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Follow-up Report to the Ad hoc Report on ROMANIA (Rule 34)

Adopted by GRECO
at its 83rd Plenary Meeting
(Strasbourg, 17-21 June 2019)

I. INTRODUCTION

1. A series of reforms in the justice system, initiated by the Romanian Government in the course of 2017, led to a large-scale wave of public protests and concerns expressed by numerous representatives and associations of the judiciary and prosecution, as well as by the international community, about the consequences of the intended reforms for the independence of judges and prosecutors. This occurred in parallel with the on-going compliance procedure in GRECO's Fourth Evaluation Round (covering, *inter alia*, corruption prevention in relation to judges and prosecutors).

2. As a consequence, GRECO decided at its 78th Plenary Meeting (4-8 December 2017), when adopting the Fourth Evaluation Round Compliance Report¹, to apply Rule 34 of its Rules of Procedure in respect of Romania. This Rule allows GRECO to carry out an *ad hoc* evaluation procedure in exceptional circumstances, when GRECO receives reliable information concerning institutional reforms, legislative initiatives or procedural changes in member States which may result in serious violations of anti-corruption standards of the Council of Europe. Owing to the complexity of the issues to examine and the fact that the reform was on-going, GRECO carried out an on-site visit, with the approval of the Romanian authorities. The *ad hoc* evaluation team, composed of Ms Panagiota VATIKALOU (Greece) and Ms Vita HABJAN BARBORIČ (Slovenia) as rapporteurs, assisted by Christophe SPECKBACHER from the GRECO Secretariat, held a series of meetings² in Romania on 21-22 February 2018.

3. GRECO adopted the *Rule 34 Ad hoc* Report on Romania (hereinafter "Ad hoc Report") on 23 March 2018, at its 79th Plenary Meeting, and made it public on 11 April 2018, following the authorisation of the Romanian authorities. The Ad hoc Report focussed on analysing the impact and risks the then intended legislation would have in respect of the corruption prevention standards developed by the Council of Europe and GRECO. Five recommendations in the Ad hoc Report were adopted and GRECO reiterated two recommendations from its Fourth Round Evaluation Report. The Ad hoc Report also contained a summary of the legislative and other measures planned by Romania within the context of the judicial reform, and in connection with the functioning of the criminal justice system, as well as reactions to intended amendments from national institutions and professional organisations of judges and prosecutors, the European Commission and other relevant actors. The Romanian authorities provided additional information to GRECO, in June and December 2018, concerning measures taken to implement recommendations provided in the Ad hoc Report.

4. The present Follow-up Report assesses the implementation of GRECO's recommendations contained in the Ad hoc Report and provides an overall appraisal of Romania's compliance with these recommendations. The Rapporteurs (see above) were assisted by the Secretariat in drawing up this Report.

¹ See paragraph 91 of the Fourth Evaluation Round Compliance Report, accessible via the following link: <https://www.coe.int/en/web/greco/-/romania-publication-today-of-the-fourth-round-compliance-report>

² The GET met with the then Minister of Justice and other officials of this ministry, members of Parliament, the Office of the President, the Superior Council of Magistracy, and the Prosecutors Office, as well as civil society and professional organisations (NGOs, associations of judges and prosecutors), and representatives of international institutions (European Commission) and diplomatic representations of several countries in Romania.

II. CONTEXT AND BACKGROUND INFORMATION

5. The proposed legislative amendments described above are part of a broader reform process. In parallel to the amendments concerning three justice laws (Law no. 303/2004 on the statute of judges and prosecutors, Law no. 304/2004 on judicial organisation and Law no. 317/2004 on the Superior Council of Magistracy), a process was initiated to amend the Criminal Code and Criminal Procedure Code. Around the same period, a further series of three laws were registered in Parliament which contained, *inter alia*, amendments to the incriminations of bribery and trading in influence, and to the offence of abuse of office, which are relevant to the functioning of the criminal justice system as a whole and its response to corruption specifically. These various draft proposals concerning procedural and substantive criminal law were a further source of controversy and concerns and were withdrawn from the legislative process by the initiators. However, a new set of amendments to criminal procedural and substantive legislation relevant to combating corruption was adopted by Parliament in June and July 2018, many of which were subsequently challenged before the Constitutional Court. In its Opinion of 20 October 2018³ on the amendments to Criminal Code and Criminal Procedure Code, the Venice Commission expressed concern that, "*taken separately, but especially in view of their cumulative effect, many amendments will seriously impair the effectiveness of the Romanian criminal justice system in the fight against various forms of crime, including corruption-related offences...*".

6. GRECO is also aware that further amendments to substantive and procedural criminal legislation, with potential consequences on combating corruption, have been adopted by the Romanian Parliament on 24 April 2019. Just as previous amendments, these were also challenged before the Constitutional Court and are currently under judicial review. In addition, GRECO notes that a public referendum⁴ was held on 26 May 2019 in Romania, with the following two questions put to the vote: "1. Do you agree with banning amnesty and pardon for corruption offenses? 2. Do you agree with banning the adoption by the Government of emergency ordinances in the area of crimes, punishments and judiciary organization, and with extending the right to challenge ordinances directly at the Constitutional Court?" An absolute majority of voters (84%) answered in the affirmative to these two questions.⁵ Although the above issues are not subjects of the present Report, GRECO will continue to closely follow developments regarding the anti-corruption legislation in Romania with a view to safeguarding the Council of Europe standards in this respect.

The legislative process concerning the three laws on the judiciary and other amendments

7. In 2015 and 2016, a series of consultations were held with bodies representing the judges and prosecutors of Romania, including the Supreme Council of Magistracy (SCM) on various judicial reform initiatives. On 31 October 2017, a group of 10 MPs submitted to the Chamber of Deputies a *Draft law amending and supplementing Law no. 303/2004 on the statute of judges and prosecutors, Law no. 304/2004 on judicial organisation and Law no. 317/2004 on the Superior Council of Magistracy* (the "draft Law"). On 13 November 2017, the three draft Laws were transmitted to the special parliamentary committee with a deadline of 20 November 2017 for the formal submission of revised drafts, and of 27 November 2017 for the submission of a final report. During the first half of December 2017, the special committee finalised its reports (one or two pages in text format, the rest in the form of a table). The three bills were subsequently adopted by the Chamber on 11-13 December 2017 and by the Senate on 19-21 December 2017. Large public protests took

³ The Opinion of the European Commission for Democracy through Law on amendments to the Criminal Code and the Criminal Procedure Code CLD-AD(2018)21, accessible via the following link:

[https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2018\)021-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2018)021-e)

⁴ As the results of the referendum are not legally binding, political consultations regarding the implementation of its outcome are currently under way between the President and political parties of Romania; see, in particular, the following link: <https://www.nineoclock.ro/2019/06/05/president-starts-consultations-with-parliamentary-parties-on-enacting-iohannis-ample-amending-of-constitution-not-desirable-now-referendum-on-amending-constitution-should-overlap-elections/>

⁵ <https://www.nineoclock.ro/2019/05/28/bec-provides-partial-results-for-european-elections-pnl-26-35-psd-23-16-usr-plus-alliance-21-21-partial-count-reveals-over-4-million-say-yes-in-justice-referendum/>

place during that period followed by public statements issued by foreign embassies on 27 November and 21 December 2017 calling on "*actors involved in the judicial reform project to refrain from any action resulting in a weakening of the independence of the judiciary and of the fight against corruption, and to seek without delay the necessary advice of the Venice Commission of the Council of Europe in order to ensure that the independence of the judiciary is preserved and the reform process in general remains intact.*"

8. The amendments to the three laws were finally adopted and entered into force on 23 July 2018 (amendments to Law no. 304/2004 on the judicial organisation), 11 October 2018 (amendments to Law no. 317/2004 on the Superior Council of Magistracy) and 18 October 2018 (amendments to Law no. 303/2004 on the statute of judges and prosecutors). In the course of the legislative process, a considerable number of provisions contained in the draft amendments were challenged at the Constitutional Court by the President of Romania, by MPs and by the High Court of Cassation and Justice. As a result, numerous provisions were declared unconstitutional.

9. During the legislative process, the numerous calls upon the authorities, including by GRECO, to request an opinion from the Venice Commission remained unanswered, until the President of Romania, on 3 May 2018, and then the Monitoring Committee of the Parliamentary Assembly of the Council of Europe (PACE), on 4 May 2018, requested such an opinion regarding the amendments to the three laws of the judiciary.

III. ANALYSIS

10. The following analysis focuses on the implementation by Romania of recommendations put forward by GRECO in the Ad hoc Report regarding certain aspects of the [then] draft amendments, which have since become laws. This new legislation is of particular relevance to GRECO's Fourth Evaluation Round, covering, *inter alia*, corruption prevention in respect of judges and prosecutors, as well as the Council of Europe standards on preventing and combating corruption effectively.

11. When preparing the present Ad hoc Report, in addition to the extensive information provided by the Romanian authorities, GRECO took into account, *inter alia*, the Opinion⁶ of the Venice Commission on amendments to the three justice laws, the Opinion⁷ of the Bureau of the Consultative Council of European Prosecutors (CCPE), the Opinion⁸ of the Bureau of the Consultative Council of European Judges (CCJE), and the latest Report from the Commission to the European Parliament and the Council On Progress in Romania under the Cooperation and Verification Mechanism (hereinafter "CVM Report").⁹

The legislative process leading to the amendment of justice laws

12. In its Ad hoc Report, GRECO reiterated its recommendation from the Fourth Evaluation Round that *the transparency of the legislative process be improved (i) by further developing the rules on public debates, consultations and hearings, including criteria for a limited*

⁶ The Opinion of the European Commission for Democracy through Law on amendments to Law No. 303/2004 on the statute of judges and prosecutors, Law No. 304/2004 on judicial organisation and Law No. 317/2004 on the Superior Council of Magistracy was adopted at its 116th session (19-20 October 2018) and is accessible via the following link: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2018\)017-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2018)017-e)

⁷ On 16 May 2019, the Bureau of the CCPE published an opinion following a request by the Romanian Movement for Defending the Status of Prosecutors as regards the situation on the independence of the prosecutors in Romania, accessible via the following link: <https://rm.coe.int/ccpe-bu-2019-3-opinion-romania-2019-final/168094848a>

⁸ On 25 April 2019, the Bureau of the Consultative Council of European Judges (CCJE) published an opinion following a request by the Romanian Judges Forum Association as regards the situation of the independence of the judiciary in Romania, accessible via the following link: <https://rm.coe.int/ccje-bu-2019-4-en-opinion-romania-2019-final-25-april-2019/168094556c>

⁹ The CVM Report COM(2018)851 is accessible via the following link: https://ec.europa.eu/info/sites/info/files/progress-report-romania-2018-com-2018-com-2018-851_en.pdf

number of circumstances where in camera meetings can be held, and ensuring their implementation in practice; ii) by assessing the practice followed and accordingly revising the rules to ensure that draft legislation, amendments to such drafts and the agendas and outcome of committee sittings are disclosed in a timely manner, and that adequate timeframes are in place for submitting amendments and iii) by taking appropriate measures so that the urgent procedure is applied as an exception in a limited number of circumstances.

13. GRECO recalls that according to the Interim Compliance Report (GrecoRC4(2019)11), adopted on 20 June 2019, this recommendation is still not implemented. In particular, no rules have been further developed to allow for public debates, consultations and hearings, and the practice in this regard has not changed. The use of Government Emergency Ordinances (GEOs) for adopting important legal amendments has continued, as in the course of 2018-2019, the Government has proceeded to adopt several new GEOs¹⁰ with substantial amendments to legislation concerning the judiciary and prosecution (for detailed analysis, see paragraphs 7-14 of the Interim Compliance Report (GrecoRC4(2019)11).

14. GRECO will continue assessing the implementation of this recommendation within the framework of the on-going compliance procedure under the Fourth Evaluation Round.

Particular concerns raised by amendments to the three justice laws

15. It is recalled that the amendments to Law no. 303/2004 on the statute of judges and prosecutors, Law no. 304/2004 on judicial organisation and Law no. 317/2004 on the Superior Council of Magistracy entered into force on 18 October, 23 July and 11 October 2018, respectively.

- Risks of drainage in the magistracy and of arbitrariness in 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).

17. GRECO recalls that this recommendation was linked to the need to address the risk that changes pertaining to the recruitment and retirement of judges and prosecutors may have had a significant impact on the work force and the general capacities of courts and prosecutorial bodies. In particular, GRECO took the view that these changes could lead to backlogs of cases, dismissal of cases due to the statute of limitations and delays in administering justice. Regarding promotions, in GRECO's opinion, the proposed amendments contained a proportion of subjectivity in the selection and decision process, and would leave more room for personal or political influence in career decisions, which could impact the neutrality and integrity of the justice system.

18. The Romanian authorities report in relation to the first part of this recommendation, that an early retirement system was introduced through amendments to Article 82, paragraph 3 of Law no. 303/2004.¹¹ According to this amendment, judges, prosecutors and

¹⁰ Emergency Ordinance no. 90 of 10 October 2018 on some measures for the operationalisation of the Section for the Investigation of Criminal Offences within the judiciary, Official Gazette no. 862 of 10 October 2018; Emergency Ordinance no. 92/15.10.2018 for amending and completing some normative acts in the field of justice, published in the Official Gazette no 874/16 October 2018; Emergency Ordinance no. 7/2019 of 20 February 2019 and Emergency Ordinance no. 12/2019 of 5 March 2019 amending and supplementing some normative acts in the field of justice.

¹¹ Art. 82

(3) Judges, prosecutors and assistant magistrates from the High Court of Cassation and Justice and judges and assistant magistrates from the Constitutional Court with a seniority of between 20 and 25 years only in these functions benefit, upon request, before reaching the age of 60, from the service pension provided in para. (1), in

assistant magistrates of the High Court of Cassation and Justice and judges and assistant magistrates from the Constitutional Court with 20 to 25 years' service may, upon their request, benefit from the service pension, prior to reaching 60 years of age. To avoid any possible shortage of human resources affecting the functioning of the courts and prosecutor's offices, the Government adopted Emergency Ordinance no. 7/2019 (20 February 2019), whereby the entry into force of this retirement provision has been postponed until 1 January 2020.

19. The authorities also refer to the statistical information regarding retirement practices in recent years, analysed by the President of the Superior Council of Magistracy (SCM), which suggests that out of the total number of judges eligible for retirement, only one third of them effectively retire. By way of example, the authorities state that, in 2017, some 490 judges were entitled to retirement but only 137 chose to do so. Regarding the retirement of prosecutors, the authorities again refer to the above statistics which states that, in previous years, only one third of the total number of prosecutors eligible for retirement have effectively retired. At present, some 930 prosecutors will have over 20 years of service by 1 January 2020. Assuming that one third of them retire, the authorities estimate 310 retirements (about 12% of the total number of prosecutors). The authorities conclude, with reference to the statistical information available, that the current retirement arrangements do not constitute a risk to a proper functioning of the judiciary and prosecution.

20. As to the second part of this recommendation, the authorities state that secondary legislation in this field is in the drafting process by the SCM. In particular, at its meeting of 20 March 2019, the SCM Joint Commission on Human Resources and Organisation, decided to draw up a regulation regarding the organisation and carrying out of competitions for the promotion of judges, and a regulation on the organisation and carrying out of competitions for the promotion of prosecutors. The first draft regulation relating to judges was examined by the Judges' Commission on 3 May 2019. It is envisaged to present the draft regulation for public debate and consult the courts, prior to its final approval. The Prosecutors' Commission examined the draft regulation concerning prosecutorial promotions on 12 June. This draft will also be presented for public debate and consultation among prosecutors prior to its final approval. The authorities also provide a detailed explanation of amendments brought to professional training of auditors of justice and the internship of trainee judges and prosecutors. In particular, the authorities refer to Article 16, paragraph 3¹² of Law no. 303/2004, as amended by Law no. 242/2018, which increased the duration of professional training of the auditors of justice at the National Institute of Magistracy (NIM) from two to four years. The duration of the internship of trainee judges and prosecutors has also been increased from one to two years. It was initially intended to apply these newly introduced provisions to those entering the NIM in 2019 – 2020 academic year. However, the Plenum of the SCM proposed postponing the application of these changes to 1 January 2020, which was reflected in Government Emergency Ordinance no. 7/2019. In addition, the authorities inform GRECO of the postponement of the hearing of appeals by a panel consisting of three judges (currently such a panel consists of two judges) until 1 January 2020.

21. GRECO takes note of the information provided. With regard to assessing the impact of legislative changes on the staff structure of courts and prosecution services, GRECO notes the statistics regarding retirement practices among judges and prosecutors eligible to do so, which contains figures of judges and prosecutors who have effectively retired in previous years, and their proportion to a total number of judges and prosecutors who were entitled

which case the amount of the pension is reduced by 1% from the calculation basis stipulated in para. (1) for each year missing from full seniority in these offices.

¹² Art. 16

(3) The period of the professional training courses of the auditors of justice is 4 years. After the first year of the courses, the auditors will follow internships for periods of six months at: courts, prosecutors' offices, prisons and law firms. In the last year of internship, trainees will also follow internships in other institutions relevant for professional training. The institutions where the internships will take place and their duration are set by the Plenum of the Superior Council of Magistracy, at the proposal of the National Institute of Magistracy, for each cycle of education. The internships will be organized on the basis of collaboration protocols between the National Institute of Magistracy and institutions relevant for professional training.

to retirement pension. However, in GRECO's view, 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. Indeed, as the authorities indicated, the entry into force of this provision has been postponed by the GEO no. 92/2018 until 1 January 2020. It would appear that no further measures are envisaged at this point to avoid and manage possible large-scale retirement of judges and prosecutors, once the amendment enters into force on 1 January 2020. Consequently, some preliminary steps have been taken to address this part of the recommendation, but more is required in this respect.

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.

23. GRECO concludes that this recommendation has not been implemented.

- *The new special prosecutor's section for the investigation of offences in the judiciary*

24. In the Ad hoc Report, *GRECO recommended that the creation of the new special prosecutor's section for the investigation of offences in the judiciary be abandoned* (recommendation ii).

25. GRECO recalls that it assessed the creation of the prosecutor's section for the investigation of offences in the judiciary as one of the most controversial amendments; it was seen as an anomaly in the existing institutional setting, which could lead to conflicts of jurisdiction and could be misused and subject to undue interference in the criminal justice process.

26. The Romanian authorities refer to Constitutional Court Decision no. 33/23.01.2018, whereby the Court stated that the setting-up of the Section for the Investigation of Offences in the Judiciary within the Prosecutor's Office attached to the High Court of Cassation and Justice was in conformity with the Constitution. According to the Court, the aim of the legislator was to establish a specialised structure with a specific investigative scope: the Section for the Investigation of Offences in the Judiciary constituted a legal guarantee of the principle of independence of the judiciary, especially with regard to the independence of judges. The Court argued that this new Section would provide adequate protection of judges and prosecutors against arbitrary complaints and ensure a unitary practice regarding the criminal prosecution.

27. Further, the authorities report that GEO no. 90/2018 entered into force on 10 October 2018, containing measures for the operationalisation of the Section for the Investigation of Offences in the Judiciary. This GEO also set out the selection procedure of prosecutors to be employed in the Section, which should be carried out within five calendar days from the date of the vacancy opening. A contest commission, tasked with the selection, should verify whether the conditions stipulated by the law are met and carry out interviews with the candidates, which should be broadcast live, with audio/video recordings published on the SCM's web page. The selected candidates are then to be appointed by the President of the SCM. The Chief prosecutor of the Section and the Deputy Chief prosecutor are also to be appointed by the President of the SCM.

28. The authorities also inform GRECO that, on 23 October 2018, the Section for the Investigation of Offences in the Judiciary was effectively set up and started functioning. In addition, GEO no. 12/2019 of 5 March 2019 introduced a new Article 88¹⁰ in Law no. 304/2004 on the organisation of the judiciary. This Article envisages secondment of the judiciary police officers to the Section for the Investigation of Offences in the Judiciary, upon request of the Chief Prosecutor of this Section, with the decision of the Minister of the

Interior. The duration of such secondments may be up to three years, renewable for the same period. In addition, GEO no. 7/2019 of 20 February 2019 amended Article 88⁽¹⁾ of Law no. 304/2004 on the Organisation of the Judiciary, by introducing the following new paragraph: "(6) Whenever the Criminal Procedure Code or other special laws refer to the "hierarchically superior prosecutor" in the case of offenses under the jurisdiction of the Section for the Investigation of Criminal Offences in the Judiciary, it refers to the Chief Prosecutor of the Section, including in the case of solutions delivered prior to putting of the said Section into operation".

29. GRECO takes note of the information provided. The steps taken by the Romanian authorities are in full contradiction to GRECO's recommendation, which is a deeply worrying development. The concerns expressed by GRECO in the Ad hoc Report over the negative consequences of setting up such a specialised prosecutorial structure and the genuine reasons behind this decision¹³ remain even more relevant against the background of the continued pressure in respect of the National Anti-Corruption Directorate (DNA), the dismissal of the Chief Prosecutor of the DNA,¹⁴ and the increasing influence of the on-going controversies in Romania on the judicial and prosecutorial appointments.¹⁵ In this respect, GRECO notes that the recent amendment by GEO no. 7/2019 of Law no. 304/2004 as regards the hierarchical position of the Chief Prosecutor of the Section for the Investigation of Criminal Offences in the Judiciary (see paragraph 28) allows revocation of appeals lodged by other prosecutorial services, including by the Prosecutor General, to higher instance courts for instance in corruption cases, and places this Section outside the hierarchical structure of the Romanian prosecution.¹⁶ GRECO also refers to the observations of the Venice Commission in its latest Opinion on the amendments to justice laws, which states that "existing fears that the new structure would serve as an (additional) instrument to intimidate and put pressure on judges and prosecutors - especially if coupled with other new measures envisaged in their respect, such as the new provisions on magistrates' material liability - may be seen as legitimate and should not be ignored." Further, GRECO notes that the number of prosecutors currently employed in this section, as well as the number of judicial police officers seconded therein, is manifestly inadequate to the amount of cases the Section has been tasked to investigate. GRECO alerts the authorities to the fact that the secondment of police officers (by the Ministry of the Interior) to the Section for the Investigation of Offences in the Judiciary inevitably leads in practice to situations where judicial police officers would be investigating cases against prosecutors and judges, as the activities of this Section are targeted at these two professional groups, instead of specific types of crime. Such a development may represent an additional risk for the functional independence of the judiciary. GRECO also notes that the setting-up of this new section received a negative assessment¹⁷ from the European Commission in its latest CVM Report on Romania.

¹³ According to the Ad hoc Report of GRECO, there were no particular data or assessments demonstrating the existence of structural problems in the Judiciary, which would warrant such an initiative; there was a risk of possible conflicts of jurisdiction with the existing specialised offices (DNA, DIICOT, military prosecutor's offices); GRECO's interlocutors expressed fears that this section could easily be misused to remove cases handled by the specialised prosecution offices, or interfere in sensitive high-profile cases, if complaints against a magistrate were lodged incidentally in those cases, as they would automatically fall under the competence of the new section.

¹⁴ Initially, the President of Romania rejected the proposed dismissal, in line with the negative opinion of the SCM. The refusal was challenged by the Minister of Justice before the Constitutional Court. In its decision of 30 May 2018, the Constitutional Court stated that the President had no refusal power in the revocation process. The Court explained, in particular, that the President's power in the dismissal procedure was limited to verifying the legality of the procedure and did not include a power for the President to analyse, on the merits, the dismissal proposal and its opportunity. This decision reinforced the trend of increased power for the Minister. Following this ruling, the President was required to sign the dismissal decision in July 2018.

¹⁵ GRECO notes the appointment, on 8 May 2019, of the now former Head of the newly created Special Section for the Investigation of Offences in the Judiciary, as judge of the Constitutional Court, upon nomination by the ruling Social Democratic Party.

¹⁶ As confirmed by the judgment no. 2862/1/2018 of the High Court of Cassation and Justice, published on 12 June 2019.

¹⁷ In particular, the Commission took the view that "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. In addition, as a generalist department dealing with all crimes by magistrates, it will also lack expertise in terms

30. In light of the above, it follows that this recommendation has been manifestly disregarded. GRECO is gravely concerned by the consequences these developments are having on the independence of the judiciary, as well as on the fight against corruption in Romania, and insists that the prosecutorial Section for Investigation of Criminal Offences in the Judiciary be abolished.

31. GRECO concludes that this recommendation has not been implemented.

- *Risks of weakening of the prosecutors' status, 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).*

33. GRECO recalls that this recommendation was adopted in view of the fact that the intended changes for the position of the prosecutorial bodies vis-à-vis the executive (Minister of Justice) would have a weakening effect on the independence of prosecutors and constitute a regression of legal guarantees of such independence, limiting it to the settlement of solutions only. Furthermore, taken in conjunction with broadening the possibilities for hierarchically superior prosecutors to invalidate decisions taken by prosecutors, not only if unlawful but also if ungrounded, such amendments risked reducing the operational independence of prosecutors even further.

34. The Romanian authorities state that the amendments to Law no. 303 were carried out with the purpose of bringing it in line with the provisions of the Romanian Constitution, which differentiates the degree of independence of judges from that of prosecutors. According to Article 124, paragraph (3) of the Constitution, "*judges are independent and subject only to the law*", while Article 132, paragraph (1) states that "*the prosecutors shall carry out their activity according to the principle of legality, impartiality and hierarchical control, under the authority of the Minister of Justice*". In addition, the authorities refer to the position of the Venice Commission, suggesting that "*the independence or autonomy of the prosecutor's office is not as categorical in nature as that of the courts. Even where the prosecutor's office as an institution is independent there may be a hierarchical control of the decisions and activities of prosecutors other than the prosecutor general*".¹⁸ As a result of the adopted amendments to Law no. 303/2004 on the statute of judges and prosecutors, the new wording relating to prosecutorial independence is as follows:

of investigating specific corruption crimes, and the impact would be accentuated if investigations of all individuals linked to a case involving a magistrate were also removed from the jurisdiction of the DNA."

¹⁸ Report on European standards as regards the independence of the judicial system: part ii – the prosecution service, adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010), page 7

4. In article 3, after paragraph (1), paragraph (1¹) and (1²) shall be inserted:

(1¹) Prosecutors are independent in the settlement of the solutions, under the conditions stipulated by the Law no. 304/2004, regarding the judicial organization, republished, as subsequently amended and supplemented.

(1²) Prosecutors appointed by the President of Romania shall enjoy stability.

35. The authorities also report amendments to the grounds which may lead to solutions adopted by the prosecutor being invalidated by the hierarchically superior prosecutor. According to the authorities, the reason for these amendments is the need to align these provisions with Article 304 of the Criminal Procedure Code, in particular the possibility to invalidate such solutions not only when they appear unlawful, but also if the senior prosecutor considers them ungrounded. As a result of the amendments to Law no. 304/2004 on the judicial organisation, the following wording has been adopted:

Article 64 para. (2), (3) and (5):

"(2) In the solutions reached, the prosecutor shall be independent, pursuant to law. The prosecutor may appeal against the intervention in the prosecution or decision-making process of the hierarchically superior prosecutor, regardless its nature, at the Section for Prosecutors of the Superior Council of Magistracy, under the procedure for the verification of judges' and prosecutors' conduct.

(3) The solutions adopted by the prosecutor may be invalidated in a reasoned manner by the hierarchically superior prosecutor, when they are appreciated as unlawful or ungrounded.

[...]

(5) The prosecutor may appeal against the measure ordered pursuant to paragraph (4) by the hierarchically superior prosecutor with the Section for Prosecutors of the Superior Council of Magistracy, under the procedure for the verification of prosecutors' conduct."

36. The authorities refer to statistical data from the President of the SCM, suggesting that these amendments would not have a negative effect on the operational independence of prosecutors, as other provisions relating to this issue, in particular Articles 64 and 67 of Law no. 304/2004, maintain references to the independence of prosecutors regarding the solutions reached, and provide prosecutors with an opportunity to appeal to the Section for Prosecutors of the SCM against interference by hierarchically superior prosecutors.

37. GRECO takes note of the information provided by the authorities. It notes that in the course of the legislative process a significant proportion of the proposed amendments were challenged before the Constitutional Court, with a number of them being declared unconstitutional. Nonetheless, the adopted amendments still contain provisions weakening the previously existing level of operational independence of prosecutors. Regarding the first part of this recommendation, GRECO notes that the previous wording of Article 3, paragraph (1) of the Law no. 303/2004 expressly stated that prosecutors enjoy stability and are independent, according to the law. The amended version of the Law no. 303/2004 reduces the prosecutorial independence to the settlement of solutions. In this respect, GRECO refers to the observations of the Venice Commission, reflected in its latest Opinion on the proposed amendments to the three justice laws.¹⁹ In particular, the Venice Commission pointed out that while the amendment of the new Article 3 (1) of Law no. 303/2004 reflected the text of the current Constitution, it indicated a general tendency to reduce the independence of prosecutors, contrary to the Venice Commission's recommendations to Romania. In addition, the authorities' reasoning that the amendments concerning the independence of prosecutors were enacted *inter alia* for a closer conformity with the Venice Commission's position on this issue was considered by the Venice Commission as a misinterpretation of its texts.

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

¹⁹ See the Opinion of the European Commission for Democracy through Law on amendments to Law No. 303/2004 on the statute of judges and prosecutors, Law No. 304/2004 on judicial organisation and Law No. 317/2004 on the Superior Council of Magistracy, accessible via the following link:
[https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2018\)017-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2018)017-e)

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."*

39. Even though the authorities state that the amendments do not aim at limiting the independence of prosecutors, the amended provisions of Law no. 303/2004 effectively reduce the extent of legal guarantees of prosecutors' independence, compared to those provided by the previous wording of this Law. In GRECO's opinion, the enacted amendments and the recent jurisprudence of the Constitutional Court,²⁰ seen in a broader context of the increasing power of the executive branch as regards the appointments and dismissals of prosecutors and the reduced role of the President of Romania, to the detriment of checks and balances, constitute a potential threat to the operational independence of prosecutors and may hinder the effective fight against corruption in Romania.

40. GRECO concludes that this recommendation has not been implemented.

- *Specific issues concerning the rights and obligations of judges and prosecutors, including incompatibilities*

41. In the Ad hoc Report, *GRECO recommended avoiding the creation of new avenues for conflicts of interest and incompatibilities, particularly in connection with political activities and government functions* (recommendation iv).

42. GRECO recalls that this recommendation was adopted in response to draft amendments allowing judges and prosecutors to take up duties in government without resignation from their position, which raises important concerns of incompatibility and conflicts of interest.

43. The Romanian authorities state that the provisions potentially generating incompatibilities and conflicts of interest for judges and prosecutors have been removed after having been declared unconstitutional by the Constitutional Court. The revised wording of Law no. 303/2004 on the Statute of Judges and Prosecutors, now in force, states that offices of judges and prosecutors are incompatible with any other public or private offices, except for the higher education didactic functions.

44. GRECO is satisfied with the amended legislation in this respect and concludes that this recommendation has been dealt with in a satisfactory manner.

45. In the Ad hoc Report, *GRECO recommended that the various amendments affecting the rights and obligations and the liability of judges and prosecutors for judicial errors be reviewed so as to ensure sufficient clarity and predictability of the rules concerned, and to avoid that they become a threat to the independence of the judiciary* (recommendation v).

46. GRECO recalls that this recommendation addressed concerns over the proposed amendments, whereby the Ministry of Public Finance would have the obligation to recover

²⁰ The decision no. 358/2018 of the Constitutional Court, adopted on 30 May 2018

from the judge or prosecutor concerned the amounts paid by the state in compensation for “judicial error”, caused by acting in “bad faith” or with “serious negligence”. GRECO was of the view that this could negatively impact the effectiveness of anti-corruption efforts because of its excessively intimidating effect on judges and prosecutors and their independence.

47. The Romanian authorities report that the amendments have been reconsidered to reflect the decisions of the Romanian Constitutional Court (Decision no. 45/30.01.2018 and Decision no. 252/19.04.2018) and that the new regulation concerning the liability of judges and prosecutors for judicial errors has been adopted. The authorities also refer to Article 52, paragraph 3 of the Romanian Constitution, which states that *“The liability of the State is established under the law and does not remove the liability of the magistrates who have exercised their duties in bad faith or with serious negligence.”* Thus, Article 96 of Law no. 303/2004 on the statute of judges and prosecutors reads as follows:²¹

Article 96

“Art. 96 - (1) The State shall be material liable for the damage caused by judicial errors.

(2) The liability of the state is established under the law and does not remove the liability of judges and prosecutors who, even if they are no longer in office, have exercised their function in bad faith or with serious negligence, as defined in art. 99¹.

(3) There is a judicial error when:

a) in the course of the trial, it was ordered to carry out procedural acts with the obvious violation of the substantive and procedural law provisions, which seriously violated the rights, freedoms and legitimate interests of the person, causing an injury which could not be remedied by an ordinary or extraordinary remedy;

(b) when a final decision is pronounced manifestly contrary to the law or factual situation resulting from the evidence administered, which seriously affected the rights, freedoms and legitimate interests of the person, an injury that could not be remedied by an ordinary or extraordinary remedy.

(4) Specific cases where there is a judicial error may be regulated by the Civil Procedure Code and by the Criminal Procedure Code, as well as by other special laws.

(5) In order to be compensated for the damage, the injured person can only bring an action against the state represented by the Ministry of Public Finance. The jurisdiction for solving the civil action shall lie with the tribunal in whose territory the plaintiff is domiciled.

(6) The payment by the state of the sums due as compensation shall be made within a maximum of one year from the date of the communication of the final court decision.

(7) Within two months from the communication of the final court decision pronounced in the action provided in paragraph (6), the Ministry of Public Finance shall notify the Judicial Inspection to verify whether the judicial error was caused by the judge or prosecutor as a result of the performance of the office in bad faith or with serious negligence, according to the procedure provided by art. 74¹ of Law no. 317/2004, republished, as subsequently amended.

(8) The State, through the Ministry of Public Finance, shall exercise the action in regress against the judge or the prosecutor if, following the consultative report of the Judicial Inspection stipulated in para. (7) and its own assessment, considers that the judicial error was caused as a result of the exercise of office in bad faith or with serious negligence by the judge or prosecutor. The deadline for exercising the action in regress is 6 months from the date of the communication of the Judicial Inspection report.

(9) The jurisdiction to solve the action in regress shall, in the first instance, rest with the civil section of the court of appeal from the defendant's domicile. If the judge or prosecutor against whom the action in regress is taken exercises his powers in this court or in the prosecutor's office attached to it, the action in regress shall be solved by a close court of appeal, at the choice of the plaintiff.

(10) Against the decision pronounced in accordance with para. (9) the appeal may be exercised to the appropriate section of the High Court of Cassation and Justice.

(11) The Superior Council of Magistracy shall establish, within 6 months from the entry into force of this law, conditions, deadlines and procedures for compulsory professional insurance of judges and prosecutors. The insurance shall be fully covered by the judge or prosecutor, and its absence shall not delay, diminish or remove the civil liability of the judge or prosecutor for the judicial error caused by the performance of the office in bad faith or with serious negligence.”

48. Thus, the liability of the state does not absolve judges and prosecutors from being liable, even if they are no longer in office, for having exercised their function in bad faith or with serious negligence, as defined in Article 99¹ of Law no. 303/2004 on the statute of judges and prosecutors. Article 99¹ reads as follows:²²

²¹ Unofficial translation provided by the Romanian authorities.

²² Unofficial translation provided by the Romanian authorities.

Article 99¹

“(1) There is bad faith when the judge or prosecutor knowingly violates the rules of material or procedural law, pursuing or accepting the injury of a person.

(2) There is serious negligence when the judge or prosecutor disregards by fault, seriously, undoubtedly and inexcusably, the rules of material or procedural law.”

49. GRECO notes that Article 96, paragraphs 7 and 8 expressly oblige the Ministry of Public Finance to establish whether the judicial error was caused as a result of bad faith or serious negligence, and if the latter is the case, to take action in regress against the judge or the prosecutor concerned. Persons wishing to claim compensation for damages resulting from judicial errors may do so by bringing action against the state, represented by the Ministry of Public Finance. In its action against the judge or the prosecutor, the Ministry should request the Judicial Inspection, within two months from the final court decision, to verify whether the judicial error was caused as a result of bad faith or serious negligence. The procedure for such verification is set out in Article 74¹ of the Law no. 317/2004 on the Superior Council of Magistracy, which reads as follows:

Article 74¹

“(1) At the referral of the Ministry of Public Finance, in the cases and deadlines provided in article 96 of Law no. 303/2004, republished, as subsequently amended and supplemented, the Judicial Inspection carries out verifications in order to assess whether the judicial error caused by the judge or prosecutor was due to the exercise of his /her office in bad faith or with serious negligence.

(2) The verification provided in paragraph (1) shall be completed within 30 days of the referral. The Chief Inspector may order the extension of the deadline by up to 30 days if there are good reasons to justify this measure. The maximum deadline of verifications cannot exceed 120 days.

(3) The verification is carried out by a commission formed, according to the position of the verified person, by 3 judges, judicial inspectors or 3 prosecutors, judicial inspectors. If, in the same case, are verified judges and prosecutors, two commissions will be set up to verify the facts distinctly according to the position of the verified persons.

(4) During the verifications, the hearing of the judge and prosecutor concerned is mandatory. The refusal of the verified judge or prosecutor to make statements or to participate at hearings shall be recorded by minutes and shall not prevent the completion of the verifications. The judge or prosecutor concerned has the right to know all acts of the verification procedure and to request evidence in defense. Inspectors can hear any other persons involved in the case in which verifications are made.

(5) The verifications shall be finalized by a report in which, based on the entire administered evidence, the Judicial Inspection appreciates whether the judicial error was committed by the judge or prosecutor in bad faith or with serious negligence.

(6) The verification provided in paragraph (1) shall be carried out also in the situation when the verified persons do not occupy anymore the position of judge or prosecutor.

(7) The report shall be communicated to the Ministry of Public Finance and to the judge or prosecutor concerned.

(8) The report provided in paragraph (5) is subject to confirmation by the Chief Inspector. The Chief Inspector may order in a reasoned manner, once, the completion of the verifications. The completion shall be made by the Commission within no more than 30 days from the date on which it was ordered by the Chief Inspector.”

50. GRECO is of the opinion that the system of personal liability upon judges and prosecutors relating to the exercise of their functions is, in itself, questionable as it may have a chilling effect on their independence from the executive, e.g. it could be used as a means for undue influence over the judiciary, if it is not accompanied by sufficient safeguards. Judicial errors should preferably be dealt with by appeal before a higher instance, or as a disciplinary matter to be handled within the judiciary itself, depending on the character of the error. This goes hand in hand with GRECO's position that members of the judiciary may even enjoy "functional immunity", as reflected in several reports. However, Romania is one of few member states where the law provides for far reaching personal liability upon judges and prosecutors for errors during their function, even after retirement. In such a situation, there must be clear safeguards in place, as has been stated by several other Council of Europe bodies (Venice Commission, CCJE and CCPE).²³

²³ In particular, see the CCJE Opinion No. 3 (2002) on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, accessible via the following link:

51. GRECO takes note of the information provided by the Romanian authorities. It is concerned that the state's action against judges and prosecutors to establish their material liability for judicial errors and recover compensation sums paid by the state remains mandatory.

52. Further, the authorities have not put in place any additional safeguards against the risk of pressure on judges and prosecutors.²⁴ GRECO is also concerned about the exclusion of the SCM from this procedure, and regarding the prominent role given to the Ministry of Public Finance in assessing the existence and causes of a judicial error, which is not in line with the independence of the judiciary. Finally, the introduction of the liability of judges and prosecutors, seen together with the setting up and reinforcing of the prosecution's Section for the Investigation of Offences in the Judiciary, constitutes a potential threat to the independence of judges and prosecutors. Further substantial efforts are therefore required by the Romanian authorities.

53. GRECO concludes that this recommendation has not been implemented.

Developments concerning the National Anti-Corruption Directorate

54. In the Ad hoc Report, *GRECO reiterated its recommendation 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.*

55. GRECO recalls that this recommendation forms part of the Fourth Round Evaluation Report and according to the Interim Compliance Report (GrecoRC4(2019)11) adopted on 21 June, remains not implemented. In particular, the amended Article 54 of Law 303/2004 does not respond to GRECO's concerns regarding the need for objective selection criteria for appointment of senior prosecutors. In addition, the SCM has still not been given a stronger role in the procedure of appointment and revocation of the most senior prosecutors (for detailed analysis of this recommendation, see paragraphs 71-78 of the Interim Compliance Report (GrecoRC4(2019)11).

56. GRECO will continue assessing the implementation of this recommendation in the framework of the on-going compliance procedure under the Fourth Evaluation Round.

[http://wcd.coe.int/ViewDoc.jsp?Ref=CCJE\(2002\)OP3&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3](http://wcd.coe.int/ViewDoc.jsp?Ref=CCJE(2002)OP3&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3)

Recommendation [CM/Rec\(2010\)12](#) of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, accessible via the following link:

https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805afb78

The Venice Commission's Opinion on Amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organization, and Law No. 317/2004 on the Superior Council for Magistracy in Romania, CDL-AD(2018)017, accessible via the following link:

[https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2018\)017-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2018)017-e)

²⁴ In particular, GRECO refers to the Opinion of the European Commission for Democracy through Law CDL-AD(2018)17, whereby the Commission stated that "in order to remove concerns that this new definition could block judges or prosecutors in making decisions, it would, however, be advisable to add a clause in new Article 96 stating explicitly that, in the absence of bad faith and/or gross negligence, magistrates enjoy functional immunity and are not liable for a solution which could be disputed by another court."

IV. CONCLUSIONS

57. The issues raised above regarding the judicial reform must be seen in the wider context of the controversial justice system reform in Romania, which continues to raise serious concerns among national stakeholders, civil society and the international community. GRECO notes that only one of the five specific recommendations made in its Ad hoc Report has been complied with, and that the four remaining recommendations have not been implemented. In addition, the two recommendations reiterated from the Fourth Evaluation Round are still pending in the Fourth Round Compliance Procedure. That said, GRECO welcomes that on 4 June 2019, the Romanian Prime Minister announced the intention to abandon the controversial judicial reforms,²⁵ and encourages the authorities to fully implement GRECO's recommendations without any further delay.

58. GRECO notes the progress achieved with respect to eliminating incompatibilities for judges and prosecutors, i.e. that they cannot perform outside activities, other than higher education and didactic functions. GRECO also acknowledges that some initial measures have been taken by the authorities to address the issue of early retirement of prosecutors and judges and its consequences. That said, for the most part of the concerns, no tangible results have been achieved.

59. GRECO is particularly concerned by the fact that the recommendation to abandon the setting-up of the Section for the Investigation of the Offences in the Judiciary has been completely disregarded. Above all, the new legislation includes several amendments *inter alia* relating to the appointments and dismissals of senior prosecutors, functional independence of prosecutors, personal liability of judges and prosecutors etc., which, taken together, represent serious threats to the independence of the judiciary in Romania.

60. The purpose of the ad hoc procedure under Rule 34 of GRECO's Rules of Procedure which is to shed light and analyse the legislative reform concerning the judiciary in Romania has been achieved and GRECO has stated its position in this respect. In view of the fact that the issues covered under the present report are particularly relevant to the themes examined under its Fourth Evaluation Round, GRECO decides to terminate the current ad hoc procedure and to continue evaluating Romania's compliance with the pending recommendations contained in the Ad hoc Report under the on-going Compliance Procedure of its Fourth Evaluation Round in respect of Romania. Consequently, GRECO invites the Head of Delegation of Romania to submit additional information concerning recommendations i, ii, iii and v by 30 June 2020, together with its next situation report under the Fourth Evaluation Round.

61. Finally, GRECO invites the authorities of Romania to authorise, at their earliest convenience, the publication of this report, to translate it into the national language and to make the translation publicly available.

²⁵ <https://www.politico.eu/article/romanian-pm-viorica-dancila-vows-to-abandon-controversial-judicial-changes-liviu-dragnea-bucharest/>