provided by Article 297, (1), Criminal Cod; forgery, provided by Article 321 Criminal Code; public communication of misleading information, provided by Article 404 Criminal Code; and for creating an organized criminal group, crime provided by Article 367, (1) and (3), Criminal Code.

On 11th of February 2019, fallowing a request, the registration number of the complaint was communicated to Mr….

By SIIJ's Ordinance no. …/…/2019 from 27th of March 2019, the criminal complaint was dismissed based on Article 315, (1), (a) and Article 16, (1), (a) Criminal Procedure Code, the solution being communicated to the petitioner the same day.

On 10th of May 2019 a complaint of the petitioner against the solution, sent by post, was registered under no. …/ …/2019. The complaint was dismissed as inadmissible by SIIJ head prosecutor by the Ordinance with the same number from 14th of May 2019.

No other documents or files referring to criminal complaints filed against Mr. XX, First Vice President of European Commission, were identified.

2. The analysis of the criminal case from the perspective in which the prosecutors complied with the legal norms and regulations

Applicable provisions

Considering the Decision of the Section for Prosecutors no. … from 4th of April 2019, the criminal case may be analysed under two perspectives:

- The registration and the file circuit; referring to which the provisions of Article 148 (2) and art. Article 149, (1), (c) of the Internal Regulation of the Prosecutor's Office, approved by Order no …/ …/2014, modified and completed by Order no. …/ …/30.05.2019 of Ministry of Justice, are applicable;
- Compliance with the competence rules; referring to which the provisions of Article 8 and 10 Criminal Code, Article 63 (1) corroborated with Article 41, (1), (a) and (2) Criminal Procedure Code and Article 88^1 of Law 304/2004, as modified by Law 207/2018, are applicable.

III. Conclusions

1. The legal norms referring to the reception and registrations of correspondence, addressed to the panels or Directorates of the Prosecutor's Office attached to the High Court of Cassation and Justice, previously mentioned, state that all the correspondence shall be presented for examination to the chief prosecutor of the panel or directorate, who will further direct the work to the competent person or persons [Article 148 (2)]. After it was directed, the correspondence shall be registered according to the criteria set forward by Article 149 (10). The letter (c) of the mentioned norm provides that "the criminal complaints and denunciations …shall be registered in chronological order in the Registry for criminal prosecution and its surveillance activity (R-…)".

Corroborating the above-mentioned norms with the facts, the judicial inspectors conclude that the norms referring to reception and registrations of correspondence were strictly followed.

2. The legal norms regulating competence refer, in the given situations, at the territoriality and reality of the criminal law, provided by Article 8 and 10 Criminal Code, applicable when foreign citizens are suspected of having committed crimes on Romanian territory, as well as the ratione loci competence, established according to Article 63 (1) corroborated with Article 41, (1), (a) and (2) Criminal Procedure Code.

Finally, considering that one of the persons indicated by the petitioner in the criminal complaint is a prosecutor, respectively the prosecutor …, the exclusive competence for undergoing the criminal prosecution belongs to SIIJ, according to the provisions of Article 88^1 of Law 304/2004, as modified by Law 207/2018. The second paragraph of the mentioned norm provides that SIIJ remains competent to undergo criminal prosecutions even in those situations when alongside magistrates other persons are being investigated. This norm was also considered by DIOCT, which directed the complaint to SIIJ, based on the provisions of Article 294 Criminal Procedure Code, that obliges the prosecuting authority, when receiving the complaint, to verify its competence for undergoing criminal investigations or supervise it.

Corroborating the above-mentioned norms with the facts, the judicial inspectors conclude that the norms were followed.

JUDICIAL INSPECTORS

The hereby report shall be published according to the provisions of Article 123 (5) of the Regulation on the Norms for carrying out inspection works.

ROMANIA

THE SUPERIOR COUNCIL OF MAGISTRACY

The PLENUM

Decision n°225

of 15 October 2019

- EXTRACTS -

The Judicial Inspection brought forward to the Plenary of the Judicial Council Report 5488/IJ/2510/DIJ/1365/DIP/2018 on "*Compliance with the general principles governing the activity of the Judicial Officers in cases falling within the competence of the National Anti-Corruption Directorate for magistrates or in connection with them*".

Having considered this report and having regard to the attached documents, the Plenum of the Superior Council of the Magistracy notes the following:

By Order No 81/30.07.2018, issued by the chief inspector of the Judicial Inspection, it was ordered to carry out, jointly, inspectors from the Directorate for Judicial Inspection for Prosecutors and Judges respectively, of a thematic control on '*Compliance with the general principles governing the activity of the Judicial Authority in cases falling within the competence of the National Anti-Corruption Directorate for magistrates or in relation thereto*'.

The general objective of the review was to ensure compliance with the general principles governing the prosecution, i.e. court proceedings, in cases of competence of the National Anti-Corruption Directorate where persons have been investigated/prosecuted/brought to trial and in court cases where the indictment was brought by the indictment issued by the Prosecutor's Office attached to the High Court

of Cassation and Justice — the National Anti-Corruption Directorate which is related to files in which magistrates were prosecuted.

With regard to this general objective, the team of judicial inspectors established, as a first step, that the following were related to cases of competence of the National Anti-Corruption Directorate for magistrates:

- criminal files definitively settled in the period 01.01.2014-31.07.2018, as well as pending criminal cases registered on the role of the courts during the same period, in both cases the condition being that the indictment/sent to court has to be carried out through the indictments issued by the Prosecutor's Office attached to the High Court of Cassation and Justice — National Anti-Corruption Directorate — Central Structure or Territorial Structures;
- files based on requests/ orders from the Prosecutor's Office attached to the High Court of Cassation and Justice — National Anti-Corruption Directorate — Central Structure or Territorial Structures for initiating specific technical surveillance measures under Article 139 et seq. Criminal procedure code, registered in the courts in the period 01.01.2014-31.07.2018.

In regards to the prosecution, the checks covered the following **aspects**:

- Compliance with procedural, substantive and regulatory provisions in the resolution of criminal cases;
- The way in which the prosecution is brought, with regard to the determination of the existence of data that justified the registration of criminal cases;
- The method of allocating cases;
- How to redistribute the criminal case to another/other public prosecutor/prosecutor;
- The time sequence of the criminal investigations;
- Management of procedural incidents: joints, splittings, observing the order of joints, how to record splits;
- The way in which prosecutors have delegated acts of prosecution and how they have pursued the operational conduct of the delegated activities;
- The way in which prosecutors have been prosecuted (witness statements, orders to start a criminal prosecution);
- The way in which solutions of non-adjudication were drafted with a view to identifying possible justifications contrary to the legal reasoning or the total lack of reasoning;
- The method of communication to the magistrates subject of closure solutions, from the point of view of compliance with Article 316 of the Code of Criminal Procedure;

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- Compliance with the legal requirements relating to technical supervision measures (how to apply for the issuing of technical supervision mandates, the designation of the body for implementing the mandates issued, the way in which the data obtained is to be operated, the existence of orders postponing information on the supervision to the persons concerned, how to communicate that information data to the subjects upon completion of the case, how to archive the data obtained);
- Requests addressed to the courts for handing over, making available the cases pending before the courts, irrespectively of the stage of the resolution, in order to carry out the acts of prosecution of the alleged facts committed by magistrates in relation to these cases — as a potential pressure factor on magistrate judges.

As regards the activity of the courts, the Order of the Chief Inspector of the Judicial Inspection No 28/06.02.2019 amending Order No 81/2018 established the courts with direct verification, setting the following **objectives** for these checks:

- The manner in which applications for the arrangements for supervision and handling of such requests are to be made available to the courts with which direct checks are carried out;
- The method of allocating requests for preventive measures and the handling of such requests to the courts with which direct checks are to be carried out;
- The allocation of the files registered in the courts with which direct checks are carried out and how to comply with the legal provisions on procedural incidents and the exceptions to the random allocation;

Identification of possible breaches of procedural safeguards and of legal provisions relating to incompatibilities and prohibitions in cases registered in the court cases where direct checks are carried out;

Any other checks relevant to compliance with the general principles governing court proceedings in cases within the jurisdiction of the National Anticorruption Directorate with which the directly verified courts have been vested with regard to the proceedings.

.....

The checks carried out revealed the following:

From the statistical data made available by the central structure and the territorial structures of the National Anti-Corruption Directorate, the National Anticorruption Directorate revealed that 1443 cases concerning judges were recorded at the level of

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the National Anticorruption Directorate, out of which 1208 files were solved and 235 files were not yet settled on 30 July 2018.

In the above files, in a number of 113 files (of which 77 settled and 36 pending) the investigation was started as a result of the *ex-officio* referral, and in a number of 1368 files (of which 1170 solved and 198 unresolved), following complaints/reports from natural or legal persons, splittings from other files, or otherwise.

In total, 1962 judges (351 in criminal matters and 1590 in civil matters — including one member of the Constitutional Court, 13 judges/former members of the Superior Council of the Magistracy and 16 judicial inspectors) were targeted at the level of the Central Structure and Territorial Structures of the National Anti-Corruption Directorate.

The cases dealt with were targeted at 1604 judges (293 in criminal matters and 1293 judges in civil matters, plus 11 judges of the Superior Council of the Magistracy, a judge of the Constitutional Court and 5 judge judges).

A total of 433 judges were concerned in the backlog files (59 in criminal matters and 365 in civil matters, plus 2 members of the Superior Council of Magistracy and 7 judicial inspectors).

* * *

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* * *

<u>CONCLUSIONS</u>:

Considering all the above mentioned, the Plenum of the Superior Council of Magistracy notes that factual findings and conclusions of the current analysis report on the criminal investigation have been judicialy argued, as follows:

- ***the unjustified length of investigations in numerous cases, mainly due to a lack of rhythmic prosecution linked to periods of inactivity;***
- ***the infringement of the procedural provisions by the prosecutors dealing with the cases/the criminal investigation, consisting of the following:***

- Infringement of the procedural provisions on the obligation of the public prosecutor to inform the person subject of recordings/technical supervision, i.e. the absence of orders for delaying/postponing to take the procedural measure, as well as the failure to notify the magistrates subject of the investigation;
- The absence of any orders for initiating the '*in rem*'criminal investigation;
- Issuing orders '*in blank*' to delegate tasks, i.e. to carry out criminal investigation activities by the criminal investigation bodies without delegation;
- Redistributing files without any therefore motivation/justification;

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- Carrying out specific criminal investigation activities by officers of the Romanian Intelligence Service in cases concerning magistrates;
- The practice of requesting files which were pending before different courts, in order to assess from a possible criminal point of view, the measures/solutions rendered by judges;
- ***Other non-inadequate issues that have been raised***
- The request to take over criminal cases by the National Anticorruption Directorate in relation to the way in which the judge has solved the request to extend technical supervision measures concerning other magistrates;
- Inadequate feedback/comments on referring to the solutions rendered by judges, on the occasion of criminal investigation activities performed by DNA prosecutors;
- ***The technique of "ex officio" referrals, in particular against judges and the criminal investigations against these judges for solutions rendered in various cases;***
- ***Settlement all together given to cases left without a solution sometimes for a very long period of time, just before the Section for Investigating Crimes within the Judiciary has beging to function.***

From the point of view of compliance with the guarantees laid down by law for magistrates involved in cases pending before the National Anti-Corruption Directorate, there were notified serious shortcomings in carrying out criminal investigation activities in a number of cases.

Thus, considering the equity of the proceedings, according to the case-law of the ECHR, a balance must be ensured between safeguarding the general interest of society for punishing all the offenders and, on the other hand, the legitimate interest of every innocent indivdual not to be subject to criminal constraint, on the other hand.

Similarly, equity implies a constant concern to not unduly prejudice the fundamental rights and freedoms enshrined in the Constitution, which implies strong safeguards to prevent any abuse and to remove the consequences of any violations of the law by the judiciary bodies.

As part of the equity, the reasonableness of the length of proceedings is considered/assessed in the light of the actual circumstances of the case and taking into account the criteria laid down in the case-law of the ECHR, namely the complexity of the case, the conduct of the complainant, the conduct of the authorities and the importance of the subject-matter of the case for the complainant.

However, it is apparent from the analysis of the aspects presented in the Report of the Judicial Inspection that the way in which the prosecution bodies has exercised the legal atributions has left the scope of the requirements laid down by the ECHR, with the consequence that the lengths of the procedures and its equity have been infringed.

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In many of the cases, unjustified inactivity periods (in terms of years) have been noticed/reported, subsequent to the technical surveillance measures taken/ordered often for significant periods of time, measures which, by their very nature, exhibit a high degree of intrusion into the rights and freedoms of the magistrates subject to these measures.

In many cases, the inactivity of the prosecution was accompanied by measures to postpone the notification of the persons subject of the technical supervision carried out, aspect which undoubtedly has amplified the negative consequences towards the fundamental rights and freedoms of the magistrates concerned by these measures.

At the same time, in the above presented cases, a manifest carelessness has been reported in relation to the prosecution's activity/involvement in solving the cases, even if, as it has been noted several times in the order/solution for classification, there were no clues of a criminal offence.

In the light of those mentioned above, the following conclusion may be drawn, namely that the guarantees of independence of the magistrates subject to investigation in these cases were affected as a direct consequence of the way/manner in which the criminal proceedings have been carried out.

In carrying out the criminal proceedings, the judicial bodies must ensure the strict compliance/observance with/of the law, which is imperative both in regards to the actions of other participants in the criminal proceedings, and, in particular, to the actions of the judicial bodies themselves.

Beyond the flagrant disregard of certain mandatory procedural provisions, the deficiencies highlighted by the Report of the Judicial Inspection raise serious doubts regarding the appearance of impartiality that should characterize/define the conduct of the prosecution bodies in carrying out the criminal proceedings.

The serious deviation/infrigements from /of the criminal procedure provisions, consisting of non-compliance with the obligation to provide information to those persons subject to the technical supervision measure, the absence of an order/injunction to start *in rem* the criminal investigation, issuing orders for delegating powers '*in blank'* (measure that may enable drawing up documents with non-real data), the redistribution of files without any justification/motivation for these means, carrying out specific activities of criminal investigation by officers from the Romanian Intelligence Service in cases concerning magistrates or the practice of requesting from the courts files that were pending before these courts in order to assess the measures/solutions rendered by judges, in addition to the procedural consequences to which only the judicial bodies competent according to the law, may act, rise, beyond any doubt, the mistrust of the public perception towards the objectivity of the prosecution bodies or,

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moreover, the justified concern/fear that their activity is not in compliance with the law.

All of the previously described circumstances lead, together, to the consequence of being/becoming an obvious pressure factor for the magistrates subject to these files, while at the same time becoming a severe impairment of the principle of the legality of the criminal proceedings and of the presumption of innocence, that represent the fundamental elements of a fair criminal trial.

In the same framework, other working methods of the prosecution bodies should be envisaged thus being highlighted by the findings of the judicial inspectors.

Thus, the number of judges subject to the criminal investigation proceedings in cases pending before the National Anti-Corruption Directorate (Central Structure and Territorial Structures) is relevant in relation to the total number of judges of the respective courts, on the one hand, and the fact that for the overwhelming majority of these cases solutions of non-prosecuting have been rendered.

As an example, more than 75 judges from the High Court of Cassation and Justice were envisaged (9 of these judges were investigated by county services of Brasov, Oradea, Constanța), about 100 judges from the Bucharest Court of Appeal, about 35 judges from Oradea Court of Appeal (out of the total of 40 judges), about 30 from Ploiesti Court of Appeal (out of the total of 50 judges), approximately 25 judges from Brasov Court of Appeal, approximately 20 judges from Iasi Court of Appeal (out of the total of 45 judges), more than 15 judges from Constanta Court of Appeal (out of the total of 40 judges), more than 15 judges from Timisoara Court of Appeal (out of the total of 60 judges), for more than 85 judges from Bucharest Tribunal, more than 25 judges from Arges Tribunal (from around 40 judges), more than 30 judges from Bihor Tribunal (out of the total of 40 judges), more than 25 judges from Dolj Tribunalul (out of the total of 70 judges).

In total, more than 1900 judges were envisaged by such investigations by the Central and Territorial Structures of the National Anti-Corruption Directorate.

The **practices of DNA prosecutors dealing with cases where judges were subject of investigations, under in the above mentioned manners represented types of pressure for judges, with direct consequences in the delivery of justice.**

Thus, the technique of *ex-officio* actions against judges and their investigation for solutions rendered in cases is an unacceptable fact of unprecedented severity, which undoubtedly represents a pressure factor not only towards those subject of investigation but towards the entire professional body of judges.

The doubts on the working methods of the prosecutors within the National Anti-Corruption Directorate are further amplified by the fact that files have been left without

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a solution for a long period of time, after having previously taken technical supervision measures with significant temporal length/durations in these cases, and that the cases have been further solved all together the solution being a non indictment one, exactly before the Section for Investigating Crimes within Judiciary became functional.

Such a practice raises serious concerns as to the reasons justifying the retention of cases over time up to years and gives rise to legitimate doubts as to generate, by this means, pressure on the work of magistrates and ultimately on the right of the parties to a fair trial process.

In the same vein, the practice of requesting files pending before the courts in order to assess the measures/solutions rendered by judges from a possible criminal point of view is part of the same practice. In fact, this investigative manner represented a true intrusion into the judge's discretion.

At the same time, it is noted that the general objective of control, established by order of the chief inspector of the Judicial Inspection, was to respect the general principles governing the criminal investigation activity, i.e. the court proceedings in cases in the competence of the National Anti-Corruption Directorate where persons who were magistrates were investigated/prosecuted/tried in the court, in cases pending before courts in which the indictment was carried out through the indictments issued by the Prosecutor's Office attached to the High Court of Cassation and Justice — the National Anti-Corruption Directorate related to files in which magistrates were prosecuted.

In relation to the general objective established, compliance with the legal provisions on technical supervision measures provided for by the Code of Criminal Procedure has been checked.

In the light of the conclusions of the report of the Judicial Inspection No 5488/IJ/2510/DIJ/1365/DIP/2018, in order to provide full clarification on the way in which the general principles of the criminal proceedings were respected in cases where magistrates were prosecuted or in cases linked to them, in respect of the same period considered during the checks (01.01.2014-31.07.2018), it is also necessary to verify compliance with the legal provisions concerning the issuing of national security mandates, in accordance with Articles 14-19 of Law No 51/1991 on the national security of Romania.

In comparison with those set out above, the Plenum is to approve the Report of the Judicial Inspection No 5488/IJ/2510/DIJ/1365/DIP/2018 on *"compliance with the general principles governing the activity of the Judicial Authority in cases falling within the competence of the National Anti-Corruption Directorate regarding magistrates or in connection with them"*.

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In view of the conclusions drawn from the findings of the judicial inspectors, the Plenum of the Superior Council of the Magistracy considers it absolutely necessary, given the potential to affect the independence of judges and prosecutors and, as a consequence, the right of the parties to a fair trial, to follow up with concrete measures to restore legality in the activity of the prosecution bodies, meaning that an analysis will be initiated at the level of the Superior Council of the Magistracy.

For these reasons, according to the provisions of Article 74 para.(1) (h) of the Law No 317/2004 on the Superior Council of Magistracy, republished, as amended and supplemented, by direct and secret ballot, by a majority of the votes of the present members (10 YES votes, 8 votes NO, 1 VOID)

THE PLENUM OF THE
SUPERIOR COUNCIL OF THE MAGISTRACY

DECIDES:

Art. 1 - Approves the report of the Judicial Inspection No 5488/IJ/2510/DIJ/1365/DIP/2018 on "compliance with the general principles governing the activity of the Judicial Authority in cases of competence of the National Anti-Corruption Directorate regarding magistrates or in relation thereto".

Art. 2 - The current decision of the Plenum of the Superior Council of Magistracy shall be communicated to the Judicial Inspection, in order to be implemented, in accordance with the law.

Rendered in Bucharest, on October 15th 2019.

President,

Judge Lia SAVONEA

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https://floricaroman.wordpress.com/2019/01/28/letter-to-the-superior-council-of-magistracy-to-validate-the-results-for-appointing-the-new-chief-prosecutor-of-the-special-section-unit-to-investigate-crimes-within-judiciary/

LETTER TO THE SUPERIOR COUNCIL OF MAGISTRACY TO VALIDATE THE RESULTS FOR APPOINTING THE NEW CHIEF-PROSECUTOR OF THE SPECIAL SECTION UNIT TO INVESTIGATE CRIMES WITHIN JUDICIARY

28.01.2019
TO
THE PLENARY OF THE HIGH COUNCIL OF JUSTICE
(sent by e-mail: secretar_general@csm1909.ro)

Subject: Validation of the examination results of the appointment in the position of head-prosecutor of the Department for the Investigation of Crimes in Justice

The undersigned Florica Roman, a judge of Oradea Court of Appeal, with 25 years seniority, I hereby request you to immediately validate the results of the examination for the appointment in the position of head-prosecutor of the Department for the Investigation of Crimes in Justice within the Prosecutor's Office attached to the High Court of Cassation and Justice, subject included at point 1 on the agenda of the CSM (Superior Council of Magistracy) Plenary of 28.01.2019, so that this Department can become operational in the shortest time possible.

First of all, this department is at present the only remedy to ensure the judges' real independence in delivering decisions, given that certain DNA (National Anticorruption Directorate) prosecutors, using their power in an abusive manner, have investigated judges in order to ensure the desired decision in the cases they themselves investigated, as I will show hereinafter.

Secondly, just because not even the justice is spared of people who break the law, the investigation of magistrates should be done in a professional manner, with celerity, guarantees this Department can offer by the terms imposed to prosecutors who want to be part of it. Then, given that this Department's prosecutors do not take part in the hearings, additional guarantees are offered that no pressure and influences will be placed on judges by any party to the case.

Thirdly, the fact that the appointments in this Department are made only by CSM, it ensures it a real independence from any interferences and political deals.

Shortly, this Department guarantees the magistrates that they will not by investigated abusively in order to be intimidated and determined to deliver certain decisions. The Department is a real guarantee for the independence of judges and prosecutors, as the Constitutional Court has noted, guarantee absolutely needed at this time to regain the credit in the act of justice.

As there are some voices claiming that this Department would have potential of breaking the magistrates' independence, I will show you hereinafter a series of facts regarding the way the DNA prosecutors have been terrorizing for the past years both the judges and the prosecutors in their area of competence in order to ensure the decisions they wanted in the cases they investigated or in which they had an interest. One can draw a single logical and immediate conclusion from these facts: setting-up the Department for the Investigation of the Crimes in Justice is a necessity which cannot be questioned by any person of good faith, who wants an independent, fair and operational justice.

At the beginning of 2019 a recording with 5 prosecutors from DNA Oradea was made public. In this recording they were discussing in DNA Oradea offices, on 19.01.2018, about a series of criminal repressive methods

to “scare” and “calm down” the judges of Oradea Court of Appeal and Bihor District Court. An important thing to be mentioned is that the 5 DNA prosecutors who took part in the respective discussion, that is Man Ciprian, Muntean Adrian, Ardelean Ciprian, Pantea Cosmin and Rus Lucian, did not contest the authenticity of the recording.

Once the recording was made public, a huge mechanism of media and political propaganda, supported also be a few prosecutors and judges, was set in motion in order to minimize the severity of what those 5 DNA prosecutors had said in the respective recording, under the pretext that the respective discussion inside the DNA Oradea was not followed by any acts or facts, it was just a simple talk, gossip between colleagues.

In reality, though, the discussions were not just preceded, but also followed by acts and facts of the respective DNA Oradea prosecutors.

Thereby, the DNA Oradea prosecutors started criminal proceedings against several judges and prosecutors attached to Oradea Court of Appeal for decisions they delivered, in order to intimidate, terrorize and subordinate them to DNA interests.

I. Abusive actions of DNA Oradea prosecutors against magistrates in this area prior to 19.01.2018

1. Since 2013, DNA Oradea started investigating judges for the decisions they delivered, which the prosecutors deemed as illegal, reasons for which they have criminally investigated the judges for abuse of office, there being no accusations that the respective judges received gains or benefits for the decisions they delivered.

2. In 2014, 5 judges of the Civil Department of Bihor District Court received, in court, an ordinance signed by the DNA Oradea prosecutor at that time, Man Ciprian, whereby it was admitted the complaint made by a litigant against a nolle prosequi for a fact representing just a decision in a civil revision case. Thereby, the prosecutor, Mr. Man, denied the decision of the case prosecutor and ordered the continuation of criminal proceedings against these 5 judges, saying that it is legal for prosecutors to verify the legality and validity of the final court orders.

I confirm that the 5 judges felt this fact as a direct pressure exercised on them, given the possibility that the prosecutors could start criminal cases in an arbitrary way, to judges for the decisions they delivered. One of the 5 judges said, half kidding, that maybe in the future, to avoid having problems for the delivered decisions, the judges should send their projects for decisions to DNA for prior approval, as they used to do in the communist era, when some court orders were priorly approved by the party.

3. Starting with 2012, DNA Oradea has been investigating the case 37/P/2012 whereby they put pressure on a person to admit that she had given me undue benefits in order to influence other judges in delivering a court order.

During 2013, although I have never been summoned in that case, I would find out from Oradea press new information in the case and the progress of investigations. Later on, DNA Oradea included 3 more judges in that case, one from Bihor Court and other two from Oradea Court of Appeal.

In 2014 all 4 of us, judges, were prosecuted, I for allegedly having received an ”unspecified amount” of money, and my colleagues for abuse of office on the grounds that they delivered a court order which the DNA prosecutors deemed as illegal and ungrounded. The charges against the other 3 colleagues, judges, were not accompanied by any accusation of corruption, alleging that they would have received any undue benefits in order to deliver those decisions.

Simply, the DNA Oradea prosecutors, led by Man Ciprian, posed as great courts to censor the judges' decisions. In this case, the prosecutors Ciprian Man and Dan Chirculescu (retired meanwhile) interrogated judges about what has been discussed in deliberations, fact which violates the deliberation secret and the very essence of the judge's independence.

Due to these pressures on judges by DNA Oradea prosecutors through such repressive actions, in 2014 over 50 judges addressed to the former CSM (High Council of Justice) requesting the clarification of the issue whether prosecutors can interrogate and investigate judges on the delivered decisions and also the clarification regarding the violation of the justice's independence by such abusive actions. The former CSM, by Decision 846 bis dated 3.07.2014, avoided to give a straight answer, leaving thus the DNA prosecutors to continue with the criminal investigations against the judges for the decisions they were delivering.

The respective case, in which we were prosecuted, registered under no. 854/33/2014 with Cluj Court of Appeal, was returned to DNA Oradea in 2016 subsequent to serious procedural flaws. By the report 231/2016 of the ICCJ (High Court of Cassation and Justice) in the previously mentioned case, the supreme court found, among many other abuses, that in this case the DNA prosecutors broke the deliberation secrecy. In other words, the DNA prosecutors interrogated the judges about the way they took the decisions in the court orders they delivered, such prosecutors' action being illegal, as the ICCJ has finally determined.

Returned to DNA Oradea, the respective file was taken over by the central DNA , who closed it in 2017. In my case, the closing was due to the fact that the "crime was inexistent", in the case of other two judges, because the crime was not stipulated by the criminal legislation and as concerns the fourth judge, the Prosecutor's Office attached to Oradea Court of Appeal declined his jurisdiction. Thereafter, both the court, in the case of the two judges, and the Prosecutor's Office attached to the High Court of Cassation and Justice, in the case of the other judge, delivered a final decision whereby they were of the opinion that the crimes were inexistent.

Therefore, 4 judges were investigated for years, prosecuted, suspended from office, presented by DNA as an example of corruption in justice and a model of success for DNA, noted as such in the institution's activity report on 2014, for crimes that were inexistent.

4. In 2014, DNA Oradea requested technical surveillance warrants for 4 prosecutors attached to Oradea Court of Appeal for abuse of office, case which was closed later on.

5. In 2016 a prosecutor from the Prosecutor's Office attached to Beius Court was prosecuted by DNA Oradea for abuse of office consisting in taking certain precautionary measures. No accusation of receiving undue benefits was made in the case, the DNA's charge came simply subsequent to a measure the prosecutor had ordered in a case. The prosecutor was acquitted in the lower court.

Those mentioned above are just a part of the facts prior to the recording of 19.01.2018, facts which nevertheless show the way DNA Oradea carries out investigations against magistrates: certain judges would become targets, criminal prosecution cases were started against them for decisions they had delivered or criminal actions were fabricated against them, they were made vulnerable by information leaking in the media from the cases against them and which were unknown to them, then they were prosecuted in order to scare and calm down the other judges.

II. Abusive actions of DNA Oradea prosecutors against magistrates in this area after 19.01.2018

"If you start the investigations against these two judges, Adi will prosecute those three, they will get scared…", said the prosecutor Man Ciprian to the other DNA prosecutors at the table, as it results from the recording of their working meeting dated 19.01.2018.

Those said by the prosecutor Man Ciprian in that recording, on 19.01.2018, were shortly followed by acts and facts of the respective prosecutors from DNA Oradea against the judges in discussion.

1. "These two judges", mentioned by Ciprian Man, were Angela Tod and Adina Cioflan. On 31.01.2018 and 12.02.2018, the prosecutor Ardelean Cristian (the one prosecutor Man Ciprian was addressing to in the recording) ordered the continuation of criminal proceedings against these two judges in the case 24/P/2013 of DNA Oradea, thus making them suspects for committing certain alleged forgery (several material acts). The forgery consists, according to the opinion of prosecutor Ardelean, in maintaining certain unreal aspects in the recitals of some court orders they delivered in 2012-2013.

What is important to be mentioned here is that these judges had been priorly investigated in 2013, by the Judicial Inspection exactly for the same actions, being sanctioned with "warning" by the Department for Judges of the former CSM. The two judges contested the sanction before the ICCJ (High Court of Cassation and Justice), their appeal was admitted and they were delivered of any disciplinary liability.

Therefore, actions dating 5-6 years ago, which were not even disciplinary misconducts, were transformed into crimes by DNA Oradea prosecutors, crimes for which the 2 judges were made suspects.

On 24.08.2018, after the establishment of the Department for the Investigation of Crimes in Justice, the case regarding the two judges was closed by prosecutor Ardelean Cristian himself, who made them suspects, DNA avoiding thus the case to be sent before the Department.

2. "Those three" to be prosecuted, whom prosecutor Man Ciprian was referring to, are judges Traian Muntean, Mircea Puscas and Mihaela Patraus, who, on the recording date were under investigation in the case 53/P/2015 of DNA Oradea. It was ordered the start of criminal proceedings against them for abuse of office and aiding the offender because they had delivered a court order in 2011 whereby admitted an appeal for annulment.

On 12.02.2018, by Ordinance, the prosecutor Muntean Adrian Valentin ("Adi" in the recording) – prosecutor of DNA Oradea at that time – , ordered the change of legal classification of the acts imputed to those three suspect judges, in order to adapt the charges to the CCR Decision 405/2016, with the clear intent of prosecuting them, as agreed in the recorded discussion.

On 20.02.2018, Mihaela Patraus requested the Central DNA to take over the case from ST Oradea. DNA Bucharest took over the case 53/P/2015 from DNA Oradea and on 28.03.2018 it ordered the closing of the case for all three judges on the grounds that the "crime was inexistent".

The argument that some of these judges were retirees and therefore no pressures could be made on the judges in office is contradicted by what prosecutor Man Ciprian had said in the recorded discussion regarding Mihaela Patrus.

Patraus is going "to too many seminars together with Udroiu. That's what she said that's why she retired, because of two people. Mine, I think, and Adi's, that's what I understood, yes! Meaning that she was accused. Prosecuting her will have a great impact", said Man Ciprian to his colleagues in the DNA head office.

All judges and prosecutors mentioned above we under criminal investigation exclusively for the decisions they delivered, DNA did not impute them that they would have received undue benefits subsequent to the delivered decisions.

In fact, in Oradea at least, the prosecutors with a seniority of 4-6 years in Magistracy, promoted in DNA with no objective criteria and only based on a totally nontransparent interview, by the former DNA prosecutor, Laura Codruta Kovesi, to censor in criminal court, court orders delivered including by judges of the court of appeal.

If for an ordinary traffic accident by fault, made by a judge or prosecutor, he/she is investigated by experienced prosecutors attached to courts of appeal, it has come to – for alleged corruption crimes, consisting in the delivery of a decision – judges and prosecutors having even a ICCJ (High Court of Cassation and Justice) degree, be investigated by DNA prosecutors coming from Prosecutor's Offices attached to Courts.

It happened that such prosecutors, totally immature and lacking any professionalism, once in office, through a nontransparent interview, from the basis of the Public Ministry directly to its top, in DNA, posed as ultimate courts, arrogating the right to check the legality of certain civil and criminal court orders delivered by judges with 20 years' experience. If such DNA prosecutors with minimum experience thought that those court orders were illegal, they criminally investigated and prosecuted the judges for abuse of office, forgery or other crimes strictly related to the delivered decision.

In none of the before mentioned cases was ordered any conviction, but both prosecutors and judges, some of them working in district courts or courts of appeal, were suspended from offices, subjected to public shame and given as examples to "calm down" and "scare" the rest of the magistrates.

That is how it functioned, in fact, at least in Oradea, the so called fight against the crimes in justice.

The establishment of the Department for the Investigation of the Crimes in Justice and its operationalization is a guarantee that such abuses against magistrates cannot happen anymore and that the people in justice who are suspected of committing criminal offenses are investigated with professionalism and celerity.

By the way the Department is organized and operates, that is at the level of the Prosecutor's Office attached to the High Court of Cassation and Justice, made of prosecutors with at least 15 years seniority and working at least in courts of appeal, appointed by CSM (High Council of Justice), with no political interference, with limited mandate and the obligation to present activity reports, it can be assured a real independence of the judges and prosecutors, and meanwhile, a real, efficient and prompt criminal investigation for criminal actions made by magistrates.

Given such reasons, I'm requesting you to consider the before mentioned actions and to order the immediate validation of the management of the Department for the Investigation of Crimes in Justice within the Prosecutor's Office attached to the High Court of Cassation and Justice, so that this department becomes operational in the shortest time possible.

Sincerely yours,
Judge Florica Roman

[Translation from Romanian]

STRICTLY SECRET

[Stamp reading Declassified]
ROMANIA

Public Ministry the Prosecutor's Office attached to the High Court of Cassation and Justice No. 00750 of 04.02.2009	Romanian Intelligence Service ~~No. 003064 of 04.02.2009~~ 7505
The General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice	The Director of the Romanian Intelligence Service
LAURA CODRUTA KOVESI	GEORGE CRISTIAN MAIOR

PROTOCOL ON COOPERATION

between the Prosecutor's Office attached to the High Court of Cassation an Justice
and the Romanian Intelligence Service
to carry out their tasks in the field of national security

in accordance with the:
- the Constitution of Romania, republished;
- the procedure of criminal procedure republished, as amended and supplemented subsequent;
- Law no. 51/1991 on the national security of Romania;
- Laws no. 14/1992 on the organization and functioning of the Romanian Intelligence Service, as subsequently amended and supplemented;
- Law no. 78/2000 on the prevention, detection and sanctioning of corruption, as amended and supplemented;
- Laws no. 143/2000 - on combating illicit trafficking and illicit drug use, as subsequently amended and supplemented;
- Law no. 678/2001 on preventing and combating trafficking in human beings, as subsequently amended and supplemented;
- Laws no. 182/2002 on the protection of classified information, as subsequently amended and supplemented;
- Law no. 39/2003 on preventing and combating organized crime, as subsequently amended and supplemented;
- Laws no. 161/2003 on certain measures for ensuring transparency in the exercise of public dignities, public functions and business environment, prevention and sanctioning of corruption, as subsequently amended and supplemented;

- Law no.304 / 2004 on judicial organization, republished, as subsequently amended and supplemented;

- Law no.508 / 2004 on the establishment, organization and functioning within the Public Ministry of the Directorate for the Investigation of Organized Crime and Terrorism, modified and completed by GEO no. 7/2005, as amended and supplemented;
- Law no. 535/2004 on the prevention and combating of terrorism;
- Government Emergency Ordinance no. 43/2002 on the National Anticorruption Directorate, as amended and supplemented;
- Government Emergency Ordinance no. 194/2002 on the regime of aliens in Romania, approved by Law no. 357/2003, as subsequently amended and supplemented;
- Government Emergency Ordinance no. 102/2005 on freedom movement on the territory of Romania of the citizens of the Member States of the European Union and of the European Economic Area, approved by Law no. 260/2005, with subsequent amendments;
- Government Decision No. 585/2002 approving the National Standards for the Protection of Classified Information in Romania, as subsequently amended and supplemented;
- Government Decision no. 1346/2007 on the approval of the Action Plan to fulfill the conditionality under the mechanism for cooperation and verification of progress made by Romania in the field of judiciary reform and the fight against corruption;
231/2005 regarding the approval of the National Anticorruption Strategy, 2005-2007 and the Action Plan for the implementation of the National Anticorruption Strategy 2005-2007;
- CS.A.T. No.00140/2001 regarding the designation of the Romanian Intelligence Service as a national anti-terrorist authority;
- The C.S.A.T. No.0068 / 2002 by which the Romanian Intelligence Service was designated as a national authority in the field of interception and relations with telecommunication operators;
- CS.A.T. no.2234 / 2004 regarding the cooperation between the Romanian Intelligence Service and the Public Ministry for the fulfillment of their tasks in the field of national security;
- CS.A.T. No.0237 / 2004 for the approval of the General Protocol on cooperation in the field of information security for national security;
- CS.A.T. no. 17/2005 on combating corruption, fraud and money laundering;
- The C.S.A.T. No.0024 / 2005 for the approval of the Regulation on the organization and functioning of the Antiterrorist Operational Coordination Center;
- The C.S.A.T. No.00173 / 2006 for the approval of the Methodology regarding the organization and execution of counterterrorism intervention.
- The C.S.A.T. No.0024 / 2005 for the approval of the Regulation on the organization and functioning of the Antiterrorist Operational Coordination Center;
- The C.S.A.T. No.00173 / 2006 for the approval of the Methodology regarding the organization and execution of counterterrorism intervention.

Taking into account the attributions and the competences, according to the law, to the Prosecutor's Office attached to the High Court of Cassation and Justice - as coordinator of the activity of the National Anticorruption Directorate, the Directorate for Investigation of Organized Crime and Terrorism, the Prosecutor's Offices attached to the High Court the Cassation and Justice and the subordinated prosecutor's offices and the Romanian Intelligence Service, as a state body specialized in the gathering of information necessary for the knowledge, prevention and counteraction of the threats to the national security of Romania,

between the Prosecutor's Office attached to the High Court of Cassation and Justice - hereinafter referred to as "the Prosecutor's Office" - and the Romanian Intelligence Service - hereinafter referred to as "the Service" - this Protocol of Cooperation is concluded.

GENERAL PART
CHAPTER I - PRINCIPLES AND COOPERATION DOMAINS
SECTION 1 - PRINCIPLES OF COOPERATION

Art. 1. -Cooperation between the Prosecutor's Office and the Service is performed under the law and in accordance with the provisions of this Protocol, in compliance with the following principles:
a. The principle of the rule of law, which enshrines the rule of law, the equality of all citizens before the law, respect for fundamental human rights and the separation of powers in the state;
b. The principle of responsibility, which presupposes that the state authorities respond to the fulfillment of their tasks, respectively the way of implementation and the effectiveness of the agreed action strategies, bearing the consequences for their non-fulfillment, according to the law;
c. The principle of crime prevention, according to which early identification and timely removal of serious antisocial deeds are priority and imperative;
d. The principle of coherence and continuity in cooperation, according to which the signatory parties must work together permanently and provide a unitary and flexible framework for achieving the objectives to be achieved;
e. The principle of periodic evaluation of the activities provided for in this Protocol, both in terms of the concrete results,
inter-institutional management, a prerequisite for ensuring efficiency in achieving common objectives.
f. The principle of compliance with the obligations and responsibilities of the Parties regarding the protection of classified information

SECTION 2 - FIELD OF COOPERATION

Art. 2. - The parties cooperate, according to the competences and attributions stipulated by the law, in the activity of capitalizing the information in the field of preventing and combating crimes against national security, acts of terrorism, crimes that correspond to the threats to the national security and other serious crimes, according to the law.

SECTION 3 - COOPERATION OBJECTIVES

Art. 3. - The objectives of the cooperation are:

a. Effective capitalization of the specific capacities held by the two institutions for the purpose of knowledge, prevention and counteraction of vulnerabilities and external and internal risk factors to national security that may generate or favor the commission of the offenses referred to in Article 2;

b. making available relevant and useful information for the fulfillment of the party's specific duties and their protection;

c. to carry out, as a matter of urgency, the steps provided by law to request and obtain, by the Service, the mandate to authorize measures to carry out activities for the purpose of collecting information;

d. organizing and carrying out the tasks assigned to the parties in accordance with Article 85 of O.U.G.Nr. 194/2002 on the aliens regime in Romania, republished with the subsequent modifications and completions and art. 27 from O.U.G.n. 102/2005 on the free movement on the territory of Romania of the citizens of the Member States of the European Union and of the European Economic Area, with the subsequent amendments and completions, with a view to preventing, combating and removing activities that could endanger the national security, which foreign citizens the territory of Romania has been deployed, carried out, or about which there are good indications that they intend to carry them out;

e. ensuring the fulfillment of the duties of the Public Prosecutor's Office for the enforcement of the authorization documents issued according to the provisions of Articles 91^1 – 91^5 and Article 98 of the Code of Criminal Procedure;

f. the correlation of the activities for identifying, obtaining, capitalizing, preserving and analyzing the information related to the offenses referred to in art. 2;

g. the establishment of joint operational teams acting on the basis of action plans for the exercise of the specific competences of the parties, in order to document the facts mentioned in art. 2;

h. providing free of charge by the Service assistance in the field of the protection of classified information held and used by the Prosecutor's Office to prevent the leakage of data and information of this nature, the collection, transportation and distribution of official correspondence in the country;

i. the development and implementation by the Parties, in complementary areas, of common strategies, actions and programs;

j. the granting by the experts of the Service, according to the law, of the specialized technical assistance to the prosecutors carrying out the criminal investigation, for the application of the provisions of art. 91^1-91^5 and Article 98 of the Criminal Procedure Code;

k. the provision by the Service, under the terms of the law and of this Protocol, of specialized technical assistance to prosecutors in the cases referred to in Article 2, where the administration of evidence requires specific technical knowledge or equipment or in cases where persons with a protected identity ;

l. the creation of informatic mechanisms to ensure the operative communication, in particular situations, of data and information necessary for the fulfillment of the tasks of each party;

m. participation in joint training, specialization, training or professional training programs.

CHAPTER II - RESPONSIBILITIES OF THE PARTIES
SECTION 1 - PROSECUTORS OFFICE RESPONSIBILITIES

Art. 4. - Verifies, through the designated prosecutors, the proposals made by the Service and requests in writing to the President of the High Court of Cassation and Justice to issue the authorization mandates for carrying out activities for the purpose of collecting information.

Art. 5. - Ensures, through specialized prosecutors, the use of information, data, documents and materials related to the initiation / perpetration of crimes transmitted by the Service obtained as a result of the implementation of the mandate, to the extent that their knowledge is necessary for establishing or finalizing a criminal case and does not affect the conduct of specific activities to counter threats to national security.

Art. 6. (1) Communicates, *operatively*, but not later than 60 days, the manner of capitalization of the information notices or referrals received from the Service, regarding the offenses provided by art. 2, except for the cases where, before the expiry of the mentioned deadline, supplementary information regarding the case are requested.
(2) The term of 60 days shall run from the date of registration of information or notification to the Prosecutor's Office.

Art. 7. - ((1) Puts at the disposal of the Service, upon request or *ex officio*, data and information which by their nature present an operative interest for counteracting or preventing some threats to the national security.
(2) Puts at the disposal of the Service, the data and information regarding the implication of some military officers or civil employees thereof in the preparation or carrying out of offenses, if it deems that, by this, finding out the truth in the case is not impeded or slowed down.

Article 8 - Provides the protection of classified information resulting from the cooperative activity in which it takes the necessary measures for obtaining the written approval of the Service, in accordance with the legal provisions, for the declassification of the documents before the introduction into the case file.

Art. 9 - Provides, at the request of the Service, consultancy, through its own specialists, in the fields of cooperation.

Article 10 - Appoints the Prosecutor in whose presence the counter-terrorist intervention is executed by the Directorate for the Investigation of Organized Crime and Terrorism Offenses.

Art. 11 - Within the framework of cooperation activities, the staff and the technical means of the Service can not be deconstructed.

SECTION 2 - RESPONSIBILITIES OF THE SERVICE

Art. 12. - Performs, according to the law, at the request of the Prosecutor's Office, specific activities in order to obtain the data and information regarding the preparation or committing of the offenses provided in art.2.

Article 13 - Provides data, information and documents to the Prosecutor's Office, in compliance with the legal provisions on access to classified information, which can support the documentation of the cases being processed. This information must contain sufficient identifying elements for the adoption of specific measures and to be used in criminal prosecution.

Art.14 - (1) Provides support, through the specialized departments, for filling in the information in the complex cases between those stipulated in Art. 2, in the Prosecutor's Office, for carrying out investigative and operative supervision activities.
(2) Provides technical support, through the specialized departments for activities necessary for the implementation of the provisions of art. 91^1-91^5 and Article 98 of the Criminal Procedure Code, involving the use of specific technical means.

Article 15 - (1) Communicates to the Prosecutor's Office, on request or ex officio, the information obtained from the conduct of operative activities for achieving national security, which are relevant and can be used in the criminal proceedings.
(2) The information intended according to the law of the central structures of the Directorate for the Investigation of Organized Crime and Terrorism and the National Anticorruption Directorate shall be communicated exclusively to the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice.

Art. 16 - Performs, through designated operative workers, the activities provided in art. 224, paragraph 2 of the Criminal Procedure Code, in the cases provided by art.2.

Art. 17 - (1) Grants support, according to the law, to the written request of the Prosecutor's Office to clarify the aspects related to the offenses stipulated in art. 2, through specific activities, according to the competence, and by performing technical or scientific expertises or findings ;
(2) At the written request of the Prosecutor's Office, he shall provide technical support under the conditions provided by Articles 911 - 915 of the Code of Criminal Procedure for the purpose of establishing the commission of the offenses referred to in Article 2, under the conditions provided by Article 465 of the Code of Procedure Criminal, on the basis of a joint action plan;
(3) At the written request of the Prosecutor's Office, put at its disposal, within 15 days from the date of obtaining the information obtained from the databases to which it has access by virtue of the protocols concluded with other institutions.

Art. 18 - Communicates to the Prosecutor's Office the reasons which prevent or cause a significant delay in solving the request formulated by it.

CHAPTER III - COOPERATION RULES
SECTION 1 - GENERAL RULES

Art. 19 - (1) Cooperation shall be carried out on the basis of the law and this Protocol, strictly observing the competencies and competencies of the parties.

2. The activities provided for in this Protocol shall be carried out only upon the written request of the Parties. For the Service, the transmission of the request is made by the heads of the central and territorial units, with the approval of the Service's management. For the Prosecutor's Office, the written request is transmitted under the signature of the head of the structure / unit of the Prosecutor's Office (central or territorial), except for the situations stipulated in art.3 e).

Article 20 - (1) The exchange of information, data, documents and materials shall be carried out by designated prosecutors and officers, with the approval of the management of the Service or of the head of the structure / unit of the Prosecutor's Office.

(2) In exceptional situations, for the exploitation of operative opportunities, the exchange of information may also be made at the execution level, with the immediate notification of the management of the Service, respectively the head of the Prosecutor's Office structure / unit.

Art. 21 - The exchange shall take place at the headquarters of the central or local units territorial units of the Service or in specific places established by the heads of these units and the heads of the structure / unit of the Prosecutor's Office (central or territorial).

Art.22 - In complex cases, effective cooperation is carried out on the basis of common plans, approved by the two institutions' management, specifying the tasks assigned to each party.
Art. 23 - (1) The expenses imposed by the activities carried out by the Service for Documentation of the cases provided in art. 2 shall be included in the court expenses.
(2) The costs of the activities performed by the Service, referred to in paragraph 1, shall be communicated in writing to the Prosecutor's Office upon their conclusion.

SECTION 2 - SPECIAL RULES

Art. 24 – In situations where certain information, documents or classified materials have a fundamental evidence utility for solving some cases, their introduction into criminal files being necessary, the Prosecutor’s Office shall request in writing and in a reasoned manner their declassification, and at the level of the Service, decisions shall be adopted supporting these requests in conditions which would prevent and remove any risks that concern the protection of the methods and means of the intelligence activity or other legitimate interests regarding the accomplishment of national security.

Art. 25 – The common action plan, provided in art. 13 let. (g) and art. 22 is made on the basis of the analysis of the operative situation and of the technical solution and shall comprise the measures and concrete responsibilities for the carrying out of the activities.

Art. 26 – The Service shall transmit to the Prosecutor's Office, immediately, the data and information obtained regarding the initiation and organization of some actions of intimidation or threat regarding the physical integrity of the magistrates and their families.

Art. 27 – The Service shall carry out, within their possibilities, the translation of some materials of interest or translation activities at the request of the Prosecutor's Office.

THE SPECIAL PART

CHAPTER I
SOLVING PROPOSALS PROPOSED BY THE SERVICE WITH REGARD TO THE PROVISION OF ARTICLE 20-22 OF THE LAW NR.535 / 2004, ART.10 OF LAW NO.14 / 1992 AND ISSUED IN THE THEME ARTICLE 3 OF LAW NO.51 / 1991 CONCERNING NATIONAL SECURITY ROMANIA

Art. 28 – (1) The request, extension and cease of the mandate provided by art. 20-22 of Law no. 535/2004 and issued under art. 3 of Law no. 51/1991 regarding national security of Romania are made under the legal provisions.

(2) In the situations where the carrying out of other activities than those authorized by the previous mandate is imposed, The Service may propose, in writing and reasoned, to the general prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice, the completion of the mandate in accordance with the needs imposed by the evolution of the threats that constitute the legal grounds thereof.

Art. 29 – The letter with proposals for request of the mandate is signed, based on the approval of the head of the Service, by the head of U.M.0198 Bucharest.

Art. 30 – The Letter with proposal for the extension of the mandate is presented to the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice at least 48 hours before the expiry of the validity term of the mandate or of the previous extension.

CHAPTER II
CAPITALIZATION WITHIN THE CRIMINAL PROSECUTION OF THE INFORMATION COMMUNICATED BY THE SERVICE, REGARDING FACTS THAT CONSTITUTE OFFENSES

Art.31 - For the purpose of capitalizing on operative moments, in particular situations, the exchange of information may also be done on other causes, after obtaining the verbal approval of the heads of the two institutions or their legal substitutes, and within 24 hours, to be sent, for approval, at the level of the two institutions, the necessary documents.

Art. 31 – For the capitalization of the operative moments, in particular circumstances, the exchange of information can be made also regarding other cases, after obtaining the verbal approval of the heads of the two institutions or of the legal replacements thereof, and within 24 hours, the necessary documents shall be transmitted for approval at the level of the two institutions.

CHAPTER III
CARRYING OUT THE ACTIVITIES PROVIDED BY ART. 91^1- 91^5 CRIMINAL PROCEDURE CODE

Art. 32 – (1) For carrying out the activities provided by art. 91^1- 91^5 Criminal Procedure Code, one can request the Service, through the specialized unit, respectively through the county information directorates, the carrying out of some technical verifications, regarding the identity of the owner of the telephone post proposed to be intercepted, the state of functioning of the post, as well as the existence of the technical conditions necessary for accomplishing the provisions of the authorization.
(2) Upon request, the Service shall make checks in the specific records of some data appeared in the process of accomplishing the interceptions made based on the authorization acts.

Art. 33 – (1) The implementation of the activities ordered through the authorizations issued by the competent courts according to the provisions of art. 91^1- 91^5 Criminal Procedure Code shall be made by the Service, on own equipment, based on the written request of the prosecutor.
(2) The letter for the request of the implementation of the authorized activities shall be accompanied by the authorization act (authorization, interlocutory decision or reasoned ordinance), in original and copy certified by the issuer or the prosecutor, and the necessary data carriers, with serial number.
(3) The letter shall have the character "office secret" and shall comprise provisions regarding the means of transmission and transcription of the results obtained and the modalities of operative connection, as well as regarding the categories of data and information relevant for the case.
(4) The Prosecutor's Office territorial units/structures shall transmit the requests for implementation of the authorizations to the intelligence county directorates within the competence area.
(5) The Prosecutor's Office and the Prosecutor's Office territorial units/structures shall transmit, immediately, to the Service, in the same conditions, the renewal or termination acts of the authorizations under implementation.
(6) The original of the renewal or termination acts of the authorizations shall be returned to the Prosecutor's Office, respectively to the Prosecutor's Office territorial units/structures at the conclusion of the authorized activities.
Art. 34 – (1) The Service shall ensure the recording of the communications or calls resulted from the interception on data carriers with serial numbers, made available by the prosecutor, as well as the sending thereof to the Prosecutor's Office or the territorial prosecutors' offices.
(2) For the support of the specific activities carried out by the Prosecutor's Office or the territorial prosecutors' offices, the Service shall ensure the transcription of the communications or the calls considered relevant in the case.

(3) Subsequently, at the written request of the prosecutor, the Service may ensure the rendering of other calls, selected from the recorded traffic. The request must contain the number of the authorization act, the interception criterion (telephone post number, IMEI series of the mobile terminal, IP address, radio frequency), date and hours of making the call or communication. For the carrying out of these activities, the Prosecutor's Office or the territorial prosecutors' offices shall transmit to the Service the data carriers containing the recordings mentioned in para. (1).

Art. 35 – The recordings resulted from the implementation of the authorizations or ordinances with provisory title, issued in accordance with the provisions of art. 91^1- 91^5 Criminal Procedure Code, the data carriers where they are recorded, as well as the resulting materials (the rendering notes transcripted on paper and electronically) are not classified.

Art. 36 – (1) For the use on operative moments of the mobile equipment held, for the identification and location of the followed persons, mobile terminals are used, the Prosecutor's Office or the territorial prosecutors' offices transmit to the specialized unit of the Service the authorization documents issued in accordance with the law, which shall comprise also the disposition of interception and recording of the calls.
(2) The measures of protection of the equipment used in the activities provided in para. (1) and of the staff they serve shall be provided in the plans of action drafted jointly, approved by the authorized representatives of the two institutions, depending on the operative institution.

Art.37 - The Prosecutor's Office or the territorial prosecutor's offices may request in writing the Service to establish the history of the geographic position and the technical characteristics (IMSI, IMEI) of the mobile terminal, under the conditions of the special law.

Art.38 - In order to ensure the efficient execution of the authorization activities issued, the specialized unit within the Service will designate a liaison officer with the Prosecutor's Office at both central and territorial level within the corresponding structures of county intelligence departments.

CHAPTER IV
SPECIFIC ASPECTS OF COOPERATION WITH THE NATIONAL ANTI-CORRUPTION DIRECTORY FOR THE IMPLEMENTATION OF THE AUTHORIZATION ACTS REFERRED TO IN ARTICLES 911 - 915 OF THE CODE CRIMINAL PROCEDURE

Art.39 - (1) Under the terms of the law, the Service shall provide technical support to ensure the fulfillment of the tasks of the National Anticorruption Directorate - the central structure, hereinafter referred to as the Directorate - on the implementation of the authorization documents issued under Article 911 - 915 of the Code of Criminal Procedure.
(2) The technical support consists in signal transmission, management and maintenance of signal transmission equipment, from the Service Interception Centers to the spaces for the Directorate.

Article 40 - The reception of the signal and the transcription of the contents of the intercepted communications shall be carried out by the Directorate.

Art.41 - The implementation of the specific applications on the technical exploitation terminals owned / managed by the Directorate, the maintenance and troubleshooting of the encryption equipment shall be performed by the Service through the specialized unit.

Art.42 - The LANs for the premises intended for the beneficiary will be implemented by the Service, with the costs being borne by the Directorate.

Art.43 - Any software interventions consisting of application testing, modification of existing software and the like on the computer system are prohibited. Intrusion attempts in system databases, beyond the limit allowed by access rights, trigger decoupling from the system.

Art.44 - (1) Remedies of hardware malfunctions occurring in the process of technical exploitation of the equipment in the spaces destined for the Directorate shall be performed by specialized personnel of the Service, and in the case of replacement of components, the expenses shall be borne by it.
(2) Software malfunctions of the specific application will be removed by the Service's specialists at the request of the Directorate.

Art.45 - The service will apply to the terminals and LANs configured in the premises designated for the Directorate the policies, strategies and procedures for security and protection implemented in their own data transmission networks.

CHAPTER V
THE PERFORMING BY THE SERVICE OF THE TECHNICAL OPERATIONS AUDIO / VIDEO AUTHORIZED ACCORDING TO THE LAW

Art.46 - (1) At the written request of the Prosecutor's Office or of the territorial prosecutor's offices, the Service performs audio / video technical operations, based on the authorization issued by the court or the prosecutor, at operational moments, in concrete cases only through the officers designated by the Service.
(2) The activities referred to in paragraph (1) shall be carried out by the specialized unit with the approval of the Director of the Service and only in the cases provided for in Article 2 of this Protocol.

Art.47 - The provisions of art.34, art.35 and art.36 of this Protocol shall also apply to the records resulting from the performance of the activities referred to in Article 46 (1), as well as in the case of audio-video surveillance.

Art.48 - The audio / video actions will be performed by the specialized unit of the Service or by the county intelligence directorates, under the coordination of the case prosecutor, on the basis of a "Joint Action Plan" drawn up by nominated representatives of the two parties and approved by the chief the specialized unit of the Service or the heads of the county intelligence directorates.

CHAPTER VI
SERVICE OF OPERATIONAL SUPERVISION ACTIVITIES AND INFORMATION INVESTIGATIONS

Art.49 - (1) Operational supervision and informational investigation shall be organized and performed by the Service only through liaison officers and specialized structures - at the written request of the Prosecutor's Office or of the territorial prosecutor's offices, individually formulated for each individual person.
(2) The activities referred to in paragraph (1) shall be carried out in the complex cases mentioned in art. 2 and only after the approval of the requests by the deputy director who coordinates the activity of the profile.
(3) Prior to the filing of applications, the Prosecutor's Office and the territorial prosecutor's offices shall consult the liaison officer, the head of the specialized unit (sub-unit), on the conditions and possibilities of organizing / executing the operative supervision and preparing the informative investigations.

Art. 50 - Where it is necessary to supervise concurrently several persons carrying out joint activity or are connected in one case, the Prosecutor's Office and the territorial prosecutor's offices shall take into account that the staffs involved shall belong only to the Service.

Art.51 - (1) The request for carrying out an operative supervision action shall be sent to the entitled persons to approve it, at least 48 hours prior to its commencement, for the time necessary for the conspiratorial organization of the devices.
(2) The term of employment of the operative supervision shall be 24 hours. in exceptional circumstances, the term may be extended up to a maximum of 3 days, irrespective of the nature of the offenses committed or the preventive measures ordered.
(3) in exceptional circumstances, when there is no possibility of issuing the written request in the time stipulated in paragraph (1), with the verbal agreement of the first deputy director or the deputy who coordinates the activity, the action may be executed, within 24 hours, the written request, which will necessarily mention the data on the basis of which the approval was obtained, shall be sent.

Art.52 The Romanian Intelligence Service, through U.M. 0198 Bucharest, communicates to the Prosecutor's Office attached to the Bucharest Court of Appeal, on written and motivated request, data and sound indices regarding the foreign citizens living on the territory of our country who have carried out or intend to carry out activities that are likely to endanger national security, necessary to declare them as undesirable persons.

Art. 53 (1) - The request of the Romanian Intelligence Service, signed by the head of U.M. 0198 Bucharest, will include:
a) data and information on the identity of the person - foreign citizen, its legal status on the national territory;
b) duly substantiated data and indications of the involvement of a foreign citizen in activities that are likely to endanger the national security (carried out, carried out or intends to carry out), facts constituting, according to the law, threats against him;
c) the period for which the measure is requested in relation to the gravity of the threat to national security generated by the subversive activities carried out by the foreign citizen.

(2) The data and information from the content of the application are state secret, applying the specific legal regime, according to the classified information protection regulations in force.

Art. 54 (1) - The Prosecutor's Office attached to the Bucharest Court of Appeal, through the designated prosecutor, shall examine the merits and legality of the request of the Romanian Intelligence Service and shall, as a matter of urgency, undertake the necessary steps to refer the Bucharest Court of Appeal and to support the matters signaled and proposed by the Romanian Intelligence Service in the council chamber.
(2) The data and information on the basis of which it is proposed to declare undesirable for reasons of national security shall be made available to the court by the designated prosecutor within the Prosecutor's Office attached to the Bucharest Court of Appeal, under the conditions laid down by the normative acts that regulate the regime of activities related to national security and the protection of classified information.
(3) The Prosecutor's Office attached to the Bucharest Court of Appeal, after the Bucharest Court of Appeal pronounces the motivated decision by which the foreign citizen is declared undesirable, shall communicate in writing to the Romanian Intelligence Service the measure taken.
(4) The provisions of paragraph (3) shall also apply accordingly, in the case of the refusal of notification of the Prosecutor's Office attached to the Bucharest Court of Appeal by the court.

Art.55 - The Romanian Intelligence Service requests, under the conditions provided by art.52 - art.54, the extension of the measure for a new period between the legal limits, if, before the expiration of the term, it considers that the reasons which have determined the taking of this measure.

Art.56 - The Parties, in carrying out their tasks under this Protocol, undertake to comply with the provisions of Law no. 182/2002 on the protection of classified information, as subsequently amended and supplemented and Government Decision no. 585/2002 approving the National Standards for the protection of classified information in Romania, as subsequently amended and supplemented.

Art. 57 - (1) The Prosecutor's Office and the territorial prosecutor's offices are obliged to ensure the protection of the classified data and information sent by the Service in the framework of the cooperation relations in order to prevent any risks of loss, misappropriation, unauthorized access, disclosure, illegal transmission or destruction theirs.

Art. 58 - (1) At the written request of the Prosecutor's Office, the Service - through the specialized compartments - secures the security of the buildings owned by the Prosecutor's Office, and free of charge, in the case of certain indications, the antiterrorist / counterterrorist intervention technical anti-terrorism to targets and activities potentially targeted by terrorist acts.
(2) The Service shall be obliged to communicate to the Prosecutor within reasonable time the reasons which prevent or cause a significant delay in solving the request made by him, if he considers that the mere fact of acceding to the requested information affects essential interests in the accomplishment of the national security.
(3) At the written request of the Prosecutor's Office or of the territorial prosecutor's offices, the Service shall provide at their premises, through the specialized unit and with

the approval of the Director of the Service, specialized assistance regarding the physical protection status of classified information held and used by inspections technical security to identify vulnerabilities that
may favor their unauthorized access as well as through environmental technical control operations in order to detect possible illegal interception by means of technical means of observation and listening.

Art. 59 - Records and / or materials resulting from the execution by the Service of activities authorized according to the provisions of Articles 911 - 915 of the Code of Criminal Procedure for which, until the date of entry into force of this Protocol, classified be declassified at the request of the Prosecutor's Office or territorial prosecutor's offices, individually formulated for each authorization.

CHAPTER IX
FINAL PROVISIONS

Art. 60 – The parties shall ensure the acquiring, the thorough knowledge and the exact application of the provisions of the protocol by their own staff, including by the territorial prosecutors' offices and the intelligence county directorates, in relation with the tasks incumbent upon them in their application.

Art. 61 – The management bodies of the two institutions may convene, depending on the situation and dynamics of the criminal status, on other cooperation fields as well, with the observance of the provisions of this protocol.

Art. 62 – The Protocol may be modified with the parties' consent, by addenda, which shall be an integral part thereof.

Art. 63 – The parties may give each other invitations for the participation to scientific sessions, symposia and seminars organized on issues of common interest.

Art. 64 – (1) This Protocol enters into force 30 days after the date of signature thereof.
(2) On the same date the following provisions cease their applicability:
a) Cooperation protocol registered with the RIS under no. 003222/28.06.2005, respectively no. 002349/30.06.2006, with the Prosecutor's Office attached to the High Court of Cassation and Justice.
b) Protocol registered with the Romanian Intelligence Service under no.002128 of 28.01.2003 and with the National Anticorruption Prosecutor's Office under no. 00112 of 28.01.2003, as well as the Note Annexed to this Protocol, registered under no. 147/C/01.03.2004 and no. 002461 of 02.03.2004;
c) Cooperation Protocol registered with the Romanian Intelligence Service under no. 0014593 of 04.06.2007 and with the Prosecutor's Office attached to the Bucharest Court of Appeal under no. 0038 of 12.06.2007.

Art. 65 – Within 30 days as of the entry into force of this protocol, the management bodies of the two institutions shall appoint and communicate to each other the representatives with concrete attributions in the fulfillment of the provisions thereof, the coordinates of which shall be communicated in writing.

Art. 66 – This cooperation protocol was concluded in two prints, of which one is kept by the Prosecutor's Office attached to the High Court of Cassation and Justice and another by the Romanian Intelligence Service.

First Deputy of the General Prosecutor Of the Prosecutor's Office attached to the High Court of Cassation and Justice Prosecutor	First Deputy of the Director of the Romanian Intelligence Service Brigade General
NITU MIHAIL TIBERIU	FLORIN COLDEA

[Translation from Romanian]

SUPERIOR COUNCIL OF MAGISTRACY **ROMANIAN INTELLIGENCE SERVICE**

No. [Illegible digits] of 07.08.2012 **No. 002539 of 06.03.2012**

THE PRESIDENT OF THE
THE SUPERIOR COUNCIL OF MAGISTRACY
ALINA NICOLETA GHICA

THE DIRECTOR OF
ROMANIAN INTELLIGENCE SERVICE
GEORGE CRISTIAN MAIOR

PROTOCOL

regarding the organization of the cooperation between the Romanian Intelligence Service and the Superior Council of Magistracy for the fulfilment of the tasks incumbent upon them, according to the law

In accordance with the provisions of the Constitution of Romania, republished, Law no. 51/1991 on the national security of Romania, Law no. 14/1992 on the organization and functioning of the Romanian Intelligence Service, as subsequently amended and supplemented, Law no. 317/2004 on the Superior Council of the Magistracy, republished, as subsequently amended and supplemented, Law no. 304/2004 on judicial organization, republished, as subsequently amended and supplemented, Law no. 182/2002 on the protection of classified information, as subsequently amended and supplemented, Government Decision no. 585/2002 on the approval of the National Standards for Protection of Classified Information in Romania, as amended, the present Protocol on the Organization of Cooperation between the Romanian Intelligence Service and the Superior Council of Magistracy, hereinafter referred to as the Parties, is concluded, for the fulfillment of their tasks , according to the law.

Chapter I

PRINCIPLES OF COOPERATION

Art. 1 - The cooperation between the Parties shall be carried out under the law and in accordance with the provisions of this Protocol, in accordance with the following principles:

a) The principle of the rule of law, which enshrines the rule of law, the equality of citizens before the laws, respect for fundamental human rights and the separation of powers in the state;

b) The principle of guaranteeing the independence of the judiciary, according to which prior identification and timely removal of facts that could affect the independence and impartiality of magistrates or raise suspicions about them are priority and imperative;

c) The principle of responsibility, which presupposes that the state authorities are responsible for the fulfillment of their duties, respectively for the implementation and effectiveness of the agreed action strategies, according to the law;

d) The principle of complementarity, according to which the Parties jointly agree on the directions of action in the fields of cooperation so that their objectives are fully covered;

e) The principle of operability, which implies the timely transmission of relevant information for the fulfillment of their duties, according to the law;

f) The principle of periodic evaluation of the activities provided for in this Protocol as a basic condition for ensuring efficiency in achieving the common objectives;

g) The principle of compliance with the obligations and responsibilities of the Parties in the protection of classified information, as well as the application of the rules on access to classified information;

h) The principle of need to know / need to share, which requires the transmission of information relevant to the performance of the duties of the Parties, according to the law, only to persons who have to work with or have access to such information.

Chapter II

PURPOSE

Art. 2 - The Parties shall cooperate, in accordance with the powers and duties prescribed by law, to ensure the independence and the exercise of justice, as well as the knowledge, prevention and counteraction of vulnerabilities and risk factors that may affect the state of legality, the maintenance of the rule of law, of unrestricted exercise of the fundamental rights, freedoms and duties of the citizens, as values of national security, according to the democratic principles and norms established by the Constitution.

Chapter III

RULES OF COOPERATION

Art. 3 - (1) Cooperation shall be carried out under the law and this Protocol in strict compliance with the competencies and competencies of the Parties through:

a) making effective use of the possibilities for early identification and timely removal of deeds that could affect the performance of justice or the achievement of national security;

b) mutual information with the data and information that each Party holds and which are useful for the fulfillment of the specific tasks of the other Party;

c) analyzing draft normative acts related to the object of activity of the Parties;

d) exchange of documentary material, works and data useful to the other Party for the development of specialized materials.

(2) In complex cases, effective cooperation shall be carried out on the basis of joint plans approved by the two institutions' management, specifying the tasks assigned to each Party.

Art. 4 - Based on the data and information transmitted by the Romanian Intelligence Service, the Superior Council of Magistracy will perform its own verifications, according to the law.

Art. 5 - (1) The transmission of data and information by the Parties shall be carried out in compliance with the legislation in force on the protection of classified information and only with the approval of the parties' management.

(2) If one of the Parties intends to use the information in accordance with its own powers, it is obligatory to obtain the prior consent of the Party that obtained the data and information.

(3) In carrying out the cooperation activities, due to their particularities, any limits or prohibitions specified by the Parties shall be observed, justified by:

a) jeopardizing the fulfillment of the legal duties of the Parties;

b) defending national security or protecting the national interest;

c) affecting the rights and freedoms of third parties;

d) disclosure of special investigative techniques or sources of information protected by law.

(4) In exceptional situations, the data and information transmitted by the Romanian Intelligence Service may be entered in the investigation files of the Superior Council of Magistracy, only in compliance with the provisions of para. (2) and para. (3).

(5) Classified documents transmitted between the Parties pursuant to this Protocol shall be returned to the issuer within 30 days without keeping any copies or extracts thereof made by scanning or multiplying all or part of the documents in accordance with applicable law.

Art. 6 - The Parties undertake, within a reasonable time, to communicate to each other the results obtained on the basis of the information received from the other Party.

Chapter IV

FINAL PROVISION

Art. 7 - The Parties may invite each other to participate in scientific sessions, symposia and seminars organized on issues of common interest.

Art. 8 - Annually, the Parties shall undertake an analysis of the way in which they cooperate.

Art. 9 - The Protocol shall be concluded for an indefinite duration and may be amended or supplemented with the consent of the Parties by addenda which shall form an integral part thereof.

Art. 10 - This Protocol has been concluded in duplicate, one for each Party and shall enter into force three days after the date of signature.

VICE-PRESIDENT OF THE SUPERIOR COUNCIL OF MAGISTRACY	FIRST DEPUTY OF THE DIRECTOR OF THE ROMANIAN INTELLIGENCE SERVICE
OANA ANDREA SCHMIDT- HĂINEALĂ	FLORIAN COLDEA

MEDEL
Magistrats Européens pour la Démocratie et les Libertés

Resolution on safeguarding the independence of the Romanian judicial system from secret and unlawful interference of the intelligence agencies

Magistrats Européens pour la Démocratie et Les Libertés (MEDEL), meeting in Brussels, Belgium, on 24th of May, 2018,

Recalling the previous MEDEL resolutions in which it raised deep concerns about "*the unlawful involvement of the Romanian Intelligence Service (SRI) in the judiciary process*" and that the courts have become a "*tactical field*" of operations for this intelligence agency (May 25, 2015), as well as that SRI is taking part in criminal investigations based on "*classified procedures and secret protocols*" with prosecutors (May 16, 2016),

Finding, shockingly, in 2018, that all the institutions part of the judicial authority (High Court of Cassation and Justice, Superior Council of Magistracy, Judicial Inspection as well as Public Ministry – General Prosecutor's Office) had secret protocols with the Romanian Intelligence Service (SRI),

Noticing the increasing number of acquittals in anti-corruption cases with high ranking Romanian personalities,

Observing an increasing numbers of public attacks against the Romanian Constitutional Court,

Remarking that the EU authorities are silent on the interference of the Romanian intelligence agencies in the judiciary, since they reduced the analysis of the Romanian judiciary system to the narrow viewpoint of fighting corruption,

Adopts the following resolution and:

1. **Condemns** firmly the concluding of secret protocols between bodies of judicial authority and Romanian Intelligence Service, which is undermining the rule of law, democracy, independence of the judiciary and the right to a fair trial, violating thereby the Romanians' fundamental human rights protected by the Romanian Constitution and the European Convention on Human Rights.

2. **Urges** the EU authorities to strongly affirm that the fight against corruption could not be done by using undemocratic and soviet-style criminal investigation methods.

3. **Requests** the publishing of all protocols signed between bodies of the judicial authority and any secret intelligence Romanian agency, so they can be evaluated by the society, magistrates and attorneys.

4. **Asks** the Romanian President Klaus Iohannis to take a firm public stand in denouncing these protocols and to take concrete steps, as president of Supreme Council of National Defense (CSAT), in ensuring that the intelligence agencies are not interfering anymore with the judiciary process in any way.

5. **Appeals** for the ending of attacks against the Romanian Constitutional Court, which undermine the trust in a fundamental institution that safeguards the rule of law and the human rights in the country.

6. **Welcomes** the decision of the current Superior Council of Magistracy to publish the secret protocol with SRI, concluded by the previous Council, and **encourages** the Council to take all the necessary steps to fully clarify the way, methods and extent of SRI's involvement in the judicial procedures.

MEDEL will continue supporting any further actions of the Romanian magistrates in safeguarding the independence of the judicial system from the influence of secret intelligence agencies and will continue addressing this unprecedented situation from Romania with the European Union's officials.

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May 23, 2018

REPORT
on the unlawful involvement of the Romanian secret intelligence agencies, through secret protocols, in the Romanian judiciary system

I. Overview of the relationship between the secret intelligence agencies and the judicial system after the fall of communism in 1989 in Romania

In 1948 and then in 1956, new communist Constitutions were adopted in Romania, which were inspired by the one from the Soviet Union.

The communist structure of the state did not have the separation of powers – legislative, executive and judicial power –, like the Western democracies do. The whole state was controlled by the communist party and, at the same time, to make sure that the communist officials are obeying the law, the *Prokuratura* – composed of all prosecutors organized hierarchically – was created with the purpose to "supervise the legality" in the state.

The *Prokuratura* in a communist society was a *"a very powerful institution whose functions considerably exceed the scope of functions performed by a prosecutor in a democratic, law abiding state*", the Venice Commission stated, and describes its functionality as following:

"*The prosecution of criminal cases in court represented only one aspect of the procuracy's work, matched in significance throughout much of Soviet history by a set of supervisory functions. In a nutshell, the procuracy bore responsibility for supervising the legality of public administration. Through the power of what was known as "general supervision", it became the duty of the procuracy to monitor the production of laws and instructions by lower levels of government; to investigate illegal actions by any governmental body or official (and issue protests); and to receive and process complaints from citizens about such actions. In addition, the procuracy supervised the work of the police and prisons and the pre-trial phase of criminal cases, and, in particular, making decisions on such crucial matters as pretrial detention, search and seizure, and eavesdropping. Finally, the procuracy was expected to exercise scrutiny over the legality of court proceedings. Supervision of trials gave the procurators at various levels of the hierarchy the right to review the legality of any verdict, sentence, or decision that had already gone into effect (after cassation review) and, through a protest, to initiate yet another*

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review by a court. Even more troubling, the duty to supervise the legality of trials meant that an assistant procurator, who was conducting a prosecution in a criminal case, had an added responsibility of monitoring the conduct of the judge and making protests. ***This power placed the procurator in the courtroom above both the defense counsel and the judge, in theory if not also in practice****."*[1]

Parallel with the *Prokuratura*, the communist system had a "secret police", which was responsible with doing the dirty work. In Russia this "secret police" was KGB, in Romania it was the "Securitate".

In communism the prosecutors worked hand to hand with the agents of the secret police in order to achieve the objectives given to them by the leaders of the state.

This system inspired from Soviet Union was brought to Romania. This meant that during communism Securitate undercover agents were posing as prosecutors or judges and conducted criminal investigations.

The Securitate had a special unit to conduct criminal investigation that was responsible for most horrific abuses in communism, which led to people being executed or unjustly imprisoned after a sham trial.

1. **Early years after the fall of communism. Creation of SRI**

1.a. In December 1989, immediately after the fall of communist dictator Nicolae Ceausescu, the Securitate has been abolished and its departments were dismantled in different security/intelligence structures that over time became standalone agencies.

1.b. Also, in December 1989 the new ad-hoc revolutionary government abolished the previsions from the Code of penal procedure that granted Securitate jurisdiction to investigate certain crimes.

1.c. In March 1990, through a secret Decree that was not published in any official bulletin, the interim government of that time created the Romanian Intelligence Service (SRI), a militarized intelligence agency designated to collect domestic intelligence.

[1] Solomon and Foglesong The Procuracy and the Courts in Russia: A New Relationship? In East European Constitutional Review Vol 9 No 4 Fall 2000; quoted in document CDL-AD(2005)014, at 5.
http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2009)048-e

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1.d. Also, in parallel, in 1990, the Justice Ministry created an intelligence structure under its jurisdiction by taken over a militarized unit from the Ministry of Internal Affairs.

1.e. In 1991 the "national security law" 51/1991 was passed by the new Parliament, law that it is still in force until today.

1.f. In 1992 the Parliament has adopted the Law 42/1992[2] for organizing and functioning of SRI. This law was published in the Official Bulletin and, besides other things, abolished the secret decree promulgated in 1990.

The Law 42/1992 explicitly prohibited SRI to conduct criminal investigations, to detain or to arrest people. Also, this law prohibited SRI to have its own detention centers.

This prohibition for SRI was instituted because SRI became the Securitate's inheritor, people still had fresh in their memories the horrifying abuses done by Securitate and they did not want that situation to be repeated.

Also, since SRI was under the authority of the executive power and the oversight of the legislative power, its involvement in the criminal procedures or judiciary would had violated the separation of powers.

2. Secret service under the Ministry of Justice

2.a. After the Law 51/1991 was passed, the government created under the General Directorate of Penitentiaries' jurisdiction an intelligence collecting service called the "Operational Independent Service" (SIO), whose duty was focused exclusively on preventing "events" in the penitentiary (riots, crimes etc.), as well as on collecting from prisoners and jail inmates information on threats to national security.

2.b. In 1997, the leadership of the Justice Ministry turned the SIO into a stand-alone unit under the authority of a state secretary and changed its name to the "Independent Protection and Anti-Corruption Service" (SIPA).

2.c. In 2000, under the pretext of fighting corruption, the new government extended the competencies of SIPA to also monitor and gather information on magistrates (judged and prosecutors).

This was done "***to ensure a real protection and anti-corruption activity, in order to guarantee the fairness of justice and prevent corruption among magistrates***", was it stated in the governing plan of Adrian Nastase, the prime-minister of that time.

[2] You can find the relevant provisions in the Addendum with the Romanian legislation

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This way, Romania became the first country in the Western hemisphere where the fair trial it was "guaranteed" by a militarized secret intelligence agency.

2.d. In 2004, in the EU pre-accession period, the European Commission had stated in multiple reports that there is a danger for the information collected by SIPA to be used to blackmail magistrates and influence the justice.

2.e. Through Government Decision 637/2004, SIPA was reorganized and its name was changed to "the General Protection and Anti-Corruption Directorate", in the subordination of Ministry of Justice.

2.e. Following the constant criticism of the European Commission, in 2006 the Government adopted Decision 127/2006 which dissolved the General Protection and Anti-Corruption Directorate subordinated to the Ministry of Justice. Monica Macovei, the Minister of Justice at that time, declared that: "*I decided to dissolve this secret service since information was circulating in the public space that it was committing abuses. The judiciary did not need a secret service.*" [3]

3. The public law was supplemented by "secret laws"

Between 2004 - 2006, the Supreme Council of National Defense (CSAT) had adopted a serious of secret decisions to supplement the Law 51/1991 on National Security in Romania, by granting SRI secretly more and more prerogatives in the criminal investigation field.

CSAT is an administrative, not legislative body that operates under the authority of the President and it is tasked with organizing and coordinating the national defense, military and security activities of Romania.

Some of the decisions taken by CSAT are the following:

- Decission no. 0068/2002 by which the Romanian Intelligence Service was designated as a national authority in the field of interception and relations with telecommunication operators (top secret);

- Decission no. 2234/2004 regarding the cooperation between the Romanian Intelligence Service and the Public Ministry to fulfill their tasks in the field of national security (not public);

- Decission no. 0237/2004 for the approval of the General Protocol on cooperation in the field of information security for national security (secret);

[3] http://www.nineoclock.ro/sipa-archives-and-control-over-magistrates-stir-controversy-once-again/

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- Decission no. 17/2005 on combating corruption, fraud and money laundering (not public). This secret decision made corruption a threat to national security.

These decisions, still secret, created the framework for the Romanian Intelligence Service to, initially, get involved in criminal investigations carried out by prosecutors, activity that was prohibited for them to do after the fall of community (see #1 from above), and lately to penetrate the courts and other institutions of the judicial system.

Former president Traian Basescu stated in an interview[4] that the Supreme Council of National Defense (CSAT) had passed a decision giving “massive responsibility” to SRI, which was supposed to create joint permanent teams with prosecutors to “identify and combat corruption within the judiciary field”. The statement of President Basescu was confirmed by the activity reports published by CSAT.

3.a. The 2004 CSAT activity report mentioned that the intelligence services were involved in law enforcement and criminal prosecution activities, especially in the fight against fraud, corruption and money laundering.

3.b. The 2005 CSAT activity report explicitly mentioned "*the contribution of intelligence services in supporting the truthfulness of evidences*".

Such a “contribution” is, in itself, one without any legal grounds, since the secret services do not have legal prerogatives in probation procedures within criminal proceedings dealing with corruption.

3.c Subsequently, the General Prosecutor's Office signed, outside the law and against the legal previsions, secret collaboration protocols with SRI (we’ll present them in chapter III), based on which hundreds of “mixed” SRI prosecutor-officer operative teams were set up to conduct criminal investigations in hundreds of criminal cases per year.

Through these secret protocol, SRI gained prerogatives in criminal investigations, like the Securitate had under communism, up to 1989.

3.d. In the 2013 SRI’s activity report, as also in the previous activity reports, it was stated that:

"***The legal SRI experts, within the local and central structures, were co-opted as members in joint operational teams of cooperation with local and central structures of law enforcement bodies*** *in 463 cases (compared to 314 cases in 2012).*

4 http://timpolis.ro/presedintele-traian-basescu-interesul-fundamental-al-romaniei-acum-si-pe-termen-lung-este-garantarea-securitatii-pe-care-nu-o-face-nici-federatia-rusa-nici-china-ci-o-fac-sua/

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Within the Joint Operational Teams, numerous meetings took place, where SRI legal experts have played an important role in the legal assessment of the operational situation and the measures proposed for the documentation of criminal activities. [...]

These have produced positive effects and responses from the beneficiaries, many of which are being used as evidences in criminal cases."

"The institutional binomial The Public Ministry - SRI had also functioned in 2013 at optimal parameters, fact that was reflected in the dynamics of the results both from the perspective of knowledge, prevention and combating threats to the national security, ***as well as from the point of the effects in criminal procedures/trials***".

3.e. The 2014 SRI activity report states: "*SRI has acted consistently to ensuring the quality and consistency of the data provided to law enforcement institutions, the accuracy and soundness of the legal reasoning, as well as the relevancy of the proving material or the clues regarding possible evidences."*

The involvement of the SRI in the judicial power was not limited to establishing secret protocols with the General Prosecutor's Office, but went all the way to signing secret protocols with the Superior Council of Magistracy, High Court of Cassation and Justice or Judicial Inspection. Some of these protocols are still secret.

II. Actions of the magistrates' associations after 2015

In 2015 representatives of the Romanian Intelligence Services made a series of public statements that revealed the involvement of this secret service in the judiciary, despite the fact that such actions of theirs were forbidden by law. Attached to this report it will be a briefing from that time, which presents, in detail, the succession of the events and our actions (addendum no.2).

Specifically, in April of 2015, General Dumitru Dumbrava, the head of SRI's legal department, stated in an interview[5] that SRI would not "*withdraw from the* ***tactical field*** *once the indictment was presented to the court*" and that SRI maintained its *"(…) interest/attention until the final resolution of every case is reached*". He also stated SRI was profiling judges to detect patterns of criminal behavior, even without suspicion of such behavior.

This raised serious and legitimate concerns about the independence of the whole Romanian judiciary system, since SRI was prohibited by law to interfere with courts and prosecution.

5 http://www.juridice.ro/373666/dumitru-dumbrava-sri-este-unul-dintre-anticorpii-bine-dezvoltati-si-echipati-pentru-insanatosirea-societatii-si-eliminarea-coruptiei.html

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Eduard Hellvig, the current SRI Director, made matters worse, by stating[6] at the SRI's 25th anniversary that magistrates had to be monitored "*to avoid situations like in the past when the judges and prosecutors forgot on the road that they serve the Romanian State and had other preoccupations than to serve the Romanian State*". The guest of honor to this event was General Iulian Vlad, the last head of Securitate before the fall of communism.[7]

The previous director of the SRI, George Maior, described SRI at the same event as "*a kind of a brain of the state, the eyes, the ears of the state*".

The mindset displayed by the representatives of the security apparatus was very troubling since a judge is not serving the state in a democracy, but the law. In front of a judge, the citizen and the state must be equal.

In the light of these statements and considering Romania's totalitarian history, the National Union of the Romanian Judges (NURJ) along with the Association of Romanian Magistrates (AMR) and the Association of Romanian Prosecutors (APR) started a serious of actions, both foreign and domestic, in order to push for the clarification of the SRI's involvement in the judiciary.

1. Domestic actions of NURJ and other associations

Since May of 2015 NURJ urged on a serious of occasions all the competent Romanian institutions, like the Superior Council of Magistracy, the Presidency, the Supreme Council of National Defense, the General Prosecutor Office, the Romanian Intelligence Service and the Parliamentarian Oversight Committee on the Romanian Intelligence Service, to clarify the involvement of SRI in the judiciary.

NURJ also requested from the above institutions a serious of public information and filed lawsuits when they refused to provide the information.

The first institution requested to act was the **Superior Council of Magistracy (SCM)**, which has the constitutional duty to "guarantee the independence of the judiciary".

6 http://www.evz.ro/hellvig-despre-implicarea-sri-in-justitie-serviciul-lucreaza-bine-dar-din-pacate-comunica-prost.html
http://www.dcnews.ro/directorul-sri-eduard-hellvig-lamure-te-declara-ia-gen-dumbrava_476395.html
http://www.stiripesurse.ro/eduard-hellvig-noul-ef-al-sri-da-ordine-in-serviciu-de-fa-a-cu-florian-coldea_956664.html

7 http://www.flux24.ro/seful-securitatii-comuniste-invitat-special-la-aniversarea-sri/

8 http://www.unjr.ro/2015/05/25/european-magistrates-concerned-about-the-influence-of-intelligence-agency-over-the-judiciary-process-in-romania/

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In May 2015 NURJ, along with AMR, APR and over one hundred of individual judges, requested the Superior Council of Magistracy to take a stand and defend the independence of the judiciary from the statements of SRI General Dumitru Dumbrava, who claimed that the courts became a "tactical fields" for Romanian Intelligence Service.

The Council rejected the associations' request, affirming that the statement did not affect the independence of the judiciary, even at the perception level. The Council justified the decision based on classified notes they received from SRI. Recently it was found that SCM had a secret cooperation protocol with SRI since 2012, based on which they acted upon.

NURJ also met with the **Supreme Council of National Defense** (CSAT) to discuss the role of the Council in the relationship between judiciary and secret services. The meeting took place in February 2016, and was requested by the Council, after NURJ asked them publicly on numerous occasions to clarify this issue.

After the meeting, CSAT sent an official letter to NURJ where it stated that, because the "national security law" is from 1991, and it is outdated, they had to opt for those secret decisions adopted by CSAT in order to "supplement" the law.

For this reason they made, through such secret decision for example, the corruption a threat to national security. Since secret services are dealing with threats to national security, implicitly the SRI's activity was extended in the judiciary field.

This artificial way of "amending" the law by secret decisions is a dangerous precedent for the rule of law, preventing citizens from knowing, in real terms, how extensive and excessive the competences of some state institutions are.

CSAT had also mentioned in the letter that, starting from their secret orders, there were signed "cooperation protocols" between SRI and the General Prosecutor's Office and created "joint teams of prosecutors-SRI agents to counteract the risks deriving from carrying out criminal activities".

Starting from this lead, NURJ had requested, based on the law providing access to information of public interest, from the Public Ministry and the main Romanian intelligence services to state whether or not they have signed collaboration protocols, and if so, on what legal basis they did it and what is the content of those protocols.

The Public Ministry and the Romanian Intelligence Service refused to release any kind of information on these subject, stating that they are classified.

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The External Intelligence Service replayed that between 1998 and 2005 the institution was party of three protocols of cooperation with the General Prosecutor's Office, respectively the National Anti-Corruption Prosecutor's Office.

The Secret service of the Ministry of the Interior replayed that it's activity is carried out under a collaboration protocol signed with General Prosecutor Office and that the content of the protocol is classified.

Consequently, NURJ initiated several lawsuits, requesting the publication of these protocols, with the argument that the rule of law is incompatible with the administration of justice based on secret acts. The cases are pending.

2. Foreign actions

MEDEL, at the proposal of NURJ, published a serious of resolutions and press releases to raise awareness about the situation in Romania.

In the first resolution, from May 2015, MEDEL stated that it "*shares the same deep concerns of the judges and prosecutors from Romania who took a stand against the unlawful involvement of the Romanian Intelligence Service (SRI) in the judiciary process. This situation is a threat to the democracy in Romania, therefore we call on all Romanian authorities to take immediate actions in protecting the independence of the judiciary and reestablishing the rule of law so every Romanian would have the confidence that has part of a just and fair trial.*"[8]

In March 12, 2016, MEDEL called again for "*the immediate ceasing of any kind of interference of secret services in the judiciary in Romania*", underling that "*In the context that SRI is part of the criminal investigation and it is also involved in the courts, corroborated with the failure of authorities to clarify transparently these matters, this raises serious doubts about the respect for basic human rights and the guarantee of a fair and just trial of any person accused by the state. The most recent attacks to the Romanian Constitutional Court, for ruling unconstitutional the article used by prosecutors to delegate SRI to conduct acts of penal investigation, confirms that there is an unhealthy involvement of SRI in the judiciary process.*"[9]

NUJR along with AMR had also notified the European Commission as well as the Helsinki Committee on the situation in Romania, the correspondence with them being annexed.

[8] http://www.unjr.ro/2015/05/25/european-magistrates-concerned-about-the-influence-of-intelligence-agency-over-the-judiciary-process-in-romania/
[9] http://www.unjr.ro/2016/03/16/medel-declaration-is-europe-under-siege/

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Except the Helsinki Committee, which held a hearing in the US Senate on the issue[10], all the other European institutions had turned a blind eye to these problems, choosing to ignore the facts and continue claiming that they support unconditionally the fight against corruption, regardless of the cost and methods used.

In fact, during the meeting with the Cooperation and Verification Mechanism experts of the European Commission, NUJR had expressed concerns and provided public information supporting the legitimate fact that SRI is unlawfully involved in the judiciary. These issues were not mentioned in any of the country's reports, and at the last meetings NUJR was not invited to participate anymore.

The recent development, though, proved that NUJR's concerns about the unlawful involvement of SRI in the judiciary were sounded, since some of the secret protocol between this secret intelligence agency and different judicial institutions were published.

III. The cooperation protocols

1. **The cooperation protocol between the General Prosecutor's** Office – hereinafter referred to as the "*Prosecutor's Office*" – **and the Romanian Intelligence Service** – hereinafter referred to as the "*Service*".

The protocol was published on March 30, 2018 and disclosed the involvement of the Service in criminal prosecution beyond the limits set by law.

For comparison, we have attached both the English version of the protocol and the relevant legislation (appendices 5 and 6).

Here are some of the most troubling articles of this Protocol:

> *Art. 2 – **The parties cooperate**, according to the competencies and attributions provided by the law, in the activity of capitalization of the information from the field of prevention and combating of offences against national security, of the terrorism acts, of the offences that have a correspondent in the threats to the national security and of **other severe offences**, according to the law.*

[10] https://www.csce.gov/international-impact/events/romanian-anti-corruption-process-successes-and-excesses

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According to the law, "*At the request of the competent judicial bodies, specially designated staff of the Romanian Intelligence Service may grant support in carrying out certain criminal investigation activities for offences concerning the national security.*

The criminal prosecution bodies shall have the obligation to impart to the Romanian Intelligence Service any data or information regarding the national security, resulting from the criminal prosecution activity" (art. 12 and 13 from Law 14/1992 on the organization and the operation of the Romanian Intelligence Service).

As a result, the competence of the SRI was strictly limited to providing support, at the request of criminal investigation bodies, ONLY in case of "certain criminal investigation activities for offences concerning the national security".

The threats to the national security are expressly defined in art. 3 of Law 51/1991 - Law on National Security of Romania.

Not only does the law not allow the involvement of the Service in other types of offenses, but expressly forbids it, by art. 13 of Law 14/1992, which states that "***The bodies of the Romanian Intelligence Service may not carry out criminal investigation activities****, they may not take a detention measure or preventive custody, nor dispose of their own arrest places*".

In conclusion, this article 2 of the Protocol expends the competence of SRI in the field of criminal investigation far beyond the legal provisions. All the other articles of the Protocol that mention specific attribution refer to Article 2, which is the reference article.

Art. 3 – The objectives of cooperation are:

- *Creation of a joint operative team to act based on action plans for the exertion of the parties' specific competencies, **for the documentation of the facts** provided at art.2;*
- *Granting by the Service, under the law and of the present Protocol, of the specialized technical assistance to the prosecutors in the cases provided in art. 2, **in which the administration of the evidence** imposes specific knowledge or technical endowments or in the cases in which persons with protected identity are listened to;*

Art. 14** – (1) Grants support, through specialized departments, for the completion of the information in complex cases such as those provided by **art. 2**, on the docket of the Prosecutor's Office, purpose for which **it carries out activities of investigations and operative surveillance.

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In 2016 the Constitutional Court (CCR) has declared unconstitutional the article 142, par. 1, of the Criminal Procedure Code that referred the bodies of the state who can conduct the technical surveillance (communications, audio-video ambient wiretapping) because it was not specific enough.

That article states that "*the prosecutor enforces the technical surveillance or may order it to be carried out by the criminal investigation body or by specialized workers of the police or* ***by other specialized state bodies***."

CCR shows that the phrase "or other specialized state bodies" does not comply with the Constitution, because is not clear to whom it refers.

The Service conducted in 2014 "*42,263 technical surveillance warrants and 2,410 ordinances from the Public Ministry and the National Anti-corruption Directorate (DNA)"*, states the activity report submitted by SRI to the Parliament in that year.

According to the Criminal procedure code (version in force in 2009, when the protocol was signed), art. 65 "**the task of administrating the evidence during the criminal trial belongs to the criminal investigation body and to the court.**"

In conclusion, all those warrants conducted by SRI based on the protocol were done against the prevision of the law.

> ***Art. 6 – (1)*** *Communicates, operatively, but not later than 60 days, the manner of capitalization of the information notices or referrals received from the Service,*

Through this article, the prosecutors took the obligation to report to SRI what they did with the data and information provided to them by the Service

> ***Art. 7 (2)*** *Puts at the disposal of the Service, the data and information regarding the implication of some military officers or civil employees thereof in the preparation or carrying out of offenses, if it deems that, by this, finding out the truth in the case is not impeded or slowed down.*

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This obligation assumed by the Prosecutor's Office is not mentioned in any law. On the contrary, this prevision violates the non-public character of the prosecution procedure and warns the SRI about corruption-related scrutiny of its employees.

> ***Art. 16*** *– Makes, by operative workers especially designated,* ***the activities mentioned in art. 224, para.2*** *of the Criminal Procedure Code, in the cases provided* ***in art. 2****.*

The article violates the limited competences allowed to the Service by the Code of penal procedure, through art. 224, which states: "*Also, in order to gather evidence necessary to the criminal investigation bodies for the initiation of criminal investigation, the operative employees of the Ministry of Interior, as well as of the other state bodies having attributions related to national security, especially appointed for this purpose,* ***may perform preliminary acts*** *in connection* ***with the deeds that constitute, according to the law, threats to national security.***"

> ***Art. 34*** *– (1) The Service shall ensure the recording of the communications or calls resulted from the interception on data carriers with serial numbers, made available by the prosecutor, as well as the sending thereof to the Prosecutor's Office or the territorial prosecutors' offices.*
> *(2) For the support of the specific activities carried out by the Prosecutor's Office or the territorial prosecutors' offices, the Service shall ensure the transcription of the communications or the calls considered relevant in the case.*
> *(3) Subsequently, at the written request of the prosecutor, the Service may ensure the rendering of other calls, selected from the recorded traffic.*

This secret provision violates the provision from the Code of penal procedure:

"Art. 91^2 *–* ***The prosecutor*** *proceeds* ***personally*** *to the interceptions and recordings provided under art. 91^1 or may dispose that these are performed by* ***the criminal investigation body****.*

Art. 91^3 – alin.2 The recorded conversations are ***entirely transcribed in writing*** *and attached to the official report, with certificate for authenticity from the criminal investigation body, checked and countersigned by the prosecutor who performs or supervises the respective criminal investigation."*

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The above mentioned articles are ONLY for exemplification, the full analysis of the attached protocols revealing that they contain rules of secret criminal procedure, some of which contradict the public one.

Based on these protocols, people who did not know that they existed were investigated, prosecuted and convicted.

2. Protocol between SRI and the Superior Council of Magistracy

According to the Constitution, the Superior Council of Magistracy is the guarantor of the independence of the judiciary.

By virtue of this role, the SCM has exclusive attributions, without any interference from outside, regarding the career of judges and prosecutors, as well as their promotion and sanctioning.

Through the protocol signed with the SRI, the Council has allowed the Service to interfere with its activity by allowing it to access its data (including the personal files of magistrates), agreeing to use secret information in disciplinary cases or collaborating with Service in the procedure of issuing an opinion on legislative projects concerning the administration of justice or the status of magistrates.

In this regard, the following protocol provisions are in force:

Art. 3 - (1) *Cooperation shall be carried out under the law and this Protocol in strict compliance with the competencies and competencies of the Parties through:*
making effective use of the possibilities for early identification and timely removal of deeds that could affect the performance of justice or the achievement of national security;
mutual information with the data and information that each Party holds and which are useful for the fulfillment of the specific tasks of the other Party;
analyzing draft normative acts related to the object of activity of the Parties;
exchange of documentary material, works and data useful to the other Party for the development of specialized materials.
(2)In complex cases*, effective cooperation shall be carried out on the basis of* ***joint plans approved by the two institutions' management,*** *specifying the tasks assigned to each Party.*

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> ***Art. 5 (4)*** *In exceptional situations, the data and information transmitted by the Romanian Intelligence Service* ***may be entered in the investigation files of the Superior Council of Magistracy, only in compliance with the provisions of para. (2) and para. (3).***
>
> ***Art. 6 -*** *The Parties undertake, within a reasonable time,* ***to communicate to each other the results obtained on the basis of the information*** *received from the other Party.*

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3. All the others protocols are still secret

There are a whole series of other protocols that have not yet been declassified. Some of these are no longer in force (those listed in the protocol between SRI and PICCJ or those between SIE and MP), but some may still be applied.

According to SRI, there are 64 secret protocols between the Service and public institutions, most of which are still secret.

The most important and severe one are the Protocols signed by the High Court of Cassation and Justice and SRI and the Judicial Inspection and the SRI. These are still classified, and in case of the High Court is not being yet clear if it is a single SRI protocol or two, the public statements of the authorities in this respect being contradictory.

IV. Conclusions

Communism collapsed in Romania almost 30 years ago, which is only one generation away. The mentality of the state institutions as well as of the majority of people did not change overnight simply by passing from one form of government to another. Changing the mentality, especially of an oppressive institution, requires time, transparency and oversight.

Romania had one of the most brutal communist regimes, which was imposed and maintained through Securitate. The need of an effective and strong democratic oversight on secret services should have come naturally, as an antibody of civil society, to prevent the horrors of the past.

But this has never happened in Romania, civilian oversight was simply not a subject of debate. A strong secret service, with widespread influence in all state institutions, in media and even in the judiciary, was seen as a natural, tolerable and even necessary authority of the government.

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The fight against corruption in the past years, clearly a necessary measure in Romania and massively supported by the West, was the ideal cover up for SRI to gradually regain influence within the judiciary to the point where now, in 2016, it gained back a part of the power Securitate had under the communist regime.

We call on all democratic institution to take a stand about this abnormal situation in Romania and urge the Romanian Government to get the secret services out of the judicial field, in order to safeguard the independence of the judiciary and to prevent future violations of human rights.

National Union of the Romanian Judges

Securitate Reloaded?

How the Romanian Secret Service undermines the independence of the judiciary and the rule of law

Dana Girbovan (37) is a judge at the Court of Appeal in Cluj-Napoca, Romania. As president of the National Union of the Romanian Judges (UNJR) she is spearheading the campaign of Romanian judges against the covert involvement of the Romanian Intelligence Service (SRI) in the judiciary. Under the pretext of fighting corruption, the SRI increased its influence to a point where the independence of the judiciary and the rule of law have become questionable.

The affair has led to a variety of concerned comments of judges' organizations abroad[1] while the European Union seems hesitant to intervene in favor of the Romanian judiciary, fearing it would restrain the combat against corruption which was perceived as a success story until now. But sacrificing the rule of law has never led to strong institutions and long term successes in fighting corruption. The head of the association of Romanian judges about the battle against a hesitant administration and a very determined secret service:

Q1: You say the Romanian Intelligence Service is undermining the independence of the judiciary in Romania. How was the involvement of the SRI discovered?

After being some sort of urban legend for the past 25 years, the scandal of SRI's involvement in the judicial process became public in April of 2015. General Dumitru Dumbrava, the head of SRI's legal department, stated in an interview[2] that SRI would not "withdraw from the tactical field once the indictment was presented to the court" and that SRI maintained its "(…) interest/attention until the final resolution of every case is reached". He also stated SRI was profiling judges to detect patterns of criminal behavior, even without suspicion. This raised serious and legitimate concerns about the independence of the whole Romanian judiciary in particular as SRI is prohibited by law to interfere with courts and prosecution.

Eduard Hellvig, the current SRI Director, made matters worse, by explaining[3] at the SRI's 25th anniversary that magistrates had to be monitored "to avoid situations like in the past when the judges and prosecutors forgot on the road that they serve the Romanian State and had other preoccupations than to serve the Romanian State". The guest of honor was General Iulian Vlad, the last head of Securitate, the former communist secret police.[4]

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1 http://www.unjr.ro/stiri/55-europeanmagistratesconcernedabouttheinfluenceofintelligenceagencyoverthejudiciaryprocessinromania.html (May 23, 2015)
http://unjr.ro/75-europeanmagistratesconcernedthattheinvolvementofthesecretservicesintheromanianjudiciaryprocesshasnotbeenclarifiedyet.html (November 21, 2015)
http://www.unjr.ro/comunicate-de-presa/90-medeldeclaration-iseuropeundersiege.html (March 12, 2016)

2 http://www.juridice.ro/373666/dumitru-dumbrava-sri-este-unul-dintre-anticorpii-bine-dezvoltati-si-echipati-pentru-insanatosirea-societatii-si-eliminarea-coruptiei.html

3 http://www.evz.ro/hellvig-despre-implicarea-sri-in-justitie-serviciul-lucreaza-bine-dar-din-pacate-comunica-prost.html
http://www.dcnews.ro/directorul-sri-eduard-hellvig-lamure-te-declara-ia-gen-dumbrava_476395.html

4 http://www.flux24.ro/seful-securitatii-comuniste-invitat-special-la-aniversarea-sri/
http://www.stiripesurse.ro/eduard-hellvig-noul-ef-al-sri-da-ordine-in-serviciu-de-fa-a-cu-florian-coldea_956664.html
http://www.ziaristionline.ro/2015/05/24/monografia-sri-25-de-ani-lansare-extraordinara-la-bookfest-2015-cu-gen-iulian-vlad-virgil-magureanu-george-maior-florian-coldea-si-eduard-hellvig-foto/

The previous SRI director George Maior described SRI at the same event as “a kind of a brain of the state, the eyes, the ears of the state“. If Maior, who had led SRI for 9 years and likes to take pride in its “modernization”, acknowledges SRI was not only a secret service but also the “brain” of the state it is hard to talk about an independent judicial system in a state controlled by a secret intelligence agency.

The representatives of the security apparatus display a very troubling mindset since a judge is not serving the state in a democracy, but the law. In front of a judge, the citizen and the state must both be equal.

These statements reveal a backward mentality among the SRI leadership contradictory to the rule of law and resonating with brutal memories of the Securitate. After the fall of communism, SRI was legally prohibited to conduct criminal investigations, to arrest or detain people. This was done to preclude any repetition of the gross violations of human rights committed by the Securitate. Because of the communist past, you have to understand the concerns of the judges when it turned out that the secret service was trying to exercise control over the judiciary. Communist Romania did not have any separation of powers like in Western democracies with legislative, executive and judiciary powers acting independently and controlling each other. Soviet advisers brought to Romania installed a Stalinist system. That approach meant the former secret police Securitate was actively involved in the justice system. The judiciary was not a distinct power but a mere function of the state in which Securitate undercover agents were posing as prosecutors or judges, carrying out criminal investigations. The judiciary unit was responsible for most horrific abuses which led to people unjustly imprisoned or even killed after a sham trial.

Former president Traian Basescu (2004-2014) mentioned in an interview[5] the Supreme Council of National Defense (CSAT), a body chaired by the Romanian president responsible for national security and the coordination of the secret services’ activities, had passed a decision giving “massive responsibility” to SRI. From that moment on, SRI was supposed to form mixed permanent teams with prosecutors to “identify and combat corruption within the judiciary field”. Not only that this CSAT decision violates the law, by empowering SRI to do something that it is prohibited from doing, but this decision makes judges targets for SRI’s covert operations that clearly undermine the independence of the judiciary.

An independent judiciary system not only means that prosecutors are free to indict anybody regardless of the public office held, but first and foremost it means that every citizen is granted the fundamental right of being heard and tried by an independent and impartial judge, who rules only based on law and according to his or her conscience. To accomplish this goal, the judges have to be protected from any pressure or influence, direct or indirect, open or covert, from anybody or any state institution.

Q2: What was the response of Romanian judges?

In the light of these statements and considering Romania's totalitarian history, the UNJR immediately raised concerns about the independence of the judiciary system in Romania and asked the state institutions to clarify in a transparent manner the involvement of SRI in the judiciary. But for over a year the government refused to publish the CSAT decisions because they are classified as “state secret”. By refusing to publish those CSAT decisions, Romania has transformed from a state ruled by law into a state ruled by “secret administrative decisions” and controlled by secret intelligence

5 http://timpolis.ro/presedintele-traian-basescu-interesul-fundamental-al-romaniei-acum-si-pe-termen-lung-este-garantarea-securitatii-pe-care-nu-o-face-nici-federatia-rusa-nici-china-ci-o-fac-sua/

services.

In parallel, UNJR along with hundreds of individual judges petitioned the Superior Council of the Magistracy (CSM) to defend the independence of the judiciary by clarifying publicly what General Dumbrava meant with the courts being a "tactical field" for SRI. CSM is the judicial body with a constitutional duty to "guarantee the independence of the judiciary". It was imperative for the CSM to elucidate what influence SRI exerts on the judiciary and to demonstrate publicly Romanian judges were independent. Unfortunately, CSM failed to do so. CSM received a classified reply from SRI, based on which it ruled that SRI did not affect the independence of the judiciary. By keeping the content of that reply classified, CSM undermines people's confidence in courts and judges.

In the meantime, the media revealed[6] magistrates in key positions had obtained doctoral degrees at the SRI Academy. This Academy is not only under the jurisdiction of SRI, it is the school where future SRI officers and spies are trained. In the summer of 2015 that academy initiated a program with European funds to "train" a targeted group of 1,000 magistrates, out of which 500 had to be in leadership positions in courts or prosecutors' offices. Enrolling magistrates had to provide their personal information to this academy and at the end of the training they were evaluated by SRI Officers.

There are about 4,700 civil, criminal and administrative judges and 2,800 prosecutors in total in Romania. Having 1,000 judges and prosecutors trained by SRI would have an enormous impact on the judiciary. In order to understand the extent of SRI's influence over Romanian judges and prosecutors, UNJR asked the SRI Academy to provide us with the names of all magistrates that took part in any of its classes and trainings. The request was based on the law on access to public information but was rejected. Consequently, UNJR filed a lawsuit which is currently pending.

Obviously, corrupt prosecutors or judges pose a threat to the credibility of the judiciary, too. But the judiciary system has the necessary means and procedures to identify, investigate and try them without the involvement of an unaccountable secret service. Prosecutors and judges are obliged to declare their income and potential conflicts of interest in case their relatives are working in the judiciary. These statements are renewed on an annual basis and are publicly accessible on the homepage of the Supreme Council of the Magistracy[7]. Transparency and accountability are the best prevention against corruption in the judiciary, which are missing completely in the context of the secret service.

Q3: Romania had to reform its intelligence agencies in order to qualify for NATO and EU membership. However, is there an indication that SRI is not limiting itself to merely influencing the judiciary but that even undercover agents might exist among magistrates today as they did during Ceausescu's regime?

The Securitate had undercover agents, informants and collaborators among prosecutors and judges. Unfortunately, Romania did not have a lustration law after the fall of communism, like many other former communist countries had. As a result, the former Securitate network remained active among magistrates, some of them active even until today. For example, the former minister of Justice Rodica Stanoiu was a Securitate collaborator, a fact confirmed by court.

First signs of direct involvement of undercover agents became visible from 1997, when Valeriu

6 http://www.romanialibera.ro/politica/institutii/magistrati-si-sefi-de-institutii-au-fost-facuti-doctori-de-generalul-politician-gabriel-oprea-388840

7 http://emap.csm1909.ro/site/Statements.aspx

Stoica, the justice minister at that time, created a secret intelligence agency under his supervision to collect information about corruption within the judiciary. While the original purpose of this agency was honorable, it degenerated soon after. Monica Macovei, the former minister of justice who dismantled this agency in 2006, confirmed that this secret service was collecting information using undercover agents among the judges and prosecutors and even blackmailed magistrates.

In 2004 the law was changed, expressively forbidding a judge or prosecutor to be an undercover agent or collaborator of any secret intelligence agency. Since then, each judge, prosecutor or affiliated staff has to sign an affidavit annually, under the penalty of perjury, that they are in compliance with the law. The same law states CSAT must verify those affidavits.

When former Romanian president Traian Basescu stated after his second term in 2015 that there were officers of secret intelligence agencies still active among the magistrates, we requested CSAT to verify if all those affidavits were compliant with the law. After prolonged pressure from the magistrates, CSAT finally confirmed the affidavits complied with the law at the beginning of 2016. However, the official decision and a copy of the procedure that CSAT followed to verify those affidavits were classified and thus access for judges was denied again. Once again UNJR filed a lawsuit to obtain those documents, which is pending.

The next day after that press release the president's chief of staff amplified the issue by stating CSAT had no capacity to verify if the Romanian intelligence agencies had undercover agents among the magistrates. In addition, Sebastian Ghita, a member of the SRI parliamentarian oversight committee declared that "the Romanian intelligence agencies must have undercover agents and informants in politics and the judiciary"[8].

No one can trust a democracy and judiciary infiltrated by undercover agents. A compromised judiciary also curtails the judicial control of secret services, which should be an important tool to protect democracy and human rights. It is the judiciary that should control the secret services, not vice versa. In the case of *Klass v. Federal Republic of Germany*[9], the European Court of Human Rights (ECtHR) expressed a clear preference for a system of judicial control, stating that "the rule of law implies, inter alia, that an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure".

The issue of undercover agents also affects the attorneys. Recently the Romanian Senate passed some amendments to the attorney's law, prohibiting them to be undercover agents, informants or collaborators of secret intelligence agencies. One amendment required the attorney to disclose any relationship with the former Securitate. All these amendments were eliminated by the judicial committee in the Chamber of Deputies, which gives raise to the suspicion that the Romanian intelligence agencies have undercover agents even among the attorneys or politicians. After public pressure, that article was introduced again in the bill.

Communism collapsed in Romania 26 years ago, which is only one generation away. The mentality of the state institutions as well as of the majority of people did not change over night simply by passing from one form of government to another. Changing the mentality, especially of an oppressive institution, requires time, transparency and oversight. Romania had one of the most brutal

8 http://www.ziare.com/sebastian-ghita/psd/sebastian-ghita-serviciile-trebuie-sa-aiba-ofiteri-acoperiti-in-politica-si-justitie-1418662

9 http://hudoc.echr.coe.int/eng?i=001-57510&%7B%22itemid%22%3A%5B%22001-57510%22%5D%7D#{"itemid":["001-57510"]}

communist regimes, which was imposed and maintained through Securitate. The need for an effective and strong democratic oversight on secret services should have come naturally, as an antibody of civil society, to prevent the horrors of the past. But this has never happened in Romania, civilian oversight was simply not a subject of debate. A strong secret service, with widespread influence in all state institutions, in media and even in the judiciary, was seen as a natural, tolerable and even necessary authority of the government. The fight against corruption in the past years, clearly a necessary measure in Romania and massively supported by the West, was the ideal cover up for SRI to gradually regain influence within the judiciary to the point where now, in 2016, it gained back a part of the power Securitate had under the communist regime.

It is our duty to raise public awareness about this abnormal situation in Romania and to get the secret services out of the judicial field, in order to safeguard the independence of the judiciary and to prevent future violations of human rights.

Q4: Could you please explain what you mean by SRI regaining influence within the judiciary to the point where it has regained in part some of the same power Securitate had?

After public pressure from the secret service early 2016, prime-minister Dacian Ciolos passed an emergency ordinance turning SRI into a “special organ to conduct criminal investigations” in certain cases.[10] By skirting the law and allowing SRI to conduct criminal investigations in principle, the current Romanian government granted SRI a power that Securitate has had.

To complete the picture of the Romanian secret service: SRI is a militarized intelligence agency, in other words it is like an army unit. SRI has a civilian director appointed politically, but all the operations are ordered and overseen by a general. SRI is controlled by the legislative branch and its activities are coordinated by the executive branch. On the other hand, the judiciary is a separate branch of the government, a power by itself, where the judicial procedures are carried out by independent magistrates, either prosecutors or judges. Carrying out justice must be done in accordance with the law, which has to be public and accessible to everybody. Involving SRI in the judiciary process violates the separation of powers, because then the legislative and executive branches influence the judiciary.

Q5: Do you personally face interference by SRI and what is the experience of other judges?

A judge does not have to be told by SRI to rule one way or another in order to be influenced in the decision. One way to influence the trial is to tamper with or suppress evidence. Until now, SRI was the only Romanian institution able to conduct wiretapping. All its servers are located in a militarized SRI unit, classified as "state secret" without civilian access. Prosecutors and defense attorneys have to rely on transcripts and copies of recordings provided for by SRI. In several cases independent experts could prove recordings handed over by SRI had been tampered with. Parts of the recording had been deleted or pieces from different conversations had been cut together to incriminate the defendant. In other instances the SRI transcripts did not match the recordings, as certain words had been changed in the transcript. In a recent case the judge asked the prosecutor to play the CD with the recording in order to verify the accuracy of the transcript. To the court's surprise, the CD contained folk music instead of the expected conversation.

The current Romanian law requires a prosecutor to collect evidence for both prosecution and defense as the purpose of the criminal investigation is to find the truth. In order to achieve that goal, the prosecutor has to be independent. But this requirement is clearly not fulfilled by a secret service

10 http://www.evz.ro/ciolos-despre-oug-privind-interceptarile-sri-organ-de-urmarire-penala-doar-pentru-cazuri-privind-siguranta-nationala-si-terorismul.html

agent under military orders. It is hard to talk about equality of arms and a fair trial when SRI has full control over the servers recording the conversations and when it is able to manipulate or hide exculpatory evidence.

Let me point out that collecting intelligence is also fundamentally different from collecting evidence in a criminal case which must meet certain criteria to be admissible in courts. Collecting intelligence is done in secrecy, sometimes at the brink of legality. Collecting evidence, on the other side, must be done according to the rules and procedures of a criminal investigation. Justice must be carried out in the name of law, not some secret orders.

Q6: Since the security organs usually execute orders only, it would be interesting to find out who has given the order to conduct such a program. Moreover, there seems to be a striking continuity between the previous Basescu[11] government and the current one of president Iohannis. How come the new government sticks in this particular point to an approach that has its roots in a policy developed by the previous government?

When Traian Basescu was elected president in 2004 he announced to declare corruption a threat to national security and he would involve SRI in the fight against corruption[12]. To circumvent the law which prevented any involvement of SRI in the judiciary, the government passed several secret decisions in CSAT defining corruption as a threat to national security. By law SRI had authority to deal with national security threats only. With this decision SRI was granted involvement to criminal investigations although corruption is a misdemeanor penalized by the criminal code and therefore should be investigated and prosecuted by prosecutors alone.

But CSAT is only an administrative body, without the legislative power of the parliament. Therefore CSAT decisions are of simple administrative nature, without the power of a law passed by parliament. Between 2004 to 2016, when prime-minister Ciolos made SRI "a special organ to conduct criminal investigations", SRI was involved in the judiciary based on these secret and classified mere administrative orders, violating the actual law[13].

At the release of the 2015 National Anticorruption Directorate's (DNA) activity report, SRI Director Eduard Hellvig stated: "SRI is a member of the team that is fighting corruption and I want to congratulate you for the wonderful results obtained in 2015. [...] From the SRI perspective, the fight against corruption represents a priority of strategic order. [...] SRI is allocating human resources, procedural and technological resources at the highest level in the cooperation with DNA. This can be translated in hundreds of common operative teams, which represent a successful inter-institutional partnership."[14] Moreover, convictions in corruption cases are mentioned in the SRI activity reports as their own achievements.[15]

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11 http://timpolis.ro/presedintele-traian-basescu-interesul-fundamental-al-romaniei-acum-si-pe-termen-lung-este-garantarea-securitatii-pe-care-nu-o-face-nici-federatia-rusa-nici-china-ci-o-fac-sua/ and http://www.mediafax.ro/politic/basescu-prea-multi-procurori-au-trecut-judecatori-si-sunt-ofiteri-acoperiti-printre-magistrati-14109992

12 http://www.hotnews.ro/stiri-esential-20862718-sri-castiga-mai-multa-putere-guvernul-facut-sri-organ-cercetare-penala-cazurile-siguranta-nationala-terorism.htm

13 http://www.9am.ro/stiri-revista-presei/Politica/5192/Coruptia-devine-atentat-la-siguranta-nationala.html , http://www.catavencii.ro/interceptarile-ilegale-pe-intelesul-tuturor/, http://economie.hotnews.ro/stiri-telecom-20860219-centrul-national-interceptare-comunicatiilor-functioneaza-cadrul-sri-cel-putin-din-anul-2007.htm , http://www.juridice.ro/431189/problema-interceptarilor-se-prabuseste-lupta-anti-coruptie-sau-pierde-sri-din-puteri.html , http://www.unjr.ro/2016/02/16/,

14 http://www.sri.ro/fisiere/discursuriinterviuri/Discurs_DNA.pdf

15 http://www.cameradeputatilor.ro/bp/docs/F-362277298/RaportSRI2014.pdf

The current president Klaus Iohannis added a concept called “extended national security”. Based on this concept, CSAT developed a National Defense Strategy where they included under the “national security” umbrella pretty much every sector of the Romanian society: education, agriculture, judiciary, and ecology, even demography. SRI is the intelligence agency dealing with national security issues and, by extending this concept to everything, slowly it turns into the “brain” of the state that controls everything.

A general trend can now be observed in Europe where the executive branch utilizes secret services in order to take control of different segments of society, especially the judiciary. If this trend is not corrected soon, it will undermine democracy and rule of law in all these countries, including Romania.

Q7: This year the Romanian Constitutional Court decided that SRI cannot conduct wiretapping in regular criminal cases. How has this decision affected the legal framework and has it impaired the work of the secret service in any way?

In February 2016 the Romanian Constitutional Court (CCR) ruled unconstitutional an article of the criminal procedure code that had been used by prosecutors to delegate the wiretapping for regular criminal offenses to SRI. The CCR confirmed SRI was only permitted to conduct wiretapping in cases related to national security but not in cases of regular criminal offenses.

The CCR decision finally brought things back to legality. In 2002 CSAT had passed a secret decision making SRI an “authority of interceptions”. In the spring of 2008, before the NATO summit in Bucharest[16], SRI made use of that opportunity and pushed through a decision in CSAT making SRI the “unique authority of interceptions” in Romania. As a result, all the prosecutors were forced to go through SRI in order to conduct wiretapping on regular criminal offenses, contrary to law.

After the CCR decision, all the SRI wiretapping procedures on regular criminal cases were suspended. But no other institution in the country has now the tools for wiretapping due to that secret CSAT decision that had made SRI the “unique authority on interceptions”.

From a constitutional standpoint the correct solution would have been the creation of an independent civilian authority to conduct wiretapping like in any democratic country. Romania now uses a very controversial wiretapping system, similar to the one in Russia. The emergency ordinance prime minister Ciolos signed earlier this year in order to bypass this decision of the Constitutional Court to uphold the Romanian wiretapping system certainly violates fair trial standards and more than likely will be ruled unconstitutional by the Romanian Constitutional Court as well.

Q8: What was the reaction of the media after this decision of the constitutional court?

Most media in Romania are very superficial and biased when it comes to reporting on the fight against corruption. The former SRI director George Maior acknowledged SRI also had undercover agents or agents of influence among the journalists. That explains why the media do not report negatively about SRI in general.

16 http://www.hotnews.ro/stiri-esential-20857237-cum-ajuns-sri-aiba-aparatura-performanta-interceptare-traian-basescu-explica-legatura-summitul-nato-din-2008.htm

According to a recent report of Reporters Without Borders, media in Romania are "manipulated and spied on" and the intelligence agency infiltrated the staff.[17] Active Watch, an organization advocating for human rights and freedom of the press, also stated in a recent report that "newsroom infiltration by undercover agents of intelligence services was reconfirmed in 2015".[18]
Exemplary for the influence of the secret service was the reaction of several people in the media when UNJR attempted to raise public awareness about undercover agents among magistrates. Instead of investigating the matter, some journalists – many of which claim to support the fight against corruption – played down the subject, saying our effort was futile because UNJR could not uncover the agents anyway.

The same media people attacked the Romanian Constitutional Court after it ruled on the unconstitutionality of SRI wiretapping. Between the time CCR announced the ruling and the day of publishing the reasoning, most of the media pressured and threatened the Constitutional Court in ways unseen before. Additionally, SRI director Eduard Hellvig stated publicly that the Constitutional Court jeopardized the national security. The same people in the media even leaked a draft deliberation with the clear purpose of pressuring the judges to change their opinion. Despite the fact that such pressure on the Constitutional Court is incompatible with the rule of law, there were very few voices in media and civil society to condemn this pressure.

Sadly, several nonprofit organizations that had previously obtained grants from the European Commission with the purpose of consolidating democracy and rule of law in Romania were silent in the face of this brutal attack on Romanian democracy.

Letting a secret service such as SRI act as a law enforcement agency means opening the door for abuses and human rights violations. This risk was acknowledged by the Parliamentary Assembly of the Council of Europe, which passed a recommendation in 1999 stating: "Internal security services should not be authorized to carry out law-enforcement tasks such as criminal investigations, arrests, or detention. Due to the high risk of abuse of these powers, and to avoid duplication of traditional police activities, such powers should be exclusive to other law-enforcement agencies."[19]

When media and civil society are silent or even praise the fact that SRI became "a special organ to conduct criminal investigations", it is a sign that the democracy in Romania is in jeopardy since media and civil society do not fulfill their controlling function any longer.

Q9: Monica Macovei, a European parliamentarian and a Romanian politician famous for combating corruption has defended the approach of the secret service General and stated in an interview fundamental freedoms and human rights could not be fully granted in societies ridden with corruption. Do you see any superseding necessity justifying this approach?

Monica Macovei seems to talk in Brussels about respecting human rights and in Romania about being tough and disregarding human rights when it comes to fighting criminality. "We need to find a balance between respecting the human rights and reducing criminality. In a country where criminality is high, the human rights cannot be fully exercised", she claims. [20]

17 https://rsf.org/en/romania
18 http://activewatch.ro/ro/freeex/reactie-rapida/lansarea-raportului-freeex-2015-2016-libertatea-presei-in-romania/#_ftnref
19 http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16689&lang=en
20 http://www.hotnews.ro/stiri-esential-20854960-monica-macovei-dosare-coruptie-spalare-bani-evaziune-fiscala-crima-organizata-anchete-privind-omoruri-vor-inchise-urma-deciziei-ccr.htm

This approach is wrong and extremely dangerous, since it will jeopardize the fight against corruption in the long run and will lead to human rights violations. Fundamental rights and the fight against corruption don't contradict each other, they are complementary. Both, corruption and violation of human rights are characteristics of a totalitarian state. They are forms of abuse by the ones in power against the ones in vulnerable positions, and they both pose a threat to democracy.

In Romania it became a taboo to talk about human rights violations that are currently happening under the pretext of fighting corruption. Public figures, such as Monica Macovei, certain media figures or civil society will accuse whoever publicly raises these issues of being a supporter of corruption. Monica Macovei launched one of the most vicious attacks against the Romanian Constitutional Court, intimidating citizens by asserting Romania would become a paradise for criminals and terrorists because of those CCR decisions.

Because of her attacks, the Superior Council of Magistracy ruled recently that Monica Macovei had affected the independence of the judiciary by some of the statements she has made. The Council notified the European Parliament and it remains to be seen how the European Parliament will react.

Q10: How do magistrates outside of Romania and the EU commission react to this problem?

The European Association of Magistrates for Democracy and Fundamental Rights (MEDEL) reacted rapidly to the situation, supporting our struggle against the Romanian secret service. Due to their professional experience they immediately recognized the danger for the independence of the judiciary if SRI is involved in the judicial process.[21]

In an additional attempt to muster support from abroad we sent a letter to the European Commission at the beginning of 2016, outlining what was happening in Romania and our concerns. Soon after, the European Commission released the Mechanism for Cooperation and Verification (CVM) report with the progress of the Romanian judiciary in 2015, which touched upon these subjects in a rather cursory fashion. Influenced by Romanian bureaucrats, it seems, the European Commission was more concerned about the "attacks" of journalists against the independence of the judiciary than by having a secret intelligence agency infiltrating the judiciary.

After the CVM report was released we received a response from Alexander Italianer, the Secretary-General of the European Commission. Mr. Italianer restated the following phrase from the report: "It is important that the judicial hierarchy is attentive to any risk of integrity for judges and prosecutors, and that magistrates receive proper guidance with regard to impartialities, conflicts of interest or incompatibilities". He said that "this is of direct relevance to the issue you raise, given this responsibility of each magistrate to declare incompatibilities".

The magistracy in Romania certainly appreciated the response. But the problem is systemic, not individual. Of course, it is very hard for EU officials to have an accurate understanding of the challenges the Romanian judiciary system faces if media and NGOs do not report on these problems. EU officials mostly concentrate on statistics: how many suspects, indictments and how many rulings were recorded each year? But a closer look at statistical data reveals Romania had over 2 million new

21 http://www.unjr.ro/stiri/55-europeanmagistratesconcernedabouttheinfluenceofintelligenceagencyoverthejudiciaryprocessinromania.html (May 23, 2015)
http://unjr.ro/75-europeanmagistratesconcernedthattheinvolvementofthesecretservicesintheromanianjudiciaryprocesshasnotbeenclarifiedyet.html (November 21, 2015)
http://www.unjr.ro/comunicate-de-presa/90-medeldeclaration-iseuropeundersiege.html (March 12, 2016)

court cases in 2015, out of which only 357 were sent by the DNA. But by analyzing the judiciary merely with statistics that are based on those 375 cases only, the European Commission moved away from its own main benchmark of the Cooperation and Verification Mechanism, which wants to: "Ensure a more transparent and efficient judicial process notably by enhancing the capacity and accountability of the Superior Council of Magistracy (CSM)."

When it comes to the independence of the judiciary there are no objectives that could justify a dodgy deal between Bucharest and Brussels. Civil rights and the rule of law should be the yardstick for EU officials when evaluating the judiciary in Romania. More and more concerns are raised about the situation in Poland, Hungary or the candidate for accession Turkey, where the rule of law and democratic principles are threatened. The principles of fundamental rights and the rule of law cannot be compromised anywhere, or else the problem will spread and it will undermine the European Union from within.

Q11: Currently the secret service seems to target corruption cases. Are there signs other cases might also be affected? And do you expect any defendants that were indicted under corruption charges to turn to Strasbourg eventually with the claim that they will not get a fair trial at home?

The activities of SRI appear to cover corruption in politics, economics and the judiciary. But since the secret decisions given by CSAT that unlawfully empowered SRI to be involved in the judiciary are not made public, one can only speculate if there are any limitations to SRI activities.

As far as the situation at the ECtHR is concerned, Romania is already losing cases in Strasbourg for violating the European Convention of Human Rights, but due to the slow procedures, it takes the court several years to render a decision. It can be expected that some of the current Romanian cases will end up in Strasbourg due to a lack of due process. However, until the current cases will be heard by ECtHR in several years from now and severe human rights violations are confirmed, the damage done to the reputation of the entire judiciary system and the fight against corruption will be very hard to be undone.

Q12: Corruption affects all states and on the corruption perception index 2015 Romania ranks 58th out of 167 states, between Greece and Italy, but well behind Rwanda, Namibia or Saudi Arabia. From the perspective of a judge, what seems to influence corruption?

Corruption is not a problem specific only to Romania. A recent study released in April 2013 by the Berlin Hertie School shows the cost of corruption in the European Union is as high as 300 billion Euros. In 2012 the European Commission estimated the cost of corruption between 1.5-2% of the GDP. These numbers suggest corruption in the EU does not only mean simple bribery but is of structural and political nature. The consequence is that the judiciary system, being limited to its punitive measures, will never be able to resolve the complex problem of corruption by itself.

Judges don't fight corruption, because fighting for or against something would mean they would take a side and therefore would not be impartial. A judge is called to hear a case and to judge impartially based on the law and the evidence, which can result in acquittal or conviction. Combating corruption has to be a state policy and strategy that has to be conducted on multiple levels vertically and horizontally in finance, business, politics and the judiciary.

The sources of corruption are diverse, including lack of transparency, hidden political party financing, weak lobbying regulation, political influence on the management of state owned enterprises, weak financial disclosure obligations and, last but not least, state's capture by special interest. In order to fight corruption effectively, we need to eliminate the causes which will help prevent the effects.

Q13: White collar-crime and corruption like price fixing and interest manipulation by major banks as well as tax haven scandals are all connected to the areas you mention. Is more qualified staff in judiciary and tax authorities, police and parliament necessary who understand the underlying money flows instead of circumventing the rule of law by secret services? Or what other elements are necessary to combat corruption?

Training on corruption related matters for all related state bodies is clearly an advantage, but not at an intransparent institution such as the SRI academy. Corruption is power without accountability, said Goran Klemencic, a well-known anti-corruption expert from Slovenia. Accountability is the result when you reinforce transparency, integrity and rule of law. Transparency is one of the main tools to fight corruption. And I am not talking about "junk transparency", which involves PR spinning. Real transparency requires efficient systems that would enable the citizens to track the spending of public money, for example online and in real time. This kind of transparency will lead to accountability which will ultimately diminish corruption.

This brings me back to the topic of the interview, the infiltration of the judiciary by SRI under the pretext of fighting corruption, and I cannot help noticing the following paradox: by definition, secret services are operating without transparency. Since the lack of transparency is the main cause of corruption, how can you effectively fight corruption using institutions that completely lack transparency?

That paradox is illustrated by a current scandal in Romania: a journalist revealed that a company sold diluted disinfectants to hospitals for about ten years, resulting in nosocomial infections and thousands of deaths. SRI knew about it and claims to have sent over 100 notifications to decision makers over the past five years. However, the decision makers claim they had not been informed about the alleged illegal activity of this company. The truth remains unknown because those notifications are classified. But thousands of people got sick and died because nobody did anything to stop this. Transparency could have prevented many of these deaths.

Romania is not alone with this kind of problem: When Putin came in power in 2000, the West supported his strong anti corruption commitment.[22] As a next step he deployed former KGB agents in public administration since civilian officials were corrupted, Putin stated. Today the Russian administration is controlled by the former KGB and a showcase on how ineffective that campaign was. China started an anti-corruption campaign in 2012 under the current president. It was widely welcomed by investors abroad and Western governments. But the use of the secret service and the elimination of the opposition lead to capital leaving China since people stated to be afraid.[23]

Where a government disregards the debates on the human rights and due process, sooner or later citizens and investors might suspect that its anti-corruption campaign is not genuine. For example, foreign media reported public officials in Romania are not signing documents any longer for the fear of being prosecuted, and resulting in many unfinished public projects.[24] It is a sign of terror, not of the rule of law, if people fear their own government.

Q14: So what would Romania have to do as a next step?

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22 https://partners.nytimes.com/library/world/europe/032400russia-putin.html

23 http://www.ibtimes.com/capital-flight-china-why-investors-are-taking-their-money-elsewhere-2174989

24 http://www.bloomberg.com/news/articles/2016-01-21/romania-corruption-crackdown-delays-infrastructure-projects

The first thing we need to do in Romania is to learn from our own history's mistakes. Involving a secret intelligence agency in the work of courts and prosecution will undermine the independence of the judiciary and the separation of powers. With this cornerstone of democracy removed, sooner or later severe human rights violations are bound to happen. When the Romanian citizens realize what is happening, they will turn against the values of the West, because the West supported the implementation of this system.

Second, we need to learn from others' mistakes. The "mani pulite" campaign in Italy was successful in individual cases but in the long run it did not change the politicians. It is democratic elections that should change the political class, not the judiciary.

Third, we need a comprehensive approach to fight corruption, in which the judiciary is the last piece. We need transparency, we need accountability, we need to empower people and teach them how to advocate for a positive change, how to watch out for corruption. The more eyes will be on the government officials, the less corruption there will be.

And last but not least, we need the EU officials to acknowledge the serious threats to the independence of the judiciary in Romania, which endanger the rule of law and democracy in this country. There is absolutely no excuse for involving SRI in the judiciary. Compromising rule of law and democratic principles in order to gain some immediate small success under the label of the fight against corruption will ultimately lead to a lack of credibility and authority of the state itself, which will result in more corruption on the long run.

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From the Judiciary in Romania to the EPPO in Brussels – The Tactical Field of the Romanian Secret Service

How the Romanian National Anti-corruption Directorate DNA and the Romanian Intelligence Service SRI manipulated the judiciary in order to obtain desired sentences and the implications of this collaboration for Romania and the European Union

by Oliver Pahnecke[1]

Abstract

This article contains an overview of how the Romanian internal secret service SRI infiltrated the judiciary and how its co-operation with the DNA lead to an infringement of due process in numerous corruption related cases. This teamwork could also have an impact on the judiciary at the European Union (EU) level, since one of the candidates for the position of first General Prosecutor of the EU at the European Public Prosecutor's Office (EPPO) is former DNA head Laura Codruţa Kövesi. The article uses publicly available reports of the Council of Europe, the EU and the OSCE, as well as newspaper articles, reports of magistrates' associations and material of the Romanian Constitutional Court to analyse the legal situation and propose policy changes for Romania, the EU and its own selection process for the EPPO.

1 Oliver Pahnecke is a PhD candidate at Middlesex University London, researching sovereign debt, human rights and rule of law related issues. Besides his PhD he has been working on the problems of the Romanian judiciary since 2015 and has published several articles on the topic since 2016.

September 2018
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List of Abbreviations

AMR – Association of Romanian Magistrates
APR – Association of Romanian Prosecutors
CCR – Constitutional Court of Romania
CSAT – Romanian Supreme Council of National Defence
CSM – Romanian Supreme Magistracy Council
CVM – Cooperation and Verification Mechanism
DNA – Romanian National Anti-corruption Directorate
ECHR – European Convention on Human Rights
ECtHR – European Court of Human Rights
EPPO – European Public Prosecutor's Office
EU – European Union
GRECO – Group of States against Corruption
ICCJ – High Court of Cassation and Justice
ICCPR – International Covenant on Civil and Political Rights
KGB – (here) State Security Committee of the Republic of Belarus
MEDEL – European Judges for Democracy and Liberty
NURJ – National Union of the Romanian Judges
OSCE – Organization for Security and Co-operation in Europe
SIE – Romanian Intelligence Service (external)
SRI – Romanian Intelligence Service (internal)
TEU - Treaty on European Union
UDMR – Democratic Union of Hungarians in Romania

I. The Romanian Intelligence Service SRI in Romania's Prosecution and Courts, in particular its Cooperation with the Prosecutors at the National Anti-corruption Directorate, DNA

Laura Codruţa Kövesi is bringing in the scalps. This is how the Guardian praised the woman leading Romania's war on corruption at the helm of the National Anticorruption Directorate (DNA) in November 2015. "This year we have investigated 12 members of parliament, two of them being former ministers," says Kövesi, who was appointed head of DNA in 2013. "We have investigated two sitting ministers, one of whom went from his ministerial chair directly to pre-trial detention."[2] In 2014, the agency successfully prosecuted 24 mayors, five MPs, two ex-ministers, former prime minister Victor Ponta[3] and more than 1,000 other individuals including judges and prosecutors, with a conviction rate above 90%.[4]

This conviction rate looks impressive. However, it becomes less so after a comparison with the conviction rates in other states. Based on the OSCE trial monitoring report on Belarus,[5] the DNA conviction rate was closer to the 91-94% conviction rate of Belarus. In Belarus, the secret service KGB plays an important role in the judiciary, unlike in Germany which has a conviction rate of 81%. This does not seem to be the only similarity. The chain of events over the past years shows that Romania's internal secret service (SRI) is active in the country's judiciary, even if the Commission of the EU is steadfast in its will to ignore this: ever since Romania's accession to the EU in 2007, the Commission publishes progress reports for the Cooperation and Verification Mechanism (CVM). The intent behind this mechanism is to help in and control the improvement of the judicial reforms and the fight against corruption. However, it does not mention the SRI's activity in the judiciary, despite the former president of the Romanian Constitutional Court Augustin Zegrean publicly declaring that the Constitutional Court's judges were threatened by SRI. In fact, one of his colleagues had even reported to the EU Commission's officers responsible for the CVM during their country visit that he was "afraid to be a judge at this court".[6]

After 11 progress reports, the Commission finally mentioned very briefly in its report published on 13 November 2018 that "[O]ne of such broader factors has been publicly-debated claims that cooperation agreements between the judicial institutions, notably the prosecution, and the Romanian Intelligence Services were the source of systemic abuse, in particular in corruption cases."[7] The technical report of 2017 claims that "[T]he prosecution and conviction of many prominent politicians in Romania is a sign that the underlying trend of judicial independence is positive" without

2 Gillet, Kit, *Bringing in the scalps: the woman leading Romania's war on corruption*, the Guardian, London, 4 Nov 2015

3 Victor Ponta was subsequently acquitted of corruption charges dating back to 2007-2008 before his political career by the High Court in 2018, see: Gidei, Mihaela, *Înalta Curte de Casaţie şi Justiţie a decis, joi, în primă instanţă, achitarea lui Victor Ponta şi a lui Dan Şova în dosarul Turceni-Rovinari. Decizia nu este definitivă şi poate fi atacată de DNA,* Mediafax, Bucharest, 10 May 2018

4 Gillet, Kit, *Bringing in the scalps: the woman leading Romania's war on corruption*, the Guardian, London, 4 Nov 2015

5 OSCE Office for Democratic Institutions and Human Rights, *Report - Trial Monitoring in Belarus March – July 2011*, Warsaw 10 November 2011, Annex II Comparative Conviction Rates p. 100

6 Gidei, Mihaela, *Augustin Zegrean, amintiri de pe vremea când Toni Greblă a fost dus la DNA: L-am chemat pe Iohannis în CCR şi ne-am exprimat teama*, Mediafax, Bucharest, 10 May 2018, referring to incidents from 2015, see also Bogdan, Gabriela, *Former CCR judge Toni Grebla, acquitted by the Supreme Court in the case related to the ostrich farm. Grebla: Judges are proving that they judge by evidence, not by targets established by SRI and DNA*, Nine O' Clock, Bucharest, Romania, 14 May 2018

7 European Commission, *Report from the Commission to the European Parliament and the Council - On Progress in Romania under the Cooperation and Verification Mechanism*, Strasbourg, 13 November 2018, p. 2

mentioning that this could also be a sign of an abuse of power and therefore should be treated with caution.[8] Additionally, it only contains one section on the SRI's activity within the judiciary.[9] In the more detailed 2018 technical report, the two-page chapter *Cooperation between the intelligence services and the judicial institutions*[10] was included. That chapter mainly reflects the positions of the Supreme Council of National Defence (CSAT), DNA and the Supreme Magistracy Council (CSM).[11] Consequently, it ignores the statements of the Constitutional Court judges and the former Romanian president, as well as the arguments of the three associations of magistrates and prosecutors. This is despite the fact that all of their concerns have been consistently proven well-founded over the past years. When it comes to concerns of infiltration, the report states that "[T]he law clearly forbids a situation where intelligence service agents would be embedded in the justice system, as incompatible with the statute of magistrates" and that the institutions concerned denied that there were any agents active in the judiciary.[12]

Yet, public statements of important stakeholders, in particular of the SRI itself, suggest otherwise. Rumours about an infiltration of the judiciary have been circulating since the 1990s until 2015 when SRI's legal director, general Dumbrava, called the SRI the antibody for the elimination of corruption in an interview. Dumbrava added that the SRI would not "withdraw from the tactical field once the indictment was presented to the court" and that the SRI maintains its "interest until the final resolution of every case is reached."[13] That same year, Traian Basescu, Romania's former president, who had declared corruption a matter of national security 2005 in his function as co-ordinator of Romania's secret services SRI and SIE Romanian Foreign Intelligence Service (SIE) in the Supreme Council of National Defence (CSAT)[14], confirmed the collaboration of DNA and SRI and accused the DNA prosecutors of abusing preventive arrests "(…) in order to force confessions (...)".[15] From 2016 onwards, Basescu demanded rigorous oversight for both bodies[16] and criticised their procedures as a violation of human rights as there are "many who have been paraded in handcuffs for the glory of Ms Kövesi".[17]

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8 European Commission, *Romania: Technical Report Accompanying the document "Report from the Commission to the European Parliament and the Council On Progress in Romania under the Cooperation and Verification Mechanism"*, Brussels, 25.1.2017 p. 4

9 id. p. 23

10 European Commission, *Technical Report Accompanying the Document "Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism"*, Strasbourg, 13 November 2018, p. 7-9

11 CSAT co-ordinates the national defence and therefore the activity of SRI, while DNA and CSM signed cooperation protocols with SRI

12 European Commission, *Technical Report Accompanying the Document "Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism"*, Strasbourg, 13 November 2018, p. 10

13 Matei, Alina, *Dumitru Dumbravă: SRI este unul dintre anticorpii bine dezvoltaţi şi echipaţi pentru însănătoşirea societăţii şi eliminarea corupţiei*, Bucharest, Romania, 30. April 2015

14 Supreme Council of National Defence (CSAT) Decision no. 17/2005 on combating corruption, fraud and money laundering (not public). This secret decision made corruption a threat to national security, mentioned in: National Union of Romanian Judges, *Report on the unlawful involvement of the Romanian secret intelligence agencies, through secret protocols, in the Romanian judiciary system*, MEDEL homepage, 23 May 2018; Basescu also ignored the 5:1 vote of the Supreme Council of the Magistracy against another term of Kövesi's as the Romanian Prosecutor General, see D.G., *Aviz negativ de la CSM pentru reinvestirea Codrutei Kovesi in functia de procuror general*, HotNews.ro, Bucharest, Romania, 24 September 2009

15 Bogdan, Gabriela, *Basescu vehemently attacks Coldea, Kövesi, Stanciu: They are the artisans of scattered justice*, Nine O' Clock, Bucharest, Romania, 7 April 2015

16 Bogdan, Gabriela, *Basescu continues to train his guns on SRI and DNA: SRI has to be vigorously placed under oversight, bill on magistrates' responsibility needed for the DNA*, Nine O'Clock, Bucharest, Romania, 2 August 2016

17 Bogdan, Gabriela, *Ex-president Basescu convinced ECHR will condemn Romania for DNA's actions*, Nine O' Clock, 24 April, 2017

The CSAT is an administrative body operating under the authority of the President, entrusted with the organisation of the national defence, military and security activities of Romania. To date, it remains unclear how the decision of the CSAT to declare corruption a matter of national security could be used to overturn the relevant laws of the legislator. This decision of the CSAT prompted the abovementioned activities of the SRI, likewise an executive organ, in the judiciary. These events not only constitute a breach of the separation of power, but also expose a military unit working undercover in a civilian justice system. It is important to note that the SRI never received any legal mandate to get involved in criminal investigations with prosecutors.

In fact, this typical feature of Securitate was explicitly excluded in the law to prevent similar abuse after the fall of communism in Romania.[18] This was circumvented, as the SRI's 2013 activity report demonstrates. It states that legal experts of the SRI were members of joint operational teams within local and central law enforcement bodies in 463 cases (compared to 314 cases in 2012). In the meetings of the Joint Operational Teams, the legal experts of the SRI played an important role in the assessment of the operational situation and the measures proposed for the documentation of criminal activity, many of which are used as evidence in criminal trials. Also, in 2014, the SRI reported similarly on its activity for law enforcement institutions.[19] SRI activities were arranged based on secret protocols with the General Prosecutor's Office and the DNA, but also with the Superior Council of the Magistracy, the High Court of Cassation and Justice and the Judicial Inspection.[20] As a response to these discoveries, the National Union of the Romanian Judges (NURJ), the Association of Romanian Magistrates (AMR) and the Association of Romanian Prosecutors (APR) demanded clarification of the SRI's involvement in the judiciary from all competent Romanian institutions. This included the Superior Council of the Magistracy, the President, CSAT, the General Prosecutor Office, the DNA, the Romanian Intelligence Services and the Parliamentarian Oversight Committee on SRI.

In February 2016, the NURJ met with CSAT. After this meeting, CSAT stated in a letter that the 1991 National Security Law was outdated which necessitated it to "supplement" the law with secret decisions. One such decision was to make corruption a threat to national security, effectively extending the SRI's activities to the judiciary. In the letter, the CSAT also mentioned that the secret orders were the starting point for the Cooperation protocols between the SRI and the General Prosecutor's Office, which led to the creation of the joint teams of SRI officers and prosecutors.[21]

Since the SRI, the External Intelligence Service (SIE) and the Secret Service of the Ministry of the Interior refused to publish any of the classified Cooperation protocols, the NURJ sued for their de-classification and publication to evaluate the extent to which the independence of the judiciary might be impaired.[22] The NURJ and the AMR contacted the EU Commission and the Helsinki Committee regarding this matter. The Commission did not assist with the issue, but the Helsinki Committee held a hearing at the U.S. Senate. While the former U.S. ambassador Marc Gitenstein[23] expressed content with the developments in Romania,[24] one of the witnesses, David Clark, "expressed concern regarding several areas of Romania's anti-corruption measures, which he said had been tainted by the politicization of justice, collusion between prosecutors and the executive branch, intelligence agency

18 National Union of Romanian Judges, *Report on the unlawful involvement of the Romanian secret intelligence agencies, through secret protocols, in the Romanian judiciary system*, MEDEL homepage, 23 May 2018, p. 5 Nr. 3
19 id. p. 5-6 Nr. 3.d. and e.
20 id. p. 6 Nr. 3.e.
21 id. p. 8
22 id. p. 9
23 Served as U.S. Ambassador to Romania from 2009 through 2012.
24 Commission on Security & Cooperation in Europe: U.S. Helsinki Commission, *"The Romanian Anti-Corruption Process: Successes and Excesses"*, transcript of the hearing at the U.S. Senate, Washington, D.C., 14 June 2017 p. 4

influence over the process, lack of judicial independence and other abuses of the process." He doubted the accuracy of the EU's CVM reports due to the EU's "epic capacity for wishful thinking," by pointing out how slow the EU has been to respond to the serious deterioration of democratic standards in Hungary and Poland.[25] A second witness, Phil Stephenson, described his personal experience with the Romanian judicial system and his ongoing investigation by the Directorate for Investigating Organized Crime and Terrorism (DIICOT). He said that "the fight against corruption itself has been corrupted." He appreciated the attention that the Commission was bringing to the issue of corruption in Romania and expressed hope that further attention will address deficiencies in the anti-corruption process.[26]

The extent to which the fight against corruption in Romania is itself corrupted, is also reflected by the number of DNA cases that ended with acquittals in the past year despite the highly praised initial conviction rate. Until Spring 2019, at least 82 former DNA cases have ended with acquittals27. Among the acquitted were former Prime Minister Victor Ponta, Senate President Calin Popescu Tariceanu, Constitutional Court judge Toni Grebla, High Court of Cassation and Justice judges Gabriela Birsan and Iuliana Pusoiu, National Liberal Party leader Ludovic Orban and many other judges, prosecutors, police officers, teachers, managers and others. Likewise, the DNA had to drop numerous corruption charges before the courts ruled.28 These issues are not likely to be resolved anytime soon, as can be seen in the case of Prosecutor General Augustin Lazar. Lazar was accused in April 2019 of having been a Securitate operative allegedly deciding on the pardon of political dissidents in a prison of the Ceaușescu era29. – There are numerous cases that are being re-opened as a response to the lack of due process in the past years.

The organisation "European Judges for Democracy and Liberty" (MEDEL) with 22-member organizations in 13 European countries and observer status with the Council of Europe, also supported the efforts of the Romanian judiciary and published several statements. It called the unlawful interference of the Romanian secret services in the judiciary a threat to democracy and expressed serious doubts about the respect for basic human rights and the guarantee of a fair and just trial.[30]

On 9 July 2019, the Council of Europe's Group of States against Corruption (GRECO) published its Interim Compliance Report on Romania's corruption prevention in parliament and the judiciary. GRECO not only confirms the existence of the classified protocols, but also finds the independence of the prosecution as well as the admissibility of evidence in numerous anti-corruption cases questionable. The report states that this undermines the credibility of previously anti-corruption efforts that were highly-praised. This means, from the viewpoint of GRECO, Ms. Kövesi's work as chief prosecutor of the DNA and her co-operation with the SRI is discredited.[31]

25 id. p. 14
26 id. p. 9
27 Figures from a non-exhaustive unofficial list until spring 2019 compiled by the National Union of Romanian Judges
28 id.
29 Bogdan, Gabriela, *PG Augustin Lazar rejects allegations that he ordered disciplinary action against political detainee in mid 80s*, Nine O'Clock, Bucharest, Romania, April 5, 2019
30 National Union of Romanian Judges, *Report on the unlawful involvement of the Romanian secret intelligence agencies, through secret protocols, in the Romanian judiciary system*, MEDEL homepage, 23 May 2018, p. 9
31 GRECO, Group of States against Corruption, Interim Compliance Report Romania, *Corruption prevention in respect of members of parliament, judges and prosecutors*, Fourth Evaluation Round, Council of Europe, Strasbourg, 9 July 2019, p. 17 fn 18

I.1. SRI involvement and SRI's first director, Florian Coldea

Ghiţa-Gate was the next phase of large disclosures in the winter of 2016-2017. Sebastian Ghiţa, a former parliamentarian, SRI collaborator and businessman, had fled Romania. He aired a series of seven tapes with a detailed description of the Cooperation of the SRI and DNA on his private TV station *Romania TV*. Ghiţa presented evidence of his close friendship with General Florian Coldea, first deputy director of the SRI, such as the fact that he spent several vacations, for example on the Seychelles and in Tuscany, with Coldea and his family. This was later confirmed by the SRI's internal control committee.[32] Since Ghita was part of the parliamentarian SRI oversight committee from 2012 to 2016,[33] holidays with a SRI official would constitute a conflict of interest. He stated that he had met with General Coldea and Laura Codruţa Kövesi, the head of DNA, at the SRI premises at least twice a week for discussions between 2010 and 2014 as well as at private parties.

Additionally, Ghiţa reported how case files for owners of media outlets and other convicts were manipulated, how people were appointed to positions important for Coldea and Kövesi and how decisions on infrastructure projects were influenced. On 5 January 2017, Ghita stated that prime minister Victor Ponta was blackmailed by Coldea to appoint Kövesi to the DNA leadership. He even went so far as to claim Coldea and Kövesi had incriminating files on current Romanian president, Klaus Iohannis.[34] Coldea was suspended from the SRI shortly after this information was made public. He was found innocent in an internal investigation and reinstated, but, referring to military honour, Coldea asked the president to discharge him so as to not damage the institution's image. On the evening of 17 January 2017, president Iohannis announced that he had signed two decrees regarding Coldea and declaring his military discharge and release from office.[35]

On this occasion, the DNA denied that its Chief Prosecutor attended video conferences organized by the SRI. The DNA confirmed that there is not and never has been any collaboration protocol between the SRI and DNA or a secret protocol between Coldea and Kövesi, nor have there been mixed teams of SRI officers and prosecutors or meetings between prosecutors and intelligence officers in safe houses.[36]

However, the Chairman of Parliament's SRI Oversight Committee Adrian Tutuianu confirmed the existence of such a protocol about two months later: "In relation to the protocols concluded between the Prosecutor's Offices and the SRI, I mention that there is a protocol concluded on 4.02.2009 between the SRI and the Prosecutor's Office attached to the High Court of Cassation and Justice (ICCJ). (...)."[37]

In 2018, former SRI colonel Daniel Dragomir disclosed further details on the cooperation of the SRI and DNA which worked to the detriment or benefit of defendants in certain cases by either using the media or by manipulating the judicial process:

32 Bogdan, Gabriela, *Tutuianu: SRI internal control committee's report confirms Ghita, Coldea travel together to Seychelles, Italy*, Nine O' Clock, Bucharest, Romania, 26 January 2017

33 id.

34 Bogdan, Gabriela, *A relationship that started at SRI and ended at Cheia: The content of the seven tapes with Sebastian Ghita that led to Coldea's suspension*, Nine O' Clock, Bucharest, Romania, 16 January, 2017

35 Bogdan, Gabriela, *SRI finalises internal inquiry in Coldea case, general found innocent and reinstated. Invoking military dignity and honour, SRI First Deputy Director asks to be discharged*, Nine O' Clock, Bucharest, Romania, 17 January 2017

36 Bogdan, Gabriela, *DNA: Kövesi didn't attend video-conferences organized by SRI; there are no SRI-DNA collaboration protocols*, Nine O'Clock, Bucharest, Romania, 27 January 2017

37 Bogdan, Gabriela, *Chair of SRI Oversight Committee Tutuianu: SRI Director terminates all protocols that don't correspond anymore*, Nine O' Clock, Bucharest, Romania, 1 March 2017

> Specifically, he referred to the involvement of the Romanian Intelligence Service in the act of justice, supervising the criminal cases until the desired sentence is obtained and choosing the court panels to this end. Dragomir said that these actions are supported in Media, the "targets" being "publicly sentenced" before receiving a final decision issued by the court. The brain of the SRI operations was also indicated as being Florian Coldea, while Laura Codruta Kövesi is the brain in judiciary, two heads which Dragomir accused of turning the institutions in their own servants due to personal interests. (…) "The SRI officers were making the indictments, and the brave DNA prosecutors were taking them, countersigning them and sending them to the court, hoping that the much esteemed tactical field will continue to take care of them in order to provide them with the necessary paths to ensure the conviction (…)There were personal relationships between judges and officers who were involved in the tactical field, relationships that have been developed over the time, for instance General Dumbrava was supporting judges to be placed on the positions. The second case, based on blackmail, such as the SIPA archive, and the third was the officers under cover from the judiciary."[38]

Despite that, Coldea maintains that the Cooperation between the SRI and DNA was conducted only within the legal limits, and indictments were not written by SRI officers.[39] However, Dragomir's deposition appears more credible. His testimony in front of the SRI oversight committee related to the DNA access to databases has been proven accurate and is congruent with the testimony of other witnesses.[40] For example, former Justice Ministry Secretary of State, Ovidiu Putura, has confirmed the so-called "Cover" method to the SRI Oversight Committee. This strategy was used to rig the allocation of court cases to certain "desired" panels of judges. Normally, the case allocation is supposed to be random to guarantee the court of law is being designated by chance to hear a case without undue influence. However, Putura explained to the SRI oversight committee in detail how court clerks can manipulate the process precisely.[41]

Another strategy was to avoid assigning cases to at least one DNA prosecutor who was not willing to follow the recommendations of the SRI to conduct searches that would violate the criminal code. The colleague that the case was re-assigned to then ordered the search as suggested.[42]

A further important manipulation took place at the High Court of Cassation and Justice in Bucharest. Most high-profile corruption cases are heard there, in front of a panel with five judges. Although the law requires the determination of the judges on these panels by lot, the chairs of the two panels were persistently held by either the president or her representative. With decision Nr. 685 of 7 November 2018, the Constitutional Court declared this practice unconstitutional and a direct violation of Article 6 (1) of the European Convention on Human Rights (ECHR), which demands "an independent and

38 Bogdan, Gabriela, *Hearing of the former SRI First Deputy Director, Florian Coldea, at the SRI Committee, was postponed by a week. Manda: Coldea announced he has a cold*, Nine O' Clock, Bucharest, Romania, 6 March 2018

39 id.

40 Bogdan, Gabriela, *Following the accusations made by the former SRI Officer Daniel Dragomir, DNA confirms: We have legal access to 21 databases, including the Cadastre Agency*, Nine O' Clock, Bucharest, Romania, 5 March 2018

41 Bogdan, Gabriela, *Before SRI Cttee, Putura talks about "Cover" method used to allocate cases to certain panels of judges. Manda: He presented a list of High Court judges who are close to the establishment*, Nine O' Clock, Bucharest, Romania, 26 October 2017

42 Bogdan, Gabriela, *Manda: A former DNA prosecutor told us how SRI was suggesting that searches should be made. About a new hearing for Maior: The question is who will pay the travelling costs*, Nine O' Clock, Bucharest, Romania, 9 May 2018

impartial tribunal established by law".[43] As the Romanian Constitutional Court points out: "Taken into consideration that the court's objective impartiality is also determined by its composition, the manner of appointing one of the members of the 5-judge panel of the High Court of Cassation and Justice is sufficient to raise legitimate and objectively justified fears of justice."[44]

Additionally, the Constitutional Court held that the High Court of Cassation and Justice had misinterpreted the law regarding the appointment of the members of the panels and expressly refused to follow its content.[45] Judge Stanciu sticks out in this context in particular: as the former president of the High Court, she was not only one of the two judges who always sat on a panel, but she also sat later on the panel of the Constitutional Court that was hearing her own case about the composition of High Court panels being rigged and refused to abstain from voting due a conflict of interest.[46] This fact was public knowledge before the EU Commission published its report on 13 November 2018.[47]

I.2. Involvement and dismissal of DNA chief prosecutor Laura Codruţa Kövesi

On Friday, 30 March 2018, the SRI published the 2009 eighteen-page protocol between the SRI and DNA which, according to Kövesi, did not exist. The document outlined a joint strategy as well as the creation of joint operational teams and was signed by Tiberiu Nitu, First Deputy Prosecutor General at the time, and Florian Coldea, First Deputy Director of the SRI. The protocol was approved by the heads of the two institutions: Laura Codruta Kövesi and George Maior, Eduard Hellvig's predecessor as the civil head of the SRI. One chapter is dedicated to the technical support consisting of signal transmission, which includes the management and maintenance of the equipment that transmitted the signal from the Service's wiretap centres to the Directorate. The audio and video surveillance activity "(…) will be carried out by the Service's specialised unit (...) under the coordination of the case prosecutor, on the basis of a "joint action plan" drafted by the designated representatives of the two sides (...)," according to this document. It also stipulates that the prosecutors are to report within 60 days to the SRI regarding how the information was used.[48] This proves joint teams exist or existed, contravening the law and in combination with judges reporting on instances where the SRI manipulated wiretap transcripts and other evidence.[49] Consequently, this could lead to courts outside of Romania raising doubts as to the rule of law in Romania, which may create difficulties in the Cooperation between the Romanian judiciary and courts in other jurisdictions.

After the 2009 protocol between DNA and the SRI had been published, the Supreme Magistracy Council (CSM) informed the public that the CSM, the Judicial Inspection and the ICCJ had also

43 Article 47 (2) sentence 1 of the Charter of Fundamental Rights of the European Union and Article 14 (1) sentence 1 of the U.N. International Covenant on Civil and Political Rights contain almost verbatim the same obligation for Romania.

44 Curtea Constituţională a României – Constitutional Court of Romania, *Parliament v. High Court of Cassation and Justice, Decision Nr. 685*, 7 November 2018, p. 2 Nr. 12

45 id. p. 25 Nr. 155 - 156

46 id. p. 45

47 Jucan, Floriana, *Livia Stanciu a refuzat să se retragă de la vot miercuri*, Q Magazine 5 November 2018; The 13 November 2018 Technical Cooperation and Verification Mechanism Report covers the illegal composition of court panels in high-level corruption cases at the High Court of Cassation and Justice. Yet, it does not state clearly that the Constitutional Court ruled that the practice of the High Court was unconstitutional as it violated the fundamental right to a court of law. Instead the report only states on page 6, footnote 22 that the Constitutional Court had admitted a constitutional conflict.

48 Bogdan, Gabriela, *Laura Codruta Kövesi verified by Judicial Inspection. DNA Chief, accused of lying about protocol with SRI*, Nine O' Clock, Bucharest, Romania, 3 April 2018

49 Pahnecke, Oliver, *Securitate 2.0?*, Heise Verlag, Hannover, Germany, 24 July 2016

concluded protocols of cooperation with the SRI.[50] There should be 65 protocols in total regulating the Cooperation of the SRI with other Romanian state bodies.[51] In the meantime, the Judicial Inspection started a disciplinary action against Kövesi due to her alleged mismanagement of cases and instances where she ignored orders from the Attorney General.52

Democratic Union of Hungarians in Romania (UDMR) president Kelemen Hunor claimed that the Cooperation lead to even more problematic actions: "(...) that UDMR had information, but not evidence, that such protocols exist, considering that in several trials it was felt that these protocols mean not only classified evidence but the fact that the accused person or their lawyer was not allowed to know what was in the dossier, only the prosecutor and the judge knew that." If this were true, an efficient defence was not possible in some cases and there was subsequently no equality of arms.53

Former President Basescu revealed a document that not only confirms a Cooperation plan between the SRI and DNA, but also seems to support Kelemen's claim. In the plenary session of the senate, Basescu read out parts of the document: "The end of the document says that according 'to the provisions of article 8 and 57 of the cooperation protocol concluded between the Prosecutor's Office attached to ICCJ and SRI, in order to fulfil their duties, we ask you that the data presented will be intended to inform the case prosecutor according to the principle of the necessity to know without being included in the case file'. This top secret document shows that the protocol between the Prosecutor's Office attached to the High Court and SRI was fully operational, an action plan was set up, and the information sent to DNA wasn't intended to be presented to the lawyer and to the defendants."[54]

Kövesi, now forced to admit a DNA-SRI protocol existed, claims that the Cooperation was based on law: "The notion of mixed team does not exist in this protocol, nor is there the notion of collaboration, but of cooperation. (…) Of course, it [the protocol] was necessary. In 2009 there were prosecutor's offices that did not have a voice recorder, there were no wiretapping teams within prosecutor's offices. The need for such a protocol and for harmonising the procedures was felt. It's not the prosecutor's fault that at that moment the wiretaps were made exclusively by the SRI, as established by the CSAT. At that moment, solutions had to be found in order for us to fulfil our obligations. This protocol did not give added prerogatives to these two institutions but sought to create unitary practices," the DNA Chief Prosecutor said. She stated that all activities of SRI officers were limited to legal technical assistance: "The SRI officers were not administering evidence, were not hearing witnesses, were not carrying out any kind of activities within the criminal dossier, they simply had specific, technical activities stipulated by law. When the prosecutor was asking for surveillance to catch someone red-handed, this joint team was formed – the prosecutor could discuss, have a dialogue with the officers carrying out the surveillance. (…) This activity couldn't be done by the prosecutor alone, so this protocol established the limits and the prerogatives of each member."[55]

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50 Bogdan, Gabriela, *Scandal in the CSM plenary meeting. Codrut Olaru: Supreme Magistracy Council, Judicial Inspection and ICCJ concluded protocols of cooperation with the SRI*, Nine O' Clock, Bucharest, Romania, 5 April 2018

51 Bogdan, Gabriela, *JusMin Toader: I will request Public Ministry to declassify protocols concluded with SRI*, Nine O' Clock, Bucharest, Romania, 18 March 2018

52 Bogdan, Gabriela, *Judicial Inspection starts disciplinary action against DNA Chief. Kövesi designated her aide to carry out audits at two territorial branches*, Nine O' Clock, Bucharest, Romania, 11 April 2018

53 Bogdan, Gabriela, *Scandal in the CSM plenary meeting. Codrut Olaru: Supreme Magistracy Council, Judicial Inspection and ICCJ concluded protocols of cooperation with the SRI*, Nine O' Clock, Bucharest, Romania, 5 April 2018

54 Bogdan, Gabriela, *Basescu reveals a secret document of SRI related to "Gala Bute": "It shows how they were reaching politicians"*, Nine O' Clock, Bucharest, Romania, 17 May 2018

55 Bogdan, Gabriela, *The SRI-PICCJ protocol raises vehement reactions in the public space. Polemics between former and incumbent DNA Chief Prosecutor. UNJR and AMR ask the General Prosecutor's Office and SRI to publish all*

The same article reports that Basescu was forced during his presidency to mediate a dispute between Daniel Morar, then chief prosecutor of the DNA, and the SRI, because of the way the secret service operated. "Unfortunately, if during Morar's stint the DNA worked while observing the Criminal Code, during Kövesi's stint the institution was placed under the SRI's control", so Basescu.[56]

Justice Minister Tudorel Toader listed 20 reasons to remove DNA Chief Prosecutor Kövesi from office. Among others, they contained her refusal to be heard in Parliament, forgeries in dossiers, the lack of an appropriate reaction in the case of the alleged abuses committed at DNA Ploiesti, and the harming of Romania's image by misinforming the European bodies.[57] The proposal to remove Kövesi from her position led to a struggle between the Minister of Justice and President Iohannis, who claimed the reasons for dismissal were not convincing, especially since the Supreme Council of the Magistracy had evaluated Toader's reasoning negatively.[58]

The dispute was resolved by the Romanian Constitutional Court (CCR) which ruled in favour of the Minister of Justice and ordered President Iohannis to remove DNA chief prosecutor Kövesi from her position. In its ruling, the Constitutional Court points out that, since President Iohannis had no objection regarding the regularity of the dismissal procedure, the procedure met the necessary criteria. However, the President assumed prerogatives he does not have. The Minister of Justice has the prerogative to exercise control over the prosecutors and, within strict limits imposed by law, can demand the dismissal of the prosecutor from a management position. The President's prerogative in this context is limited to a control regarding the regularity of the procedure, not its content, and so the President blocked the Justice Minister from exercising his authority over the prosecutors.[59] Therefore, the CCR ordered the dismissal in the course of the resolution of a constitutional conflict, not because Kövesi might have violated the law.

After General Coldea and DNA-head Kövesi had to leave their positions, two further steps were made to clarify what had happened in the judiciary during the past years.

On 15 November 2018, the Romanian Parliament passed the Declassification Act which declassified the Decision no.17/2005 of the CSAT on the fight against corruption, fraud and money laundering, together with all the documents containing classified information relied upon or concluded according with or based on this decision. Also, this act requires the declassification of all the cooperation plans made by the DNA and the SRI concluded between the Prosecutor's Office attached to the High Court of Cassation and Justice and the Romanian Intelligence Service to accomplish their duties in the national security field. Finally, it demanded the declassification of all the protocols and/or collaboration and cooperation agreements concluded with the other relevant organs of the Romanian state. People affected by the consequences of these documents have the right to legal recourse with the competent courts to establish any violation of their fundamental rights. The law stipulates in particular that the cases in which final decisions were delivered and evidence was administered by

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the protocols, and the CSAT to make public all the issued decisions, Nine O' Clock, Bucharest, Romania, 4 April 2018

56 id.

57 Bogdan, Gabriela, *President Iohannis: Won't comply with JusMin's request to dismiss DNA Chief Prosecutor. Justice Minister announces he will notify CCR about Iohannis's refusal to dismiss Kövesi*, Nine O' Clock, Bucharest, Romania, 17 April 2018

58 id.

59 Bogdan, Gabriela, *Kövesi's dismissal from office. CCR publishes reasoning of decision that obligates Iohannis to dismiss DNA Chief Prosecutor. The document has 133 pages. CCR: President blocked the minister's competences without having this prerogative. Reactions to Constitutional Court's reasoning on anti-graft chief prosecutor's removal from office*, Nine O' Clock, Bucharest, Romania, 8 June 2018

special technical means during the existence of the protocols and Cooperation agreements are subject to revision.

On 16 January 2019, the Romanian Constitutional Court decided that the protocols with the SRI were unconstitutional due to their violation of the separation of powers: "The High Court of Cassation and Justice and the other courts, as well as the Public Ministry – the Prosecutor's Office attached to the High Court of Cassation and Justice and the subordinate units – will verify in pending cases the extent to which a violation of the provisions occurred in terms of substantive competence and by the quality of the person of the criminal prosecution body and will order the appropriate measures," the Constitutional Court specified. Due to its time frame of about a decade, this case has had a massive impact on the human rights of defendants. Furthermore, by illegally conferring competences to a secret service it has eroded the authority of the judiciary and caused distrust in public institutions.[60]

Limiting the review only to pending cases as the Constitutional Court of Romania suggests would probably exclude all defendants that had the coincidental misfortune of being convicted earlier than others.61 It's restriction seems to violate Romanian and international legal standards: Article 453 of the new Romanian Criminal Procedure Code states that a revision of the case may be required when new facts are established that could lead to a nullity of the judgement, such as fake documents or if the court's decision was based on false statements of the prosecutor or an expert. According to Article 426, annulment can be sought when the panel of judges hearing the case had been illegally composed.

These articles reflect the fair trial standards of the International Covenant on Civil and Political Rights (ICCPR) which Romania is a member of. Article 14 section 6 adds that "[W]hen a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him." This UN treaty suggests revision by court or pardoning by the president in the case of a miscarriage of justice, and stipulates that there is no limitation, also not in time, unless the defendant is responsible for the non-disclosure of the unknown fact.

Summing up, the protocols, in particular the SRI-DNA protocol signed by Kövesi, Maior, Nitu and Coldea, caused three problems:

The first problem is the expansion of the SRI's competence to other areas, such as criminal investigations. That means an administrative act violated the law the parliament had passed. The same act also violated the separation of powers. The second concern is that the SRI was authorized to gather evidence in criminal cases, essentially granting it powers that Securitate had during the Ceaușescu dictatorship. The third issue is the change of the competence in the criminal investigation. As the investigation plan can only be amended by both heads of SRI and DNA, and the prosecutor was not free to develop the case according to criminal law, the SRI decided de-facto on the criminal investigation.

60 Bogdan, Gabriela, *Reactions after secret protocols between the Public Ministry and SRI ruled unconstitutional. JusMin Toader: Not surprised. PG Lazar: Optimistic current prosecution documents will be deemed legal. UNJR's Girbovan: CCR finds one of most serious conflicts between state powers*, NINE O'CLOCK, Bucharest, Romania, 17 January 2019

61 With similar limitations: Curtea Constituţională a României – Constitutional Court of Romania, *Parliament v. High Court of Cassation and Justice, Decision Nr. 685*, 7 November 2018

An additional problem that is most likely not directly linked to the protocols is the rigging of the case assignment at courts. The cases should be either randomly distributed by chance, or by a mechanism set in place that cannot be altered, for example a distribution based on the alphabet. For case assignment, the OSCE recommends: "Administrative decisions which may affect substantive adjudication should not be within the exclusive competence of court chairpersons. One example is case assignment, which should be either random or on the basis of predetermined, clear and objective criteria determined by a board of judges of the court. Once adopted, a distribution mechanism may not be interfered with."[62]

I.3. Summary

The magazine "Romania Insider" published the following comparison between Russia and Romania on 24 January 2019:

> The European Court of Human Rights (EC[t]HR) had a total of 56,350 pending cases at the end of 2018, of which 8,503 (15.1% of the total) were complaints against the Romanian state. Romania thus ranked second for the total number of ongoing cases at EC[t]HR after Russia, which had a share of 20.9% of the total pending cases, according to the EC[t]HR annual report.[63]

One could equally argue that Russia's population is 7,35 times larger than Romania's, whereas it is accountable for only 5% more of the cases.[64] Both statements are misleading as the absolute and relative numbers do not correlate with the gravity of the situation in the country. Instead, it is necessary to look into the violations by article and by state[65] which shows that Romania has problems with "inhuman and degrading treatment", "lack of effective investigation", "right to a fair trial", "length of proceedings" and "right to respect for private and family life", as well as to "protection of property". This is a reflection of the issues discussed in this article and expressed by the Romanian public. Although it is a positive sign that Romania does not lead the statistics in respects to torture, slavery or right to life, but it can certainly do better.

Even though statistics can be misleading, the mere fact that Romania occupies a top position in the statistics of the European Court of Human Rights – along with some other members of the EU– demonstrates that the EU Commission must improve its policy as a first step to facilitate the necessary corrections in Romania. The seemingly accurate SRI reports to parliament, the ethical guide for SRI staff and the fact that SRI was the first institution to declassify some of the protocols could be an indication that SRI under its current director, Hellvig, is willing to put an end to this practice. If possible, the EU Commission should capitalize on this opportunity in the years to come.

Despite the current government's commitment to remove SRI from the judiciary and keep up the fight against corruption without forcing through policies by way of emergency ordinances, as recently

62 OSCE Office for Democratic Institutions and Human Rights, *Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia*, Kyiv, Ukraine, 23-25 June 2010, p. 5 Nr. 12

63 Romania Insider, *Romania ranks second by the number of pending cases at European Court of Human Rights, Romania Insider*, Bucharest, Romania, 24 Jan 2019

64 European Court of Human Rights, *Pending Applications Allocated To A Judicial Formation*, European Court of Human Rights Statistics, Strasbourg, France, 31 December 2018

65 European Court of Human Rights, *Violations by Article and by State*, European Court of Human Rights Statistics, Strasbourg, France 2018

promised,[66] these problems will not be resolved overnight. It is paramount that the EU Commission admits the current problems to ensure the success of this judiciary reform. The fight against corruption cannot be won by supporting one side and eliminating the other, because then Romania would still have one corrupt network that is likely to become even stronger. Likewise, the removal of Kövesi and Coldea has not lead automatically to an improvement of the rule of law. In January 2019, for example, recordings surfaced in which prosecutors of the DNA office in Oradea discussed how to intimidate judges.[67]

If the collusion of secret service and prosecution is not stopped, it is almost certain that executive structures will develop that are open to abuse for future governments. Declassification and independence of the judiciary are the only alternative. This approach might not lead to spectacular arrests and could lead to the occasional acquittal due to a lack of evidence. However, the possibility of acquitting a defendant is essential when upholding the core principle that everyone charged with a criminal offence shall be presumed innocent until proven guilty, as determined by Article 6 paragraph 2 of the ECHR. This safeguard is paramount for a democratic society based on the rule of law. If a trial ends with a pre-determined verdict, someone has made this decision outside of the law.

According to Dana Girbovan, judge at the Court of Appeal in Cluj-Napoca and president of the NURJ, this happened in several instances where independent experts could prove recordings submitted for evidence by the SRI had been tampered with. For example, parts of the recording had been deleted or pieces from different conversations had been cut together to incriminate the defendant. In other instances, the SRI transcripts did not match the recordings, as certain words had been changed in the transcript. In one case, the judge asked the prosecutor to play the CD with the recording to verify the accuracy of the transcript. To the court's surprise, the CD contained folk music instead of the expected conversation.[68]

Romanian law requires a prosecutor to collect evidence for both prosecution and defence in a criminal investigation so as to find the truth. In order to achieve that goal, the prosecutor has to be independent. However, his requirement is clearly not fulfilled by a secret service agent under military orders. It is hard to talk about equality of arms and a fair trial when the SRI has full control over the servers recording the conversations and so is able to manipulate or hide exculpatory evidence. Collecting intelligence is also fundamentally different from collecting evidence in a criminal case, which must meet specific criteria in order to be admissible in courts. Collecting intelligence, albeit necessary, is done in secrecy, sometimes at the brink of legality. Collecting evidence, on the contrary, must be done according to the rules and procedures of a criminal investigation. Justice must be carried out in the name of law, not some secret orders.[69]

As the President of the NURJ Dana Girbovan says:

“The CSAT decisions and the secret protocols, which have affected the administration of justice, are bombs at the foundation of the rule of law. There is a simple and clear principle underlying the rule of law and democracy: justice is carried out in the name of the law. Not in the name of the CSAT’s secret decisions, not in the name of the secret protocols, but in the name of the law.”

66 Bogdan, Gabriela, *EC’s Juncker and Timmermans hail the European approach of PM Dancila and Romania’s Gov’t support for the European project. Dancila about meetings in Brussels: We want to punctually resume discussions on the CVM*, Nine O'Clock, Bucharest, Romania, June 5, 2019

67 Romania Insider, *Romania’s anticorruption directorate launches probes into new internal scandal, Romania Insider, Bucharest*, Romania, 7 Jan 2019

68 Pahnecke, Oliver, *Securitate 2.0?*, Heise Verlag, Hannover, Germany, 24 July 2016

69 id.

Put simply, the laws are made by Parliament which is the supreme representative body of the Romanian people. The President then promulgates these laws and they take effect after they are published in the Official Gazette. “This is the fundamental principle of the rule of law functioning everywhere in the democratic world: you cannot observe a law that is non-public, all the more you cannot be held liable under a law that is non-public. If we accept the violation of this fundamental rule, we accept that, in the name of various desiderata, slogans or ideologies that appear noble at the moment, we can make deviations, detours or we can bracket democracy and the rule of law. The effect is the undermining of democracy, compromising of the good functioning of the state and the trust between the citizen and the state.”[70]

II. Recommendations

As this is an evolving situation, it is impossible to determine which allegations of corruption will be proven in court and what sections of the protocols in question violate the human rights of these defendants. This is especially true because these protocols have an impact on a variety of laws and vice versa. However, based on the available information, it makes sense for Romania and the EU to overhaul several policies.

II.1. Recommendations for Romania

Romanian parliament, judiciary and government could consider and implement the following points:

1. Granting fair trials

International obligations related to fair trial standards were not observed in the fight against corruption. A cooperation with the OSCE Office for Democratic Institutions and Human Rights could be helpful. In particular, the Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia contain guidelines for Judicial Administration, Selection and Accountability to ensure the necessary independence of the judiciary.[71] Romania also committed itself to the right to a fair trial in the Vienna principles 1989, the Copenhagen 1990 document, as well as in the Ljubljana 2005 and Helsinki 2008 decisions.[72] Romanian Courts are bound by the Romanian Criminal Procedure Code and the International Covenant on Civil and Political Rights, both of which demand a legal remedy in cases of a miscarriage of justice. A review of all corruption-related criminal cases, either pending or with ongoing impact on the defendant, such as a prison sentence, should be treated accordingly.

2. Declassification and investigation of intelligence activity

Besides the declassification of protocols and Cooperation agreements between the SRI, the prosecution and relevant bodies, also the minutes of those CSAT meetings should be made public that are connected to establishing corruption as a threat to national security and those that are related to

70 Bogdan, Gabriela, *The Protocols’ “saga”: While Judge Girbovan (UNJR) claims that CSAT decisions, secret protocols are bombs at foundation of rule of law, Florian Coldea warns that SRI is today in impossibility to work on a protocol basis in terms of national security crimes*, Nine O' Clock, Bucharest, Romania, 5 April 2018

71 OSCE Office for Democratic Institutions and Human Rights, *Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia*, Kyiv, Ukraine, 23-25 June 2010

72 OSCE, *Human Dimension Commitments*, Volume 1 Thematic Compilation 3rd Edition, Warsaw 2013, pp. 114-115

fighting corruption are especially important. Based on the current law 303 Art. 7, all justice-related decisions must be published. Therefore, publishing relevant CSAT minutes would be a necessary second step to understand past developments.

Additionally, it could eventually make sense to investigate whether there is similar involvement of other intelligence services, such as the Romanian SIE, etc.

3. Securing the independence of the magistracy

Publishing the CSAT's procedure regarding the confirmation of the annual affidavit of judges, prosecutors and other staff in the judiciary that they are not collaborators or agents of any intelligence services would help measure the effectiveness of this procedure in identifying threats to judicial independence. Once its ability to safeguard the independence of the judiciary is verified, this screening could be conducted publicly.

Making it illegal for all members of the judiciary, not only judges and prosecutors, to become collaborators, informants or agents of domestic and foreign secret services should also help. This measure would prevent a circumvention of the prohibition of national secret service activities in the judiciary by exchanging information from one intelligence organisation to the other across borders. It would also be necessary to make it illegal for secret service members, foreign or domestic, to solicit collaboration of any form from members of the judiciary.

The same must be valid for Romanian magistrates, staff at European and International Courts, and other law enforcement agencies outside Romania. For other nationals working in the EU courts and the Council of Europe, this should apply just the same.

As the guardian of EU treaties, the EU Commission must respond when a member state's secret service is undermining the independence of the judiciary because that is outside the scope of secret services' role in responding to national security threats. In the case of Romania, the EU Commission first must stop basing its analysis for the CVM on decision no.17/2005 of the Supreme Council of National Defence. This decision made corruption a matter of national security which violated the prerogative of the parliament to legislate and the separation of powers. If this is not addressed, then the EU perpetuates this violation of core principles on which the EU is founded. It may also encourage other Member States to declare other areas as matters of national security which the EU would not be able to supervise. Where national security threatens the independence of the judiciary, it has ceased to be an issue outside of the scope of the EU Commission. Representatives of all judicial bodies as well as all associations of magistrates have to participate in official meetings with the EU commission to guarantee the EU Commission receives all information necessary for a complete evaluation.

4. Independent interceptions by law enforcement and judicial oversight

The prosecution has to have its own wiretapping equipment and the use of this equipment has to be subject to judicial oversight. The current government seems to prefer one wiretapping body for all intelligence services and criminal investigations, which saves money. However, economic concerns should not be prioritised over the independence of the judiciary. Dependent on the parliament's decision, increasing the prosecutors' independence to that of judges could help reduce political interference with the prosecution.

5. Correcting economic incentives for the intelligence community

Finally, prohibit economic activities of secret services, unless they are needed for intelligence operations and take place under the supervision of the relevant parliamentarian oversight committees. In cases where economic activities are necessary, profits should benefit the state budget and not the operatives of an intelligence service. Furthermore, the responsible units of the tax authorities should be obliged to report to the same parliamentarian oversight committee.

II.2. Recommendations for the European Union

1. Safeguarding the independence of the magistracy in Member States and re-starting the EPPO selection process based on EU and international standards

As a first step, the EU Commission, the EU Parliament, the Council and its Member States should condemn the infiltration of any judiciary by any secret service. This constitutes a breach of the separation of powers and, even more importantly, it infringes the right to a fair trial and threatens human rights and democracy. This practice is not in accordance with the foundations of the EU. Intelligence gathering is fundamentally different from collecting evidence in a criminal trial and so a trial cannot be based on the work of a secret service and secret protocols.

Since the EPPO is a current affair, the prohibition of secret services in the judiciary means that all candidates for the new EPPO have to be prudently screened. Only then can citizens of the EU be certain that a person filling this office is not or has not been an agent of any European or foreign intelligence service. It also ensures that the candidate does not collaborate or has not collaborated in any way with intelligence services. These steps demonstrate the candidates' integrity and ensure that the candidate does not pose a risk to the independence of the judiciary.

The EPPO selection committee chair Dr. Haberl-Schwarz has ignored a request to publish any form of ranking of all eligible candidates[73], nor its evaluation criteria. This committee has not publicly explained why the three shortlisted candidates are to be preferred in that given order, or why the shortlist had to be narrowed down to three when there is no legal requirement for that. According to the operating rules of the selection panel, the "deliberations of the selection panel shall be confidential and shall take place in camera",[74] but "[b]ased on its findings during the review and hearing, the selection panel shall draw up a shortlist of three to five candidates to be submitted to the European Parliament and the Council. It shall provide reasons for selecting the candidates on the shortlist. (…) The selection panel shall rank the candidates according to their qualifications and experience. The ranking shall indicate the panel's order of preference and shall not be binding on the European Parliament and the Council."[75] The operating rules stipulate "deliberations in camera", but as soon as the list has reached the EU Parliament the results – which are the outcome of the deliberations – must be published to ensure transparency.

The former OLAF head and current Italian customs chief allegedly applied for the EPPO unsuccessfully[76] despite possessing the necessary qualifications and practical experiences. Thus, the

73 Pahnecke Oliver, *Greift der rumänische Geheimdienst nach der Europäischen Staatsanwaltschaft?*, Telepolis – Heise Verlag, Hannover, Germany 17 February 2019

74 Council Implementing Decision *on the operating rules of the selection panel provided for in Article 14(3) of Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ("the EPPO")*, Brussels, 25 May 2018 Annex nr IV

75 id. Annex nr. VII. 1.

76 Kassandra, *Why is Romania still an EU member state?*, New Europe, Brussels, 18 February 2019

selection procedure for the EPPO is not fully transparent. Moreover, the collaboration between Kövesi and the SRI has not been taken into consideration by the selection committee or the EU Parliament when they made Kövesi their number one candidate. This contradicts Article 14 2. (b) of "Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office" which demands that the EU Parliament and the Council should appoint the European Chief Prosecutor from among candidates "whose independence is beyond doubt". Recital (83) states that "[t]his Regulation requires the EPPO to respect, in particular, the right to a fair trial, the rights of the defence and the presumption of innocence, as enshrined in Articles 47 and 48 of the Charter."

According to the EU vacancy notice for the EU General Prosecutor[77], the candidates had to "demonstrate their understanding of and commitment to the independence and guardianship of fundamental rights", to "have high ethical standards and personal integrity" and to be independent of any institution, member state or the EU itself.

To ignore this regulation and the vacancy note collides with the legal standards set by the European Court of Human Rights in the case *Guðmundur Andri Ástráðsson v. Iceland*.[78] In this case, the Court found a violation of the right to a fair trial in criminal proceedings. Of particular relevance is that the Court cited a violation of the right to a tribunal established by law because the Icelandic institutions had picked judges for a newly created court in a manner that violated Icelandic law. This case relates to a national court but is transferrable to choosing the first prosecutor of the EU. If the selection process is not transparent and objective, there is a clear danger that other candidates will file a complaint which, in the light of the Icelandic case, could be successful.

The selection panel decided on a shortlist of three candidates instead of five, which means that they did not find any of the other candidates suitable for this position. GRECO criticises the use of classified protocols; the admissibility of evidence in numerous anti-corruption cases that were originally praised very highly; and the cooperation between DNA and the SRI which was designed by Coldea and Kövesi. Kövesi being named as the selection panel's number 1 candidate despite this history calls into question the selection process as a whole and the reasoning behind disqualifying candidates that were not shortlisted.

It could be argued that the EU was a supra national body on which the ECHR was not binding, yet, but it is already binding on all EU member states and so are decisions of the European Court of Human Rights. Consequently, the council cannot vote for Kövesi because such a vote would violate EU law, just as Iceland had violated its own law.

Furthermore, the EU requirement that the "selected candidate should hold, or be in the position to obtain, a valid security clearance certificate at the level of EU Secret from his/her national security authority"[79] is also contrary to the OSCE/ODIHR "Opinion for the appointment of judges for the Supreme Court of Georgia". This legal opinion was written by former European Court of Human Rights (ECtHR) judge András Sajó, former Vice-President of the International Commission of Jurists Michèle Rivet and President of the European Association of Judges, and First Vice-President of the

77 European Commission, European Public Prosecutor's Office (EPPO), Publication of a vacancy for the European Chief Prosecutor — Luxembourg , Temporary Agent AD 15 (2018/C 418 A/01), published in the Official Journal of the European Union on 19.11.2018

78 *Guðmundur Andri Ástráðsson v. Iceland*, Application no. 26374/18, Judgement 12 March 2019

79 European Commission, European Public Prosecutor's Office (EPPO), Publication of a vacancy for the European Chief Prosecutor — Luxembourg , Temporary Agent AD 15 (2018/C 418 A/01), published in the Official Journal of the European Union on 19.11.2018

International Association of Judges José Igreja Matos. They clearly state that background checks have to be based on the rule of law and should rely on a standard criminal record from the police instead of security services[80]. This is a precautionary measure to keep security services from influencing the selection of magistrates and reflects OSCE/ODIHR Kyiv recommendation Nr. 22.[81] In light of this and after the cooperation with the SRI, the value of the SRI's security clearance for Kövesi is questionable.

For the sake of credibility and the rule of law in the EU, it makes sense to re-start this procedure with a transparent selection based on improved operating rules for the selection panel. This would include a disclosure of the evaluation criteria, a public ranking according to the grades of all candidates and a wider selection of candidates to choose from. Monitoring the process could be helpful, as evidenced by the example of Serbia. Ongoing legal reforms driven by preparations for the accession to the EU resulted in the current Serbian legal framework that governs the process of electing members of the state prosecuters council and the high judicial council of Serbia in a transparent manner through monitoring.[82]

2. Correcting economic incentives for the intelligence community

EU Member States should also consider prohibiting economic activities of secret services, unless they are needed for intelligence operations and take place under the supervision of the relevant parliamentarian oversight committees. In cases where economic activities are necessary, profits should benefit the state budget and not the operatives of an intelligence service. Furthermore, the responsible units of the tax authorities should be obliged to report to the same parliamentarian oversight committee.

3. Maintaining and expanding the CVM

While it is understandable that Romania would like to have the CVM lifted as Tariceanu suggested in his meeting with Timmermans, this mechanism is far from being obsolete.[83] Even for non-high profile cases, there is a lot of work left to be done concerning fair trial standards and police work.[84] Tariceanu himself said that amendments in the judicial domain, such as the modifications of the Criminal Codes, will have to be implemented according to the decisions of the Constitutional Court of Romania, the European directives on the presumption of innocence and the right to a fair trial, and the Venice Commission's recommendations.[85] Therefore, the CVM is just as important now as it used to be.

Expand the CVM by adding a section on the involvement of Intelligence Services.[86]

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80 OSCE/ODIHR, *Opinion on Draft Amendments Relating to the Appointment of Supreme Court Judges of Georgia*, Opinion-Nr.: JUD-GEO/346/2019 [AlC], Warsaw, 17 April 2019 p. 23 Nr.72

81 OSCE/ODIHR, *Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia*, Kyiv, 23-25 June 2010 p. 6 Nr. 22

82 OSCE Mission to Serbia, Office for Democratic Institutions and Human Rights, *Report on Monitoring of Peer Elections for the High Judicial Council and State Prosecutors' Council of the Republic of Serbia*, Belgrade/Warsaw 2016 p. 21 Nr. 6, Nr. 7

83 Bogdan, Gabriela, *In Brussels, Tariceanu talks with EC First Vice President Frans Timmermans about CVM and SRI's protocols with judicial system institutions*, Nine O' Clock, Bucharest, Romania, 29 June 2018

84 Mihala, Lorelei, *Truth and Justice: Romania's Wrongly Accused*, Balkan Insight and Balkan Investigative Reporting Network, Bucharest, Romania and Sarajevo, Bosnia and Herzegovina, 18 December 2018

85 Bogdan, Gabriela, *In Brussels, Tariceanu talks with EC First Vice President Frans Timmermans about CVM and SRI's protocols with judicial system institutions*, Nine O' Clock, Bucharest, Romania, 29 June 2018

86 See also recommendation Nr. 4

4. Improving the CVM by intensifying the rapport between the Romanian magistracy, the Romanian government and the EU Commission

In a fourth step, it is recommended that the EU Commission give appropriate weight to the concerns of the magistracy. The NURJ informed the experts of the European Commission on several occasions during CVM meetings about the lack of independence in the Romanian judiciary due to the secret service. Not only was this problem not mentioned in any way by the Commission, but the NURJ was also not invited to continue participating in meetings with EU experts for the 2018 report.[87] If the Commission ignores the representatives of professional bodies that are affected, it is essentially acting like a judge who is ignoring the arguments of either the prosecution or defence, which is clearly problematic.

The 2018 CVM progress report[88] of the European Commission draws mainly on the findings of the Venice Commission's 2018 reports.[89] It rightfully criticises the reforms of the judiciary and the criminal codes and is the first EU progress report raising concerns regarding the SRI activities within the judiciary. It is incomprehensible that the CVM's progress reports between 2007 and 2017 do not contain any reference to the infiltration of the judiciary by the SRI or their Cooperation with the DNA considering MEDEL[90] has published statements of concern since 2015 and critical articles have been published in Romanian and European newspapers for years.

In January and February of 2016, the NURJ together with the Association of the Romanian Magistrates addressed EU Commission President Juncker with a letter of concern. They received a polite and non-committal letter of then Secretary General of the Commission, Alexander Italianer, regarding this matter. Now, since both 2018 Venice Commission's opinions contain information to that effect across several sections[91], the Commission finally included a comment related to the Romanian Intelligence Service's activity in the judiciary in its CVM progress report. It states that "[T]he operation of the intelligence services is not a matter for the EU and falls outside the CVM benchmarks."[92]

87 National Union of Romanian Judges, Report on the unlawful involvement of the Romanian secret intelligence agencies, through secret protocols, in the Romanian judiciary system, MEDEL homepage, 23 May 2018, p. 10

88 European Commission, *Report from the Commission to the European Parliament and the Council - On Progress in Romania under the Cooperation and Verification Mechanism, Strasbourg*, 13 November 2018

89 Venice Commission, *Opinion No. 924 / 2018 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*, Strasbourg, 20 October 2018
and
Venice Commission, *Opinion No. 930 / 2018 on Romania, Amendments to the Criminal Code and the Criminal Procedure Code*, Strasbourg, 20 October 2018

90 Magistrats Européens pour la Démocratie et les Libertés

91 Venice Commission, *Opinion No. 924 / 2018 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*, Strasbourg, 20 October 2018, para. 91 - 107
and
Venice Commission, *Opinion No. 930 / 2018 on Romania, Amendments to the Criminal Code and the Criminal Procedure Code*, Strasbourg, 20 October 2018, para. 17
and
Venice Commission, *Preliminary Opinion on Draft 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*, Strasbourg 13 July 2018, para. 11, 94, 156

92 European Commission, *Report from the Commission to the European Parliament and the Council - On Progress in Romania under the Cooperation and Verification Mechanism*, Strasbourg, 13 November 2018, p. 3

Indeed, matters of national security and the national secret services are not part of the Commission's decision establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption.[93] However, where the Venice Commission is unable to evaluate such activities and the content of secret protocols in its report[94], indeed, it becomes a necessity to deal with this activity at the EU level. Fighting corruption is clearly defined by the EU Commission as a CVM benchmark and should be achieved according to the rule of law. It could be argued that EU intervention is justified in this case, since the Romanian intelligence services were involved in manipulating the judicial process to guarantee a particular outcome in high-profile corruption cases.

Therefore, it would be desirable if the European Commission would analyse the role of the Romanian intelligence services as a tool and participant in undermining the judicial process in Romania. As section (7) of the Commission Decision establishing the CVM for Romania stipulates, the Commission may apply safeguard measures based on Articles 37 and 38 of the Act of Accession. This includes the suspension of Member States' obligation to recognise and execute Romanian judgments and judicial decisions, such as European arrest warrants (EAWs), under the conditions laid down in Community law should Romania fail to address the benchmarks adequately. The decision does not contain a time frame for this suspension, but such a suspension would be a serious impediment for Romania in every respect.

In recent years, the discussion about the loss of mutual trust and the end of mutual recognition of judicial acts has been centred on Poland and Hungary. These member states enacted reforms of the national judiciary that are seen as a threat for the independence of the judiciary. As Bárd and van Ballegooij suggest,[95] a lack of judicial independence should be treated as a rule of law problem which could lead to the executing judicial authorities freezing their judicial cooperation with the judiciary of other Member States should doubts arise in respect to the rule of law in the issuing Member State.[96] As such, even without the EU Commission's decision to suspend the Member States' obligation to co-operate, it is possible for the judiciary of individual Member States to halt a judicial procedure in connection to Romania. The European Court of Human Rights as well as the Court of Justice of the EU issued decisions on several relevant cases.[97] In *Aranyosi and Căldăraru*, the Court of Justice of the EU ruled that "(…) the execution of a European arrest warrant must be deferred if there is a real risk of inhuman or degrading treatment because of the conditions of detention of the person concerned in the Member State where the warrant was issued."[98]

93 European Commission, *Decision of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption (notified under document number C(2006) 6569) (2006/928/EC)*, Official Journal of the European Union, 14 December 2006

94 Venice Commission, *Opinion No. 924 / 2018 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*, Strasbourg, 20 October 2018, para. 98 reads: "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."

95 Bárd, Petra and van Ballegooij, Wouter, *Judicial independence as a precondition for mutual trust? The CJEU in Minister for Justice and Equality v. LM*, New Journal of European Criminal Law, XX(X) 2018, pp. 1-13

96 id. p. 1

97 For example ECtHR Cases Nr. 22015/10 Voicu v. Romania, Requête no 13054/12 Bujorean c. Roumanie and Case Nr. 79857/12 Mihai Laurentiu Marin v. Romania, all 10 June 2014 and related to the detention conditions in Romania; Court of Justice of the European Union joined Cases C-404/15 and C-659/15 PPU Pál Aranyosi and Robert Căldăraru, 5 April 2016, deferral of the EAW in case detention conditions amount to inhuman or degrading treatment

98 Press release No 36/16 of the Court of Justice of European Union

In *Minister for Justice and Equality v. LM*[99], Polish courts had issued three EAWs against a defendant to start criminal procedures in a case about trafficking narcotics. Upon arrest in Ireland, the defendant claimed an extradition to Poland would threaten his right to a fair trial, according to Article 6 of the ECHR, in particular due to the reforms of the judiciary in the Republic of Poland. The Grand Chamber of the Court of Justice treated the case as a possible violation of the right to a fair trial, meaning the courts are to be impartial and independent. The Court of Justice ruled that even if an Art. 7 Treaty on European Union (TEU) procedure is not concluded yet, the courts have the responsibility to examine whether an EAW is appropriate in light of possible infringements of fair trial standards and other fundamental rights. First, the courts are required to evaluate the independence and impartiality of the judiciary in the requesting Member State. In a second step, the courts determine if the right to a fair trial could possibly be violated in the specific case of the defendant.[100]

According to the Court of Justice of the European Union "the executing judicial authority must request from the issuing judicial authority any supplementary information that it considers necessary for assessing whether there is such a risk. (…) If, after examining all those matters, the executing judicial authority considers that there is a real risk that the individual concerned will suffer in the issuing Member State a breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial, it must refrain from giving effect to the European arrest warrant relating to him."[101]

Applied to Romania, the information made publicly available by the two professional bodies of judges - the NURJ and the Association of the Romanian Magistrates - as well as the decisions of the Romanian Constitutional Court, already suggest that such a violation seems likely in certain cases. This is further supported by the reports of the Venice Commission and GRECO. What is more, the CVM has been in force since Romania's accession to the EU in 2007. As sections (6) and (7) of the Commission's decision on establishing the CVM indicate, there were issues in the accountability and efficiency of the judicial system and the law enforcement bodies that warranted the establishment of a CVM. If Romania should fail to address the benchmarks in areas of judicial reform and the fight against corruption adequately, the Commission may apply safeguard measures based on Articles 37 and 38 of the Act of Accession, including the suspension of Member States' obligation to recognise and execute Romanian judgments and judicial decisions, such as European arrest warrants.[102] That the CVM could not be abolished, yet, shows Romania failed to reach the benchmarks and the application of said safeguard measures is possible.

These safeguard measures that can be triggered based on section (7) of the Commission's decision on the CVM suggest that this is a similar sanction as the infringement procedure according to Art. 7 TEU as it would lead to the same result: the suspension of judicial Cooperation. Romania has similar problems with judiciary reforms as Poland, but Romania also has issues with the SRI being active in the judicial process, as evidenced by the declassified protocols. Thus, it is likely that future Romanian cases will be examined by courts of other states according to the test established by the Court of Justice of the EU in the case *Minister for Justice and Equality v LM* as the ongoing CVM suggests

99 Court of Justice of the European Union Case Nr. C-216/18 PPU Minister for Justice and Equality v LM, Opinion of Advocate General Tanchev published 28 June 2018

100 Court of Justice of the European Union, *Press Release No. 113/18, Judgment in Case C-216/18 PPU Minister for Justice and Equality v LM (Deficiencies in the system of justice)*, Luxembourg, 25 July 2018, p. 2

101 id. p. 3

102 European Commission, *Decision of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption (notified under document number C(2006) 6569) (2006/928/EC)*, Official Journal of the European Union, 14 December 2006

that tribunals in Romania could violate Art. 47 section two and the first sentence of the European Charter of Fundamental Rights.[103]

III. Conclusion

The problems arising from the activities of the Romanian secret service in the judiciary seriously threaten the right to a fair trial and the judicial reforms are slow. So the situation in Romania arguably has a higher level of urgency than Poland and Hungary. The 2019 GRECO report is the latest official assessment of Romania's progress in efforts to reform its judiciary and combat corruption. It criticised the existence of the classified protocols between the DNA and the SRI and states, they "(…) raised questions as to the independence of the prosecution and the admissibility of evidence obtained in numerous anti-corruption cases, thus undermining the credibility of previously highly-praised anti-corruption efforts."[104] Later, "(...) GRECO concludes that Romania has now implemented satisfactorily or dealt in a satisfactory manner with four out of the thirteen recommendations contained in the Fourth Round Evaluation Report."[105] According to the 2018 report, "the very low level of compliance with the recommendations was "globally unsatisfactory"".[106]

As long as the independence of the magistracy is not guaranteed and the cases affected by the DNA-SRI collaboration are not tried by an independent tribunal, Romania does not fulfil its domestic and international obligations. The EU Commission's current stance in limiting itself in discussions with the Romanian government to the CVM is therefore insufficient. In order to improve this situation, the Commission should discuss the application of safeguard measures based on Articles 37 and 38 of Romania's Act of Accession, including the suspension of Member States' obligation to recognise and execute Romanian judicial decisions to prevent possible violations of the fundamental rights of individuals.

In a more general approach, it is recommended that the EU should explore the application of an Article 7 TEU procedure to evaluate if there is a violation of the values listed in Article 2 TEU.[107] If a violation was found, there would be the potential that Romania's voting rights in the EU Council could be suspended. This was already discussed in the context of the emergency ordinances[108] which not only lead to protests from the side of EU representatives, but also to massive and unprecedented protests in the judiciary through measures such as reducing working hours.[109] By May 2019, Prime

103 Art. 47 section two sentence one of the European Charter of Fundamental Rights reads: "Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law."

104 GRECO, Group of States against Corruption, *Interim Compliance Report Romania, Corruption prevention in respect of members of parliament, judges and prosecutors*, Fourth Evaluation Round, Council of Europe, Strasbourg, 9 July 2019 p. 17 fn 18

105 id. p. 17 Nr. 79

106 GRECO, Group of States against Corruption, *Interim Compliance Report Romania, Corruption prevention in respect of members of parliament, judges and prosecutors*, Fourth Evaluation Round, Council of Europe, Strasbourg, 18 January 2018 p. 19 Nr. 90

107 Article 2 TEU reads: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

108 Bogdan, Gabriela, *European Commissioner Jourova on activation of Art. 7 for Romania: It depends on what happens in the following days*, Nine O'Clock, 5 April 2019

109 Bogdan, Gabriela, *PM Dancila: Not giving up on OUG 7/2019; some issues bring dissatisfaction, substantiated, they could be changed. Dragnea: Premier slated to meet magistrates' associations. DIICOT suspends its activity 4*

Minister Viorica Dancila had abandoned the idea of using emergency ordinances because it was clear that triggering Article 7 would have harmed Romania.[110]

The example with Article 7 in the context of Romania shows that an attentive EU Commission as well as a persistent dialogue with a government that puts the interest of the Member State it represents first can yield the necessary result. What is right for Romania is also right for the EU and future candidates for accession: the goal of fighting corruption must be accomplished according to the rule of law. This might not lead to spectacular arrests and stars among the prosecutors, but this protects the foundational principles of the EU from damage in the long run.

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21 January, 2016

Mr. Jean-Claude Juncker
President of the European Commission

Dear President Juncker,

We are writing you on behalf of the professional associations of the magistrates from Romania, requesting the European Commission to include in the new Cooperation and Verification Mechanism report on Romania the ongoing issue of the undercover agents among the magistrates, as well as the unlawful involvement of the Romanian Intelligence Services (SRI) in the judiciary, as the threats to the independence of the judiciary.

These unresolved issues are a threat to the rule of law and democracy in Romania. They are also undermining the independence of the judiciary and the fight against corruption, creating the premise for severe human rights violations.

The issue of the undercover agents among the magistrates surfaced when it appeared publicly that, since 2004, the Supreme Council of National Defense (CSAT) has never verified the annual affidavit given by judges and prosecutors, under the penalty of perjury, that they are not operative agents, inclusively undercover, informants or collaborators of the secret intelligence services.

Despite the fact that we sent to CSAT multiple requests during 2015, this institution has not clarified the problem. The Romanian Presidency released a statement only on January 18th, 2016, stating that CSAT performed verifications and there are no undercover agents among the magistrates. However, the next day, the President's chief of staff stated that he has "doubts" that such verification could have actually been performed effectively, because CSAT does not have the capabilities "to chase after undercover officers".

The statement is shocking, since CSAT is the institution that should, according to the law, perform this kind of verifications and make sure that the intelligence agencies have no undercover agents among the magistrates. In other words, the chief of staff and advisor of the President, who is a CSAT member, stated that the Romanian secret intelligence services are basically uncontrollable, making this issue a very seriously one, which has to be utterly looked into by the European Commission and reported in the CVM.

The second issue is related to the statement made by the SRI General Dumitru Dumbrava, the head of the Romanian Intelligence Service's legal department, who stated that the courts became the "tactical field" for this secret agency and they are following/monitoring every case they have an interest in, until a verdict has been reached.

The Romanian law prohibits any involvement of SRI not only in the court proceedings, but even during the penal investigations. The former communist secret police, the "Securitate", had a penal division that was used to perform the most horrific abuses under the cover of criminal investigations. This is the reason why, after the fall of communism, the law governing the activity of SRI prohibited categorically the involvement of this intelligence agency in the judiciary process.

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Circumventing the law, the public found out in 2015 that CSAT, which is a militarized entity under the authority of the President, has passed some orders granting SRI certain competence in the judiciary process. Nobody knows exactly what this intelligence agency is doing in courts or among the magistrates because the CSAT orders are classified.

The basic principle of the rule of law is the separation of powers in the state, therefore the judiciary, as a distinct power, must be independent and not influenced by the executive power using infiltrated undercover agents of secret intelligence agencies. Also, the administration of justice is done publicly and on behalf of the law, therefore it should be governed by laws, procedures and regulations that are public, not by secret orders given by a militarized structure.

The unresolved issue of the undercover agents among the magistrates, as well as the unlawful involvement of the SRI in the judiciary process based on secret orders represent a real threat to the independence of the judiciary and democracy in Romania, and are undermining the rule of law and even the fight against corruption.

Regrettably, the media from Romania is not reporting accurately these real problems facing the judicial system, many even stating that this involvement of the intelligence agencies in the judiciary process is normal because they are supporting the fight against corruption.

The fight against corruption must be conducted within the boundaries of the law, and cannot be used as an excuse to undermine the rule of law and the independence of the judiciary.

We included along with this letter two press releases from MEDEL, the organization of the European judges, who also raised similar concerns during 2015 on these issues challenging the Romanian judiciary system.

It is imperative that all the serious issues challenging the Romanian judiciary system be reported in an objective, rational and fully transparent manner, so they can be resolved.

We call, therefore, the European Commission to include in the CVM report on Romania the unresolved problem of the undercover agents among the magistrates as well as the unlawful involvement of the Romanian Intelligence Service in the judiciary process as the biggest threats to the independence of the judiciary.

We thank you in advance for your attention to this matter. The National Union of the Romanian Judges as well the Association of the Romanian Magistrates, who is co-signing this letter, remain open to working closer with the European Commission on resolving, in the upcoming year, these challenging issues facing the Romanian judicial system.

Sincerely,

Judge Dana Girbovan
President, UNJR

Judge Gabriela Baltag
President, Association of the Romanian Magistrates

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ASOCIAȚIA MAGISTRAȚILOR DIN ROMÂNIA

30 August 2016

Hon. Christopher H. Smith Chairman
Hon. Roger W. Wicker Co-Chairman
Commission on Security and Cooperation in Europe
U. S. Helsinki Commission
234 Ford House Office Building
3rd and D Streets, SW
Washington, DC 20515
United States of America

Dear Chairman Smith and Co-Chairman Wicker,

We are writing you on behalf of the professional associations of the magistrates from Romania (which include judges and prosecutors) to notify the U.S. Commission on Security and Cooperation in Europe (Helsinki Commission) of the ongoing issues of unlawful involvement of the Romanian Intelligence Service (SRI) in the judiciary. This is undermining the separation of powers, destabilizing the rule of law, severely threatening the independence of the judiciary and democracy in Romania, compromising the fight against corruption and brutally violating the human rights in the country.

We ask, therefore, for your cooperation with our professional associations to address the following six issues in order to preserve the rule of law and safeguard the human rights in Romania.

The first issue is related to the fact that SRI has transformed the Romanian courts into so-called "tactical fields" where they conduct specific operations, and they monitor and profile all Romanian judges using "behavioral patterns", even when there is no suspicion of wrongdoing. These facts were revealed by SRI General Dumitru Dumbrava, the head of the Romanian Intelligence Service's legal department, who also publicly stated in April 2015 that this secret intelligence agency is following/monitoring every court case they have an interest in, until a final verdict has been reached.

Having the Romanian judges profiled and the courts transformed into "tactical fields" by a secret intelligence agency is undermining the independence of the judiciary and the separation of powers. Our professional associations have formerly requested the Romanian authorities to clarify these statements and the involvement of the SRI in the judiciary, but they have failed to do so citing "classified" secret documents.

The second issue is the involvement of the SRI in criminal investigations under the pretext of fighting corruption. This involvement is done outside the law and compromises the integrity of the fight against corruption.

After the fall of communism in Romania, SRI was categorically forbidden to conduct any penal investigations. This was due to the fact that the former communist secret police, the "Securitate", had a penal division unit that, under the cover of penal investigations, conducted the most horrific abuses and violations of human rights.

In 2015, the Romanian public found out that SRI is involved in anticorruption criminal investigations due to secret orders issued by the Supreme Council of National Defense (CSAT). CSAT is an administrative body that operates under the authority of the President and is tasked with organizing and coordinating the national defense, military and security activities of Romania.

In total contradiction with the law, CSAT issued an unknown number of secret orders since 2005 granting SRI authority to be involved in criminal investigations. All these orders are "classified" and not known to the public, judges or attorneys, so nobody knows exactly what SRI is doing during criminal investigations.

We requested clarifications on the legal background for SRI to be involved in criminal investigations, but we received no conclusive answers since the CSAT orders are "classified".

The third issue is the SRI's monopoly in carrying out wiretappings for criminal investigations, which threatens the integrity of every criminal case in Romania. Wiretappings can be used as evidence in criminal cases, even in the corruption ones, and it is important that they would be unaltered.

Initially, SRI had the authority to conduct wiretappings that was only limited to national security cases. After 2005, through different secret orders, CSAT extended the authority of SRI to conduct wiretappings on regular criminal cases as well. Afterwards, CSAT made SRI the sole authority in Romania allowed to conduct wiretappings.

SRI is a militarized secret intelligence agency and its activity, technology and tools are classified. As a result, none of the parties involved in a criminal case have access to the tools SRI uses to do wiretappings or to the original recordings, all relying solely on SRI to provide the admissible "evidence" to the parties. It is now documented by recent court cases that SRI has provided prosecutors with altered transcripts and recordings in order to ease the convictions.

Earlier this year, the Romanian Constitutional Court (CCR) ruled that the technical surveillance ordered by the prosecutor must be performed only by the criminal investigation body or police experts, not by secret intelligence agencies. This should have removed SRI from the criminal investigations.

However, immediately after that decision, CCR judges were viciously attacked by the media, politicians and civil society figures, all of whom have close ties with SRI. This raised serious doubts that SRI fully understands its role in a democratic society and respects the separation of powers.

Instead of creating an independent authority to do wiretappings under civilian control, as urged by our professional associations and consistent with CCR's decision, the current Romanian government passed on March 2016 an emergency ordinance making SRI a penal investigation body for national security related cases.

Thus, the current Romanian Government has re-established SRI with powers and prerogatives that the former communist secret police once had, but were taken away and forbidden by law after the fall of communism. This represents a major and serious step backwards for the democracy in Romania.

The fourth issue is the SRI's involvement in scrutinizing and vetting people nominated for public offices. According to an official response that our associations received from CSAT, one of SRI's objectives is to investigate and "verify" such persons in order to prevent the "corrupt" ones from having access to a public position.

In other words, before a person is convicted in a court of law, SRI is able to rule unilaterally whether such person is "corrupt" and should not ascend to a public office. In this respect, SRI functions as a court, which "convicts" a person of corruption without the rights of due process. This grants SRI an extra-legal and arbitrary authority to subjectively determine who is "qualified" to occupy public positions. Such a non-transparent way to control the appointment of public officials gravely distorts the democratic process and tramples upon fundamental human rights.

The fifth issue is the unresolved problem of the undercover agents that operate among Romanian magistrates, which includes judges and prosecutors. This issue surfaced publicly in 2015, when the former Romanian President Traian Basescu stated that there are undercover agents among the magistrates, who are "blackmailed" or otherwise controlled because of their undercover status since they are in violation of the law.

A Romanian law passed in 2004 prohibited all magistrates to be operative or undercover agents, informants or collaborators of secret intelligence agencies. Each magistrate was required to annually sign a sworn affidavit, under the penalty of perjury, that they are in compliance with this law. Although the law required CSAT to verify that magistrates had complied with their signed affidavits, our professional associations found out in 2015 that in the 10 years since the law was enacted, CSAT had never conducted any such verifications.

After multiple requests during 2015 from our associations to CSAT urging for these verifications to be performed, the Romanian Presidency released a statement on January 18, 2016, stating that CSAT had performed the verifications and there were no undercover agents among the magistrates. However, the next day, the President's chief of staff stated that he has "doubts" that such verifications could have actually been performed effectively, because CSAT does not have the capabilities "to chase after undercover officers".

His statement is shocking, since CSAT is the institution mandated by the law to perform these kinds of verifications and to make sure that the intelligence agencies have no undercover agents among the magistrates. In other words, the chief of staff and advisor of the President has, in effect, acknowledged that there is no control and oversight to the activities of the Romanian secret intelligence services, which make them unaccountable to anybody.

The sixth issue is the public misinterpretation in Romania of the position of U.S. government officials regarding these on-going violations to the rule of law. Regularly in the past years, U.S. officials either from the U.S. Embassy in Romania, State Department or from Congress who have visited Romania were seen to implicitly endorse with their statements these abusive actions of the Romanian Government.

When the U.S. officials talk about the judiciary in Romania, they talk only from the perspective of aggressively prosecuting corruption cases, totally ignoring the importance of due process and respect for human rights, integrity of the criminal cases and the independence of the judiciary.

For example, none of the U.S. officials have said anything about the unlawful involvement of SRI in the criminal investigations, that the courts have become "tactical fields", the unresolved issue of the undercover agents among the magistrates, nor about respecting the human rights and due process during criminal investigations.

Further, the non-governmental organization Reporters Without Borders, concluded in their 2016 press freedoms report[1] that the media in Romania is "manipulated and spied on" and corrupted by "excessive politicization, […] editorial policies subordinated to owner interests and intelligence agency infiltration of staff".

As such, the statements of the U.S. officials are often taken out of context, spun by the media and presented to the Romanian public as the American officials have nothing against or even support the SRI's involvement in the judiciary. This combined effect is severely undermining the confidence of the Romanian public in judicial proceedings and the rule of law across the country.

In fact, a survey conducted by the European Commission[2] in May 2016 found out that 13% of the Romanians have lost confidence in the judiciary since 2015. This is the biggest drop in confidence in any institution across the entire European Union in one year.

As the U.S. has demonstrated better than any other nation, the basic principle of the rule of law depends on the separation of governmental powers, and especially the independence of the judiciary. Therefore the judiciary, as a distinct power, must not be influenced by the executive power using infiltrated undercover agents of secret intelligence agencies. The administration of justice must be transparent and fully governed by laws, procedures and regulations that are public, not by secret orders given by an administrative structure under the authority of the President.

Some have justified these violations of democratic principles as a means to fight corruption. In reality, these abuses are compromising over time the anti-corruption efforts the Romania needs, and will lead to a dysfunctional state that will not be able to maintain a system of checks and balances among its powers of government. The fight against corruption must be conducted within the boundaries of the law, and cannot be used as an excuse to violate the democracy, rule of law and human rights.

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1 https://rsf.org/en/romania

2 http://ec.europa.eu/COMMFrontOffice/PublicOpinion/index.cfm/Survey/getSurveyDetail/instruments/STANDARD/yearFrom/2010/yearTo/2016/surveyKy/2130 – see the Annex

In summary, the unlawful involvement of SRI in the Romania's judiciary, based on secret orders, as well as the unresolved issue of the undercover agents operating among the magistrates, represent a real threat to the independence of the judiciary and democracy in Romania, undermine the rule of law and the fight against corruption, and severely violate the human rights in the country.

These threats to democracy and the rule of law in Romania are inconsistent with the Helsinki Accords and thus warrant your close attention.

We are including with this letter a similar letter we sent to Mr. Jean-Claude Juncker, the President of the European Commission, and two press releases from MEDEL, an international organization of European judges, that also has raised similar concerns on these issues.

We thank you in advance for your attention to these matters. The National Union of the Romanian Judges as well the Association of the Romanian Magistrates, the co-signers of this letter, remain open to working closer with the Helsinki Commission on promptly addressing these challenging issues facing the Romanian judicial system.

Sincerely,

Judge Dana Girbovan
President
National Union of the Romanian Judges

Judge Gabriela Baltag
President
Association of Romanian Magistrates

Attachments:
(1) Letter from UNJR and AMR to Mr. Jean-Claude Junker (President of the EC)
(2) Two press releases from MEDEL

ASOCIAŢIA PROCURORILOR DIN ROMÂNIA

A.P.R.

No. 18/7.02.2019

The Romanian Magistrates' Association (AMR), a non-governmental, apolitical, national and professional organization of judges and prosecutors, set up in 1993 - to pursue the traditions and goals of the Association of Magistrates and Lawyers (AMA), created in 1933 and whose activity ceased during the time of the communist regime - AMR being declared as a "public utility" association by the Government Decision no. 530/21 May 2008 - Headquartered in Bucharest, Regina Elisabeta Blvd. no. 53, sector 5, tel./fax. 021.4076286, e-mail amr@asociatia-magistratilor.ro, fiscal registration code 11760036, bank account RON IBAN RO37RNCB0090000508620001, opened at BCR Bank-Lipscani Branch -, represented legally by Judge Dr. Andreea Ciucă, acting as Interim President,

And

The Romanian Prosecutors' Association (APR), a non-governmental, apolitical, national and professional organization of prosecutors, headquartered in Bucharest, Libertăţii Blvd. 12-14, legally represented by prosecutor Elena Iordache, as president,

Send the following

OPEN LETTER

to the justice and home affairs ministers of the EU Member States

The Romanian Magistrates 'Association (AMR) and the Romanian Prosecutors' Association (APR) recall that they have consistently taken into account their actions and their public positions, the dialogue with the other state powers and the proposals/ observations they did about legislative changes, respect for the independence of the judiciary as a pillar of the rule of law.

Also, taking into account the obligations of the Romanian State as a member of the European Union, AMR and APR have never stated that the cooperation and monitoring mechanism is only optional or that the recommendations contained in the reports drawn up in this framework would not have effects.

On the contrary, AMR and APR have repeatedly underlined that the Cooperation and Monitoring Mechanism (MCV) directly concerns the justice system, with recommendations aimed at strengthening the independence of the judiciary. In such a context, these professional associations of judges and prosecutors have emphasized the importance of the accuracy of the premises on which the recommendations are based - themselves - precisely because they concern the system and magistrates with both important effects on the act of justice and, on citizens.

As magistrates, we cannot close our eyes on the existence of repeatedly incorrect, unrealistic, factual and legal statements in MCV reports that some of the recommendations have been built. Informing about these errors/ unrealities does not

mean denying MCV character for the Romanian State as an EU member, but rather the need for magistrates, the justice system, institutions and citizens to benefit from recommendations with accuracy, precisely, strictness.

In the last years, our professional associations have publicly showed and argued that the way the data collection for MCV reports has made it possible to shatter errors/ inaccuracies/ incomplete statements that can only affect the independence of justice because it does not reflect the correct premise.

Without making an exhaustive presentation at this time (although we can always detail each aspect), we bring you some of these aspects that we feel necessary to know in the interests of the independence of the judiciary and the proper fulfillment of the obligation to follow MCV's recommendations:

i) MCV reports have largely looked at progress in the field of justice through the fight against corruption and preventive action in the field of corruption, leaving the wrong impression that these goals - which can not be denied the importance to society - would subsume the whole or most of the activity of the justice system. In addition, the place and role of the courts was almost "forgotten". When referring to combating high-level corruption, MCV reports looked at DNA and, occasionally, HCCJ (in that order!), With emphasis on "DNA independence or effectiveness." Courts of appeal have been rarely mentioned, referring to the fight against high-level corruption, and when the fight against corruption at all levels was discussed, the reports unjustifiably ignored the courts. The exclusion of references to the work of the majority of courts, essential for the progress made in recent years, proves a distorted understanding of the Romanian judicial phenomenon. Under these circumstances, timely, tangential referrals to the "excessive workload of courts", which continue to "strike on the consistency of court rulings," are not likely to outline a clear picture of the realities of the justice system, nor to deepen the problems of this system .

ii) The 2017, 2018 reports do not even mention the "Memorandum on the Situation of Justice", a programmatic document developed by professional associations and adopted by the overwhelming majority of the courts (over 80%) in September 2016, requesting respect for the independence of the judiciary and the implementation of 17 measures, including guaranteeing and respecting the status of magistrates, their independence, the publication by the European Commission of the methodology they follow in drafting the CVM report, the names of the experts consulted and all NGOs and institutions consulted the Romanian justice system as well as ensuring full transparency in the institutional cooperation with the intelligence services, strict observance of the legal framework and ensuring effective judicial and civil control over their activity.

iii) The Technical Report of November 2018 states that previous draft amendments to the Laws of Justice (since 2015) have finally been abandoned in favour of the new amendments that have advantaged from an accelerated adoption process in Parliament. By comparing the form of the draft law amending the Laws of Justice (ie Law 303/2004 on the Status of Judges and Prosecutors, Law No. 304/2004 on Judicial Organization and Law No. 317/2004 on the Superior Council of Magistracy), as a result after the discussions in the Working Party of the Ministry of Justice (April 2016) with the form of the draft, as voted in Parliament's Joint Special Committee (December 2017), it is clear that the previous project was not abandoned, but a series of the proposals discussed / requested in the years 2015 and 2016 (regarding the career, the rights, the

status of judges and prosecutors, the judicial organization, the functions of the Superior Council of Magistracy, its organization and functioning, the disciplinary procedure) 2017.

iv) The MCV report states that the obligation for magistrates to refrain from defamation or expression in relation to other state powers limits freedom of expression and information. However, as the Constitutional Court has held (Decision No. 45 / 30.01.2018), the term "defamatory" means offensive, contemptuous, libelous, insulting, denigratory. In the exercise of their duties, judges, prosecutors and their representatives must demonstrate impeccable conduct - this also being appreciated by the way of expression and reporting to institutions, authorities, citizens. Independence of the judge does not mean absolute freedom of expression or expression according to arbitrary criteria, but observance of the reserve requirement, as is apparent from the case-law of the ECHR and the Constitutional Court. Therefore, the Constitutional Court concluded that public positions can be firm, but at the same time they must be animated by an institutional respect that must characterize the activity of any state official.

v) From verifying the texts of Law no. 304/2004, it can be seen that the legal provisions do not include the risk of affecting the role of the SCM of defense of judges and prosecutors against public statements from other state bodies. We point out in this context that the law expressly lays down the right and the obligation of the SCM to defend, on request or ex officio, judges and prosecutors against any act of interference with or in connection with the professional activity - could affect independence or impartiality, as well as against any act that would create suspicions about them, and the right / obligation of the SCM to defend the independence of the judiciary. At the same time, in order to strengthen the right of judges and prosecutors to defend themselves against acts that could affect their independence, the legislator has distinctly determined their possibility to address the SCM, in order to order the necessary measures, according to the law, being as well as the remedies that the Council may use / dispose of.

vi) Regarding the statement in the MCV Technical Report to remove from the status of prosecutors the previous reference to their independence, we emphasize, first of all, that the hierarchical organization of the Public Ministry, such as that instituted by the Constitution and Law no. 303/2004, is one of three European organization models accepted by the Venice Commission, as is apparent from its documents. Secondly, we show that the independence of prosecutors in the exercise of their powers is expressly found in the Laws of Justice - being supported by the debates in the Joint Special Committee, the need to provide for prosecutors' independence in organic law. In particular, the independence of prosecutors is provided in 7 texts of Laws no. 303/2004 and 304/2004.

vii) The MCV Technical Report states that the SCM managed to speak as one in September 2017, rejecting proposed changes to the laws of justice, after consulting all courts and prosecutors' offices. However, this statement is contradicted precisely by the Decision of the SCM Plenum no. 974 / 28.09.2017, approving the draft amendments to the Laws of Justice, the decision being taken with 10 votes "for" a negative opinion, but there are also 8 votes "for" a positive opinion (see " Agenda settled on September 28, 2017 ").

Regarding the speech "as one", following the consultation of all the courts and prosecutor's offices, the technical report stated that there are 16 courts of appeal in Romania, of which only 6 appear in the annex to the Decision of the SCM Plenum no. 974/2017 as calling for the rejection in block of proposals to amend the Laws of Justice, so the other 10 courts of appeal, ie the majority, did not request such a measure. There

are 46 courts in Romania, and only 21 appear in the annex, asking for the blocking of proposals to amend the Laws of Justice, so the other 25 tribunals, most of them, have not requested such a measure. Also, the MCV Technical Report is limited to a general statement regarding the two negative opinions given by the SCM, without presenting the situation in the light of the entire SCM activity in the legislative process. Had there been a willingness to do this important analysis, it would have been found that, although it gave a negative opinion, the SCM had in fact a position of "positive opinion with observations".

In this respect, it is relevant by the SCM to assume the dialogue with the legislative body, by constantly participating in the meetings of the Joint Special Commission, by exposing the point of view of each of the texts dealt with by formulating a series of proposals / very important! - by acquiring the majority of them by the legislative body in the debates of the Joint Special Committee. In the reports drawn up after the conclusion of these debates, the SCM was mentioned in over 300 places as "amendments", as an author or supporter of the proposals for amending and completing the Laws of Justice, of which more than 250 times the admissible amendments - represents a very large number of proposals that the SCM has made during the debates. Moreover, although it gave a "negative notice", the SCM also came up with unresolved proposals with the courts and prosecutors' offices.

viii) Concerning the statement in the MCV Technical Report that "the justification for the application of special treatment to magistrates in comparison with other civil servants has not been clarified" - referring to the Section for the Investigation of Criminal Offenses by Magistrates - we underline that the inclusion of magistrates in the category "Civil servants" proves an ignorance of the general principles governing judiciary organization in Romania, the status of judges and prosecutors, constitutional norms.

Also, the Technical Report ignored the reality of the Constitution and the Criminal Procedure Code, which provides for multiple exemptions from the ordinary material competence of the prosecutor's offices and / or courts, taking into account the criterion of the person's quality (in case of deputies and senators, on the accusation of the President of Romania and in the case of the ministers, in the case of the judges of the Constitutional Court, the members of the SCM, the judges of the HCCJ and the prosecutors from the Prosecutor's Office attached to the HCCJ, in the case of the judges from the courts, prosecutors from the prosecutor's offices , in the case of the magistrates-assistants from the HCCJ, the judges from the courts of appeal and the Military Court of Appeal, as well as the prosecutors from the prosecutor's offices attached to these courts, in case of senators, deputies and members of Romania in the European Parliament, members of the Court of Cassation , the President of the Legislative Council, the People's Advocate, the deputies of the People's Advocate, the Quaestors, the lawyers, the public notaries, the bailiffs, the Financial Controllers of the Court of Accounts, the external public auditors).

Therefore, as the Constitutional Court underlined in Decision no. 33 / 23.01.2018, the establishment of special rules of competence regarding a certain category of persons is not an element of novelty in the current procedural normative framework. Therefore, prior to the amendments to the Laws of Justice, judges and prosecutors were not

prosecuted and judged by the common rules of competence, and even less by the rules of jurisdiction applicable to civil servants.
Moreover, the Technical Report is silent on the reality that such a structure already exists. In particular, through the Order of the Chief Prosecutor of the National Anticorruption Directorate no. 10/31 January 2014, the "Anti-Corruption Justice Service" was established, with the competence to investigate all corruption offenses committed by judges and prosecutors.

ix) With regard to general information and the absence of conclusions based on factual situations, under the heading "Cooperation between intelligence services and judicial institutions", we again point out that this important issue for the justice system has been the subject of concerns from 2015, with addresses, requests, letters open to the CSM, the CSAT, the Presidency of Romania, with press releases, these issues being included in the Memorandum on the Situation of Justice in 2016. The justified preoccupations for the clarification of the "cooperation" with the appearance in the public domain of protocols containing provisions without a legal basis and allowing the intelligence services to carry out tasks among those on which the Constitutional Court has established, by Decision no. 51/2016, that they were not competent to perform them. Despite the repeated requests I have made to clarify these issues of great gravity, neither the MCV report of 2016 nor the 2017 issue addressed the issue of "court shelters", the issue of the protocols concluded by magistrates (as representatives of the prosecutor's offices) with secret services, and the injurious influence of these protocols on the independence of justice. The technical report of November 2017 treats this topic superficially, although there have been ample public debates on this issue as well as decisions of the Constitutional Court confirming the claims of our professional associations.

x) The MCV Technical Report merely states on several occasions the question of how the text on material liability of magistrates has been amended without making a recommendation on this issue of vital importance to the independence of the judiciary. As we have shown many times, the "reconfiguration" of the material responsibility of judges and prosecutors in a sense that violates the principle of the judge's independence, regarded as an essential attribute necessary for the accomplishment of the act of justice, can only have negative effects on the justice system and for the citizen.

xi) Briefly, in connection with the specifications regarding the appointment / revocation of the chief prosecutors and the role of the Minister of Justice in this procedure, the material responsibility of magistrates, the establishment of the Section for the Investigation of Criminal Offenses, the revocation of the members of the Superior Council of Magistracy, the stimulation of early retirement, corroborated with the period magistrates' training, articles of Laws no. 303/2004, no. 304/2004 and no. 317/2004 regulating these matters have been verified by the Constitutional Court in the many complaints with which it has been invested.

Also, the Constitutional Court, by Decision no. 358 / 30.05.2018, in paragraph 17, decided that: "In the procedure for the dismissal of prosecutors with management positions, the central role of decision-making on the trigger is the Minister of Justice, a

conclusion based on the provisions of Art. 132 par. (1) of the Constitution, according to which the activity of prosecutors is carried out under the authority of the Minister of Justice. The Minister of Justice has the obligation to legally establish and argue his proposal (...) "

Finally, with regard to cooperation in civil and criminal matters between the Member States of the European Union, we emphasize that the realization and development of this cooperation is viewed with great seriousness in the courts and prosecutors' offices, proof being the way of carrying out the procedures (see also the use of the obtaining evidence from electronics, videoconferencing, etc.). Also, with concrete reporting on the work of the Annual Meeting of Members of the European Judicial Network in Civil and Commercial Matters (Brussels, 31 January - 1 February 2019), it can be clearly concluded that amendments to the Laws of Justice do not affect this cooperation.

In this context, the letter of the three professional associations, addressed yesterday 6 February 2019 to the JAI Council meeting, alleging violation of the principle of the independence of the judiciary, contains statements which we do not agree with and do not represent us, so we ask the JAI Council not to go along with it.

The Romanian Magistrates' Association

by the Interim President,

jud. dr. Andreea Ciucă

The Romanian Prosecutors Association

by the President,

proc. Elena Iordache

MINISTERUL JUSTIȚIEI
TRADUCĂTOR ȘI INTERPRET AUTORIZAT
ENGLEZĂ
URSU
IULIA
Aut Nr 26734
ROMÂNIA

ASOCIAȚIA MAGISTRAȚILOR DIN ROMÂNIA
Membru al Uniunii Internaționale a Magistraților • Membru al Asociației Europene a Magistraților • Membru al Alianței pentru o Justiție Europeană în România

No. 77/4.04.2019

Dear M. President Jose Igreja Matos,

Please find attached the Open Letter sent to EAJ by The Romanian Magistrates Association (AMR) in May 2018 (before the Conference in Berlin).
The Open Letter on the amendments to the Laws of Justice presents an argumentative point of view of the content of these amendments and of the consequences and the progress of the legislative process.

Bottom line, despite some voices, the independence of the prosecutors is ensured by the existence of express provisions, in this respect, in the amendments to the Laws of Justice.The independence of prosecutors in the exercise of their duties is expressly found in the Laws of Justice, as amended following the vote in Parliament. The Romanian Magistrates' Association (AMR) supported the debate on the Joint Special Committee of the Chamber of Deputies and the Senate on the necessity of stipulating the independence of prosecutors in organic law.

Therefore, the Romanian Magistrates' Association (AMR) points out that the information in the international press, according to which the provisions of the three Laws of Justice brings amendments to the definition of prosecutors' attributions, to exclude the word "independent", is untrue. Please note that such information was brought to the attention of AMR by the International Judges Association (IAJ-UIM) by e-mail on December 17, 2017. AMR appreciates in particular the concern for the independence of the judiciary, manifested by IAJ-UIM. But the assertion that the word "independent" does not exist in the Laws of Justice regarding prosecutors does not correspond to reality.

The Open Letter on the amendments to the Laws of Justice clearly shows that they were not intended to undermine the country's anticorruption efforts. On the contrary, these efforts are not hindered and the judges and prosecutors can continue their activity without having their independence affected.

Anticorruption struggles are not hampered by the creation of the Section for investigating criminal offenses within the judiciary. The appointment of prosecutors to this section by the Superior Council of Magistracy (SCM) as a result of a transparent competition can not be interpreted in any way as an aspect that would affect the independence of the judiciary and the fight against corruption. Moreover, it can not reasonably be argued that the establishment of the section would "sacrifice" the independence of prosecutors because this independence is enshrined in the law. As such, it is only necessary to be assumed and applied by prosecutors.

On the other hand, the section is created under the direct subordination of the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice. In this context, a possible mitigation of the independence of the prosecutors of this section - which would constitute an illegal act - could only be a consequence of the faulty way of organizing and carrying out the activity of the section, under the direct subordination of the General Prosecutor of Romania.

Regarding the idea that competence is not justified by the status of the person, AMR wants to indicate the existence of a specialized service within the National Anticorruption Directorate (DNA), namely the Service for Combating Corruption in Justice. It was created in 2014 and has the competence to investigate all corruption offenses allegedly committed by judges and prosecutors. Secondly, competence on the status of the person (ratione personae) with regard to judges and prosecutors had already been legislated before the amendments to the Laws of Justice. See para 134-143 from Decision no. 33/23rd January 2018 of the Constitutional Court.

The Venice Commission welcomed the role of the Superior Council for Magistragy in the organization of the new Section and in the appointment of the Section's Chief prosecutor, as well as of prosecutors. In The Opinion on Amendments to Law 303/2004 on the Statute of Judges and Prosecutors, Law 304/3004 on the Judicial Organization, Law 317/2004 on the Superior Council for magistracy, adopted in October 2018, the Venice Commission stated (para 85-86):

„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. 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 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 883 to 885 of Law no. 304)."

The necesity to create this Section came from the amount of abuses by the DNA (National Anticorruption Directorate) reported by the judges as well as the public.

Regarding the changes, the organization and functioning of the Judicial Inspection, the Romanian Magistrates' Association (AMR) had a clear objective: to increase the functional independence and autonomy of the Judicial Inspection, as a necessary element for respecting the independence of the judiciary and the independence of the judge. According to art. 65 par. (1) of the Law amending and completing the Law no. 317/2004 on the Superior Council of Magistracy, the Judicial Inspection remained to function as a legal personality within the Superior Council of Magistracy (SCM). According to art. 67 paragraph (1), the chief inspector shall be appointed by the Plenum of the Council, after a contest, and according to art. 67 paragraph (5) may also be revoked by the Plenum of the Council. In art. 70 par. (1) it was foreseen that judicial inspectors were appointed by the Chief Inspector following a competition organized by the Judicial Inspection.
As regards the amendments to the legal texts on the organization and functioning of the Judicial Inspection, one can not overlook an element that obviously demonstrates the strengthening of the independence of the judiciary. We refer to the fact that, under the previous legal provisions, the Minister of Justice as well as the President of the High Court were the holders of disciplinary action against judges and prosecutors. Thus, they were able to refer the Judicial Inspection and, in this way, trigger the procedure of prior verification that lead to the disciplinary action against a judge or prosecutor. Following the debates in the Joint Special Committee of the Chamber of Deputies and the Senate and the vote of the legislative body, the law was amended at the request of the AMR. Currently, the Minister of Justice the President of the High Court are no longer able to initiate disciplinary action. Moreover, the decisions of the Supreme Council for Magistracy issued on disciplinary actions can be appealed to the Supreme Court of Justice with all the guarantees of a fair trial.

Therefore, you can see that the situation in Romania is unquestionably different from the one in Poland as exposed by the Polish Judges Association „IUSTITIA" in the letter from 13 February 2019.

The Romanian Magistrates' Association (AMR), has been an active participant and influencer in the dialogue aimed at amending the Laws of Justice.

Regarding some of the current issues in the Romanian Judiciary, please also find attached the Open letter of the Supreme Council for Magistracy (3rd April 2019), whose points of view the AMR (Romanian Magistrates Association) also holds.

We want to highlight the fact that the protests you have probably heard of on the news have been attended by only 6% of the courts. Therefore, the points of view stated by the protesters do not represent the points of view held by the majority of the general assemblies of the Romanian Courts.

In order to avoid making this email too long, I will sent you another mail on the essential topic of the unlawful interference of the Romanian secret intelligence agencies in criminal and court procedures. We are deeply concerned about this interference, which is clearly undermining the judicial independence, especially since it was revealed recently that bodies of the judicial authority (prosecutors' offices) concluded secret protocols with the Romanian Intelligence Service (SRI).

Yours sincerely,

Judge Dr. Andreea Ciucă – Romanian Magistrates Association