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FOURTH EVALUATION ROUND

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FOURTH EVALUATION ROUND

Corruption prevention in respect of members of parliament, judges and prosecutors

SECOND *INTERIM* COMPLIANCE REPORT

Including

FOLLOW-UP TO THE AD HOC (RULE 34) REPORT

ROMANIA

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

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I. INTRODUCTION

1. This Second *Interim* Compliance Report assesses the measures taken by the authorities of Romania to implement the recommendations issued in the Fourth Round Evaluation Report on that country (see paragraph 2) dealing with "Corruption prevention in respect of members of parliament, judges and prosecutors".

2. The Fourth Round Evaluation Report on Romania was adopted at GRECO's 70th Plenary Meeting (4 December 2015) and made public on 22 January 2016, following authorisation by Romania (GrecoEval IVRep(2015)4E).

3. The Compliance Report on Romania (GrecoRC4(2017)24) was adopted by GRECO at its 78th meeting (8 December 2017) and made public on 18 January 2018, following authorisation by Romania. The report concluded that only two of the thirteen recommendations contained in the Fourth Round Evaluation Report had been implemented satisfactorily or dealt with in a satisfactory manner and four had been partly implemented. This very low level of compliance was considered "globally unsatisfactory" in the meaning of Rule 31, paragraph 8.3 of GRECO's Rules of Procedure. GRECO therefore decided to apply Rule 32, paragraph 2(i) and requested further information from the delegation of Romania.

4. The *Interim* Compliance Report was adopted by GRECO at its 83rd meeting (21 June 2019) and made public on 9 July 2019, following authorisation by Romania. The level of compliance remained "globally unsatisfactory" and the authorities of Romania were requested to submit further information.

5. In addition, in light of the reforms of 2017 in Romania, which critically affected the criminal justice system (including the status of judges and prosecutors etc.), GRECO decided at its 78th Plenary Meeting (4-8 December 2017) to apply the Rule 34 ad hoc procedure[1] in respect of Romania. As a result, GRECO adopted at its 79th Plenary Meeting (19-23 March 2018) the Rule 34 Ad hoc Report, which assessed issues closely related to the scope of the Fourth Round Evaluation Report. The Follow-up Report to the Ad hoc Report was adopted by GRECO at its 83rd Plenary Meeting (17-21 June 2019) and made public on 9 July 2019, following authorisation by Romania. At that stage, GRECO decided to terminate the ad hoc procedure and to continue evaluating Romania's compliance with the pending recommendations from the Rule 34 Ad hoc Reports under the on-going Fourth Round Compliance Procedure.

6. The authorities of Romania submitted a Situation Report on measures taken to implement the recommendations that, according to the Interim Compliance Report, had been partly or not implemented, as well as the additional recommendations issued in the Rule 34 Ad hoc Report. This information was received on 31 December 2020 and served as a basis for this Second Interim Compliance Report.

7. GRECO had selected Denmark and Turkey to appoint Rapporteurs for the compliance procedure. The Rapporteurs appointed were Mr Anders RECHENDORFF on behalf of Denmark and Mr Furkan USTAOĞLU on behalf of Turkey. They were assisted by GRECO's Secretariat in drawing up the current Second Interim Compliance report.

II. ANALYSIS

8. It is recalled that GRECO, in its Evaluation Report, had addressed thirteen recommendations to Romania. In the Interim Compliance Report, GRECO concluded

[1] Rule 34 of GRECO's Rule s of Procedure provides for an ad hoc procedure that can be triggered in exceptional circumstances, such as when GRECO receives reliable information concerning institutional reforms, legislative initiatives or procedural changes that may result in serious violations of the Council of Europe's anti-corruption standards.

that four (recommendations v, vii, x and xii) had been implemented satisfactorily. Three recommendations (ii, viii and xi) remained partly implemented and six (i, iii, iv, vi, ix and xiii) remained not implemented. To this, the Rule 34 Report added a further five recommendations, of which one (recommendation iv) had been implemented satisfactorily in the Follow-up Report to the Rule 34 Report. The remaining recommendations (i, ii, iii and v) were not implemented and will be referred to below as Rule 34 recommendations i-iii and v. Compliance with the eleven pending recommendations is dealt with below.

Corruption prevention in respect of members of parliament

Recommendations i, ii, iii, iv, vi and ix

9. *GRECO recommended:*

- *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 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 (recommendation i);*

- *i) developing a code of conduct for the members of parliament and ii) ensuring there is a mechanism to enforce* [its rules] *when it is necessary (recommendation ii);*

- *that measures be taken ii) to clarify the implications for members of parliament of the current provisions on conflicts of interest independently of whether such a conflict might also be revealed by declarations of assets and interests and ii) to extend the definition beyond the personal financial interests and iii) to introduce a requirement of ad hoc disclosure when a conflict between specific private interests of individual MPs may emerge in relation to a matter under consideration in parliamentary proceedings – in the plenary or its committees – or in other work related to their mandate (recommendation iii);*

- *establishing a robust set of restrictions concerning gifts, hospitality, favours and other benefits for parliamentarians, and ensuring that the future system is properly understood and enforceable. (recommendation iv);*

- *the introduction of rules on how members of Parliament engage with lobbyists and other third parties who seek to influence the legislative process (recommendation vi);*

- *that the parliamentary authorities establish for their members i) a system of counselling through which parliamentarians can seek advice on integrity matters and ii) provide dedicated and regular training on the implications of the existing and yet-to-be adopted rules for the preservation of the integrity of parliamentarians, including the future Code of conduct (recommendation ix).*

10. GRECO recalls that recommendation ii had been partly implemented and recommendations i, iii, iv, vi, ix not implemented in the Interim Compliance Report. At the stage of the Interim Compliance report, information provided on all of the aforementioned recommendations was not new or was insufficient to demonstrate

tangible improvements. With respect to recommendation ii, in the Compliance Report, GRECO had welcomed the adoption of the code of conduct for MPs and concluded that part (i) of that recommendation had been implemented satisfactorily. As for part (ii) of the recommendation, various inconsistencies in the code had to be dealt with to provide for robust compliance.

11. The authorities now indicate that no updated information has been provided by Parliament, despite several reminders by the Ministry of Justice. The Ministry sent letters to both chambers of the Parliament in December 2019, April 2020 (together with a list of proposals and good practices reflected in other GRECO reports) and November 2020. The new Parliament was sworn in on 21 December 2020 and is expected to deal with all pending recommendations.

12. GRECO notes with concern that no tangible improvements have been reported since the adoption of the Interim Compliance Report. It urges the new Parliament to take appropriate measures necessary to comply with the recommendations. GRECO's previous assessment on all pending recommendations is maintained.

13. GRECO concludes that recommendation ii remains partly implemented and recommendations i, iii, iv, vi and ix remain not implemented.

Recommendation viii.

14. *GRECO recommended that the system of immunities of serving parliamentarians, including those who are also members or former members of government, be reviewed and improved, including by providing for clear and objective criteria for decisions on the lifting of immunities and by removing the necessity for prosecutorial bodies to submit the whole file beforehand.*

15. GRECO recalls that this recommendation had been partly implemented in the Interim Compliance Report. Although the Regulation of the Chamber of Deputies had been amended to include criteria and a procedure for removing immunity for MPs, including those who are also members of government, the reform did not extend to the Senate. Moreover, the practice of prosecutorial bodies submitting the whole file beforehand had not been eliminated[2].

16. The authorities recall that, in June 2019, the Vice President of the Chamber of Deputies sent a letter to the Prosecutor General and the Minister of Justice confirming that there is no legal obligation for prosecutors to submit the whole case to the Chamber of Deputies or the Senate when prosecuting a minister or a former minister who is also a member of Parliament or when requesting one of the Chambers to approve the arrest, detention or search of an MP.

17. GRECO notes that an informal requirement for prosecutorial bodies to submit the whole file when prosecuting a minister or a former minister who is also a member of Parliament has apparently been lifted by a letter. However, it remains unclear whether this informal practice is still maintained in respect of MPs who are *not* current or former members of government in situations where prosecution authorities seek their arrest, search or detention. GRECO also recalls that clear and objective criteria for decisions on the lifting of immunity are to be developed for senators, to mirror the rules already in place in the Chamber of Deputies.

18. GRECO concludes that recommendation viii remains partly implemented.

[2] The authorities recall that there is no requirement to submit the whole file but doing so is still perceived as increasing the chances of a favourable decision (cf. GRECO's Compliance and Interim Compliance Reports on Romania).

Corruption prevention in respect of judges and prosecutors

Recommendation xi.

19. *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.*

20. GRECO recalls that this recommendation had been partly implemented in the Interim Compliance Report. It had welcomed the adoption by the Supreme Council of Magistracy (SCM) of the Integrity Plan for the Judiciary 2016-2020, which was viewed as evidence of the SCM's enhanced analytical and advisory role. For this reason, the first part of the recommendation had been partly implemented. As to the second part of the recommendation, GRECO had taken note of training and awareness raising initiatives for managers at courts and prosecution services. However, how the role and effectiveness of those managers had been enforced remained to be demonstrated. This part of the recommendation had therefore been only partly addressed.

21. The authorities now report on further measures taken under the Integrity Plan for the Judiciary 2016-2020:

- managerial plans have continued to be evaluated by competition commissions, in light of accountability and integrity standards, under the overall supervision of the SCM, the National Institute of Magistracy (NIM) and the National School of Clerks;
- the fulfilment of managerial objectives was examined by the Judicial Inspection via substantive and managerial controls (exercised in 2019 in respect of eleven courts, two prosecutor's offices and one territorial service of the National Anticorruption Directorate). Additionally, heads of courts and prosecution offices carried out 70 checks regarding possible integrity incidents within teams in their courts/offices;
- evidence collected by the SCM in the course of competitive initial recruitment, promotion procedures and competitions for managerial posts. These pointed to the absence of irregularities in the organisation of all such contests;
- the National School of Clerks organised four training events on judicial management for managers at courts and prosecution offices. The NIM organised one training event.

22. Additionally, the authorites state that the following steps have been taken under the Action Plan for the Implementation of the Strategy for the Development of the Judicial System 2015-2020:

- more than a dozen training initiatives on integrity, ethics and professional deontology were held in 2019-2020 under the strategic objective "strengthening integrity within the judiciary by promoting anti-corruption measures and professional ethics standards", targeting judges, prosecutors and auxiliary staff within courts and prosecution offices;
- with a view to identifying and removing blockages in disciplinary procedures, including in cases of corruption within the judiciary, , more than 150 disciplinary decisions of the High Court of Cassation and Justice were published on its website and this issue was thoroughly analysed also in the 2020 series of publications of the High Court of Cassation and Justice, as well as the first issue of the Journal of Jurisprudence on Disciplinary Liability of Judges and Prosecutors, a publication that reflects, annually, the entire jurisprudence of the supreme court in this area;

- the project on the "Management optimisation at the level of the judicial system. The component concerning courts" is underway. Within it, the selection of 165 external experts to serve as assistants to judges in 19 pilot courts is being finalised. A similar project and selection procedure are implemented also in the prosecution service.

23. GRECO takes note of the information provided. With respect to part one of the recommendation, it appreciates the further strengthening of the supervisory powers of the SCM and the Judicial Inspectorate as well as the many awareness raising and other initiatives carried out with a view to strengthening judicial integrity and providing for more uniform and swift disciplinary procedures in the judiciary. This goes in the right direction. This being said, GRECO wishes to stress that more concrete measures to assess integrity risks within courts and prosecutor's offices (as mentioned in par. 114 of the Evaluation report) are required from these bodies, in order to indicate that the justice system has been made more responsive to such risks. In GRECO's view more needs to be done to comply with this recommendation, which, for the time being, remains partly implemented.

24. Concerning the second part of the recommendation, GRECO recalls that the Evaluation Report pointed to the excessively limited role of managers in courts and prosecution offices in respect of misconduct, aside from referring a possible case of infringement to a formal criminal or disciplinary procedure. It does not appear that this situation has been dealt with sufficiently. GRECO concludes that this part of the recommendation also remains only partly complied with.

25. GRECO concludes that recommendation xi remains partly implemented.

Corruption prevention in respect of prosecutors specifically

Recommendation xiii.

26. *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.*

27. GRECO recalls that this recommendation had not been implemented in the Interim Compliance Report. As regards the procedure for the appointment and revocation of the most senior prosecutors, the introduction of live broadcasting of hearings of candidates and their publication on the website of the Ministry of Justice had been noted as a step towards enhanced transparency. However, objective criteria for appointment/revocation had yet to be developed. Giving the SCM a stronger role in this process, as recommended, had not materialised. The Minister of Justice retained a decisive role, contrary to the observations made by GRECO and the Venice Commission[3].

28. The authorities now report that the rules governing the appointment and revocation of the most senior prosecutors (i.e. Article 54 of Law No. 303/2004 on the Status of Judges and Prosecutors) assessed in the Interim Compliance Report remain in force. Pursuant to them, two selection procedures were carried out in December 2019 -

[3] 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.

February 2020, and all related details are available on the Ministry of Justice's website[4].

29. The authorities also state that a new draft Law on the Status of Romanian Magistrates has been developed and subject to public consultation[5] since 30 September 2020. The authorities refer in particular to Articles 145-149 and Article 173 of this draft as relevant to the recommendation in question.

30. The authorities moreover indicate that the Government Programme 2020-2024, adopted in December 2020, foresees, among its short-term objectives, an increased role of the SCM in the procedure for appointment of prosecutors to managerial posts. Although proposals to that effect will still be made by the Minister of Justice, the procedure will have to be objective and transparent and competition results validated through *mandatory* opinions of the SCM's Section for Prosecutors, and the appointments made by the President of Romania. Dismissals from management positions will be based on a similar procedure, which can be initiated by the SCM's Section for Prosecutors.

31. GRECO takes note of the above information. It acknowledges that the draft Law on the Status of Romanian Magistrates (available to GRECO) contemplates a number of improvements to the system of appointment/revocation of the most senior prosecutors, including a more transparent procedure and more objective evaluation criteria. The restriction allowing the President to refuse an appointment only once, criticised by GRECO, is removed. In relation to revocation, the draft expressly stipulates that the President of Romania may refuse them solely on the grounds of legality and is to inform the public of the grounds for the refusal. The related decree handed down by the President may be challenged before the competent administrative court.[6] GRECO welcomes the draft legislation which clearly goes in the right direction. However, it will assess it in detail once adopted by Parliament.

32. However, GRECO notes with concern that giving the SCM an enhanced role in the process does not appear to be foreseen. As before, the SCM's Section for Prosecutors can only issue a non-binding opinion on the proposal of the Minister of Justice. Moreover, the Selection Committee established by the draft is to include only one prosecutor amongst its seven members. GRECO understands that the enhanced powers of the SCM are to be implemented under the new Government Programme 2020-2024 and it regrets that the opportunity of the development of the new legislation is not being seized to that end. GRECO concludes that, at present, the involvement of the Minister of Justice in the appointment/revocation of the most senior prosecutors remains considerable and bears a risk of undue political influence. Pending further substantial progress and bearing in mind that the draft Law on the Status of Romanian Magistrates is still to be submitted to the Parliament, GRECO concludes that the recommendation as a whole remains not implemented.

33. GRECO concludes that recommendation xiii remains not implemented.

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[4] http://www.just.ro/anunt-privind-selectia-procurorilor-in-vederea-efectuarii-propunerilor-de-numire-pentru-ocuparea-functiilor-vacante-de-conducere-respectiv-procuror-general-al-parchetului-de-pe-langa-inalta-curte/ , http://www.just.ro/anunt-al-ministerului-justitiei-cu-privire-la-selectia-procurorilor-in-vederea-efectuarii-propunerilor-de-numire-pentru-ocuparea-unor-functii-de-conducere-vacante/

[5] http://www.just.ro/in-temeiul-dispozitiilor-art-7-din-legea-nr-52-2003-privind-transparenta-decizionala-in-administratia-publica-republicata-ministerul-justitiei-supune-dezbaterii-publice-urmatoarele-proiecte-de-leg/

[6] GRECO notes that this provision responds to the recent jurisprudence of the European Court of Human Rights, in the case of *Kovesi vs. Romania* (request No. 3594 from 5 May 2020): the court decided that there has been a violation of the applicant's right of access to court, as guaranteed by Article 6(1) of the European Convention on Human Rights.

Recommendations issued in the Rule 34 Ad hoc Report of June 2019

Rule 34 Recommendation i.

34. *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 CSM 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.*

35. GRECO recalls that this recommendation had not been implemented in the Follow-up Report to the Ad hoc Report. Although some preliminary analysis had been made by the SCM's President to address part (i) of the recommendation, no measures to avoid and manage possible large-scale retirement of judges and prosecutors following the entry into force of the new retirement rules in January 2020 had been taken. Regarding part (ii) of the recommendation, adequate, objective and clear criteria for the appointment of judges and prosecutors to higher positions had still not been adopted by the SCM.

36. The authorities now report, with respect to part (i) of the recommendation, that the entry into force of the new system for the early retirement of judges and prosecutors introduced by Law No. 242/2018 has been postponed until January 2022[7] to avoid any possible shortage of human resources which could affect the functioning of the courts and prosecution offices. Moreover, the previously mentioned draft Law on the Status of Romanian Magistrates proposes to abolish the early retirement system altogether. The authorities further refer to changes in the duration of professional training of auditors of justice and of internships for trainee judges and prosecutors. Although, under Law No. 242/2018, the duration of training was extended from two to four years, and of internships from one to two years, the duration that had existed prior to 2018 (i.e. two and one years, respectively) was reinstated in 2019[8] in order to give the judiciary and the NIM reasonable time to prepare. Last but not least, the introduction of a panel consisting of three judges for hearing appeals was postponed until January 2023[9], and the new draft Law on the Judicial Organisation, which is undergoing public consultation since September 2020[10], proposes that, as a general rule, appeals be heard as they were prior to 2018, by a panel of two, not three, judges.

37. Concerning part (ii) of the recommendation, the authorities make reference to Decision No. 1348 of 17 September 2019 adopted by the SCM's Section for Judges approving the Regulation on preparing and holding the competition for the promotion of judges. This Regulation applies to promotions to executive posts up to the level of a court of appeal (so-called "on the spot promotion") and promotions in tribunals, specialised tribunals and courts of appeal (so-called "effective promotion"). Both types of promotions can only be made via national competition. The Regulation determines the conditions, the composition of the competition commission and its powers, the stages and content of the contest as well as various procedural requirements.

38. Detailed evaluation criteria apply to various stages of the selection procedure of both "on the spot" and "effective promotion". To be declared admitted, candidates are to obtain a specific number of points/grades. The total score/grade of each candidate

[7] By Government Emergency Ordinance (GEO) No. 92/2018.
[8] By GEO No. 7/2019.
[9] As per the GEO of 30 December 2020.
[10] http://www.just.ro/comunicat-de-presa-privind-continuarea-dezbaterilor-publice-vizand-legile-justitiei/

are to be published on the SCM's and NIM's websites and can be appealed to the SCM's Section for Judges. The final results are to be published and presented to the SCM' Section for Judges for validation.

39. The authorities add that largely similar principles and conditions apply to the promotion of prosecutors to higher posts as per Decision No. 681 of 23 July 2019, adopted by the SCM's Section for Prosecutors approving the Regulation on preparing and holding the competition for the promotion of prosecutors.

40. GRECO takes note of the above information. Regarding part (i) of the recommendation, it recalls that it was prompted by several changes pertaining mostly to the recruitment and retirement of judges and prosecutors in Law 303/2004 on the Status of Judges and Prosecutors, the combined effect of which was expected to have a significant impact on the workforce and the general capacities of courts and prosecutorial bodies especially since no transitional period had been planned. GRECO now notes that all such developments, notably the introduction of the early retirement system for judges and prosecutors, the extension of training/internships for auditors of justice and trainee judges/prosecutors etc. have been postponed. Moreover, the new draft Law on the Status of Romanian Magistrates and the new draft Law on the Judicial Organisation foresee their complete removal from the legislation. Bearing in mind the transitional measures in place and pending the adoption of both draft laws, this part of the recommendation is considered partly implemented.

41. As for part (ii) of the recommendation, GRECO takes note of the two regulations dealing with the promotion of judges and prosecutors to positions up to court of appeal/tribunal/specialised tribunal level, adopted by the SCM Section for Judges and Prosecutors respectively. Some of the criteria these establish seem to respond to the recommendation's concerns. However, in the absence of texts of both regulations, GRECO is not in the position to ascertain whether a degree of subjectivity in the selection and decision process concerning promotions, as referred to in paragraph 31 of the Rule 34 Report, has been eliminated as requested. In light of the foregoing, GRECO concludes that this part of the recommendation has been partly implemented. As for appointments to the most senior prosecutorial posts, these are dealt with under recommendation xiii above.

42. GRECO concludes that this Rule 34 recommendation i has been partly implemented.

Rule 34 Recommendation ii.

43. *GRECO recommended that the creation of the new special prosecutor's section for the investigation of offences in the judiciary be abandoned.*

44. GRECO recalls that this recommendation had not been implemented in the Follow-up Report to the Ad hoc Report. Steps taken by the authorities had been in contradiction with the recommendation as well as the relevant observations of the Venice Commission[11]. Amendments introduced by Government Emergency Ordinance (GEO) No. 7/2019 to Law No. 304/2004 on the Judicial Organisation[12] had placed the new special prosecutor's section for the investigation of offences in the judiciary outside the hierarchical structure of the prosecution service by allowing its Chief to revoke appeals lodged by other prosecutorial services, including the Prosecutor General, to higher instance courts e.g. in corruption cases. GRECO also noted that the number of prosecutors/judicial police officers employed/seconded to this section was manifestly inadequate for the amount of cases under its remit. Moreover, the

[11] Cf. footnote 2.
[12] In Articles 88^1(6) and 88^8 (1) (d).

secondment of judicial police officers (by the Ministry of Interior) to the section to investigate cases against prosecutors and judges created an additional risk for the functional independence of the judiciary.

45. The authorities now report that amendments to Law No. 304/2004 on the Judicial Organisation introduced by GEO No. 7/2019[13] were annulled by the Constitutional Court[14]. Furthermore, the previously mentioned draft Law on the Judicial Organisation proposes to dismantle the Section for the Investigation of Criminal Offences in the Judiciary and provides for transitional measures in respect of the pending cases and procedural acts initiated by it (notably, by subjecting them to the hierarchical control by the Prosecutor General)[15]. The draft also redistributes the offences currently under the Section's jurisdiction to the National Anticorruption Directorate and the Directorate for the Investigation of Organised Crime and Terrorism in the following manner:

> ***Art.158 of draft Law on the judicial organization***
> *(1) From the date of entry into force of this law, the offences provided in Law no. 78/2000 for the prevention, discovery and sanctioning the deeds of corruption, as subsequently amended and supplemented, falls within the jurisdiction of the National Anticorruption Directorate, whether, irrespective of the amount of the material damage or the amount of the sum or property which is the subject of the corruption offence, are committed by the judges of the High Court of Cassation and Justice, by the other judges and prosecutors, including military judges and prosecutors and those who are members of the Superior Council of Magistracy.*
> *(2) From the date of entry into force of this law, the offences provided by art. 11 para. (1) of the Government Emergency Ordinance no. 78/2016 for the organization and functioning of the Directorate for the Investigation of Organized Crime and Terrorism, as well as for the amendment and completion of some normative acts, with subsequent amendments and completions, committed by judges of the High Court of Cassation and Justice, other judges and prosecutors, including military judges and prosecutors and members of the Superior Council of Magistracy, falls within the jurisdiction of the Directorate for the Investigation of Organized Crime and Terrorism.*

46. The draft furthermore regulates e.g. the reallocation of the Section's staff positions within the Prosecutor's Office attached to the High Court of Cassation and Justice, the return of prosecutors currently employed by the Section to their former offices and the termination of secondments to the Section by other categories of staff[16].

47. The authorities additionally state that the Section's dismantlement is also foreseen under the Government Programme 2020-2024, as a short-term objective. Moreover, on 18 February 2021, the Government adopted a Draft law on the abolition of the section, on the initiative of the Ministry of Justice. This draft law contains similar provisions to those of the Draft Law on the Judicial Organisation. On 22 February, it was registered for debates by the Chamber of Deputies (http://cdep.ro/pls/proiecte/upl_pck2015.proiect?cam=2&idp=19177).

48. GRECO notes that the Constitutional Court has ruled that the provisions of Law No. 304/2004, which had placed the Section for the Investigation of Criminal Offences in the Judiciary outside the hierarchical structure of the Romanian prosecution are unconstitutional since they allowed its Chief Prosecutor to revoke appeals lodged with higher instance courts by other prosecutorial services, including by the Prosecutor General, in corruption cases. GRECO notes that this deeply worrying development, criticised in its Follow-up report, has now been reversed. GRECO also welcomes the elaboration of legislative proposals foreseeing the Section's formal dismantlement, as is required by the recommendation. Bearing in mind that one of those drafts was already submitted to Parliament, GRECO accepts that this recommendation has now

[13] This concerned Articles $88^{1}(6)$ and $88^{8}(1)$ of Law No. 304/2004.
[14] Decision No. 547/2020, published in the Official Gazette on 19 August 2020.
[15] Article 156 of the new draft Law on Judicial Organisation.
[16] Article 157 of the new draft law on Judicial Organisation.

been partly complied with. This being said, GRECO looks forward to familiarising itself with the text of the draft so as to ensure its compliance with the recommendation.

49. GRECO concludes that this Rule 34 recommendation ii has been partly implemented.

Rule 34 Recommendation iii.

50. *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.*

51. GRECO recalls that this recommendation had not been implemented in the Follow-up Report to the Ad hoc Report. It also recalls that the 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 prosecutors' independence. With respect to part (i) of the recommendation, GRECO was concerned that amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors had reduced the prosecutorial independence to the settlement of solutions only. Regarding part (ii) of the recommendation, it regretted that amendments to Law No. 304/2004 on the Judicial Organisation provided for hierarchically superior prosecutors to invalidate subordinates' decisions not only if unlawful but also if ungrounded.

52. The authorities now report, in respect to part (i) of the recommendation, that the situation, as described in the Follow-up report to the Ad hoc Report, remains valid and that the amendments to Laws 303/2004 and 304/2004 criticised by GRECO in its previous reports, were necessary as they ensured conformity of both laws with the Constitution and the Criminal Procedure Code.

53. That being said, the authorities point out that the previously mentioned new draft Law on the Status of Romanian Magistrates reinstates the provisions on the independence of prosecutors that existed prior to 2018, namely:

> ***Art. 3 of the draft Law on the Status of Romanian Magistrates***
> *(1) Prosecutors appointed by the President of Romania shall enjoy stability and shall be independent, in accordance with the law. Prosecutors shall act in accordance with the principles of legality, impartiality and hierarchical control, under the authority of the Minister for Justice.*
> *(2) Prosecutors who are granted stability may not be reassigned by transfer, secondment or promotion without their consent. They may be delegated, suspended or removed from office under the conditions provided for by this Law.*

54. Moreover, the new draft Law on the Judicial Organisation provides in Article 68 (2) that "*In the ordered solutions, the prosecutor is independent, under the conditions provided by law. The prosecutor may challenge at the Section for Prosecutors of the Superior Council of Magistracy, within the proceedings of verifying the conduct of judges and prosecutors, the intervention of the hierarchically superior prosecutor, in any form, in conducting and supervising the criminal investigation or in adopting the solution.*"

55. Regarding part (ii) of the recommendation, the authorities refer to the following provisions of the draft Law on the Judicial Organisation:

> ***Art. 68 of the draft Law on the Judicial Organisation***
> *(3)* The solutions adopted by the prosecutor can be invalidated in a reasoned manner by the hierarchically superior prosecutor, when they are considered unlawful.

Art.72 of the draft Law on the Judicial Organisation
(2) *The* prosecutor shall be free to present before court the conclusions that he/she considers well-founded, according to the law, while considering the evidence administered in the case. The prosecutor may complain to the Section for Prosecutors of the Superior Council of Magistracy, within the procedure of verifying the conduct of prosecutors, against the intervention of the hierarchically superior prosecutor aiming at influencing the conclusions in any manner.

56. The authorities report in addition that the impact of the legislative changes on the operational independence of prosecutors was assessed by the SCM and the Prosecutor's Office attached to the High Court of Cassation and Justice. The SCM, in its analysis, reiterated that the Romanian Constitution does not provide for a regime of independence of prosecutors, contrary to what is the case for judges, and that prosecutors enjoy only the stability attached to their public office. Regarding the legal provisions allowing for the invalidation of subordinates' decisions if ungrounded, the SCM took the view that this was not a legislative novelty, but a realignment of the provisions of the Law on the Judicial Organisation with the Criminal Procedure Code. The SCM also invokes two documents of the Venice Commission[17], which acknowledge *inter alia* that there are no common standards requiring more independence of the prosecution system, that "a plurality of models exist" and that the independence of the prosecutor's office is not as categorical in nature as that of courts.

57. The assessment of the Prosecutor's Office attached to the High Court of Cassation and Justice additionally argues that hierarchical controls as established by the current legislation in no way prejudice the independence of prosecutors in criminal proceedings or the legitimate interests of parties or other participants in the case. Such controls are not arbitrary, carried out only when provided for by the Criminal Procedure Code and are subject to verification and confirmation by a court[18]. The judicial practice on the matters in question corroborates the conclusion that the full exercise of such controls is vital for the proper functioning of the prosecution service, bearing in mind that it represents the public interest, defends the rule of law and civil rights and freedoms. Moreover, the analysis of the implementation of the provisions in question does not reveal any problems pointing to prosecutors' operational independence being affected in practice when carrying out their duties.

58. GRECO takes note of the elaboration of amendments to the Law on the Statute of Romanian Magistrates and to the Law on the Judicial Organisation. As opposed to the current legislative framework, which reduces the prosecutorial independence to the settlement of solutions, the draft law on the Status of Romanian Magistrates expressly provides, in addition to the principle of stability, for the principle of independence of prosecutors, which is a welcome development. Likewise, the draft Law on the Judicial Organisation proposes to remove the possibility for the hierarchically superior prosecutor to invalidate the solutions of the prosecutor when ungrounded. These draft texts go in the right direction.

59. Bearing in mind that both drafts are still at an early stage of development, GRECO cannot yet conclude that the recommendation has been complied with, even partly. GRECO is also concerned that the assessments of the impact of the currently effective legislation on the operational independence of prosecutors carried out by the SCM and the Prosecution Office attached to the High Court of Cassation and Justice appear to contradict the general thrust of the proposed legislative change and, instead of proposing additional safeguards, as is required by the recommendation, appear to favour the existing system, which is at variance with the recommendation.

[17] Opinion on Romania No. 924/2018 and Study No. 494/2008 (CDL-AD(2010)004).
[18] Articles 341, 335 and 342-348 of the Criminal Procedure Code.

60. GRECO concludes that this Rule 34 recommendation iii remains not implemented.

Rule 34 Recommendation v.

61. *GRECO recommended that 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.*

62. GRECO recalls that this recommendation had not been implemented in the Follow-up Report to the Ad hoc Report. It also recalls that this recommendation addressed concerns over the proposed amendments whereby the Ministry of Public Finance would have the obligation to recover from the judge/prosecutor concerned the amounts paid by the state in compensation for "judicial error", caused by acting in "bad faith" or with "serious negligence". GRECO had noted that the state's action against judges/prosecutors as indicated above remained mandatory and that no additional safeguards had been put in place against the risk of pressure on judges/prosecutors[19]. Moreover, the exclusion of the SCM from this procedure, in contrast to the prominent role given to the Ministry of Public Finance, was not in line with the independence of the judiciary.

63. The authorities now report that the previously mentioned new draft Law on the Status of Romanian Magistrates proposes a series of amendments to the regulation of the liability of judges and prosecutors for judicial errors and related procedures.

64. GRECO is pleased that the new draft Law on the Status of Romanian Magistrates (available to GRECO) foresees important improvements to the regime of liability of judges and prosecutors for judicial errors. The concepts of "bad faith" and "serious negligence" are refined to allow for greater objectivity and predictability (Article 273). It is clearly foreseen that, in the absence of "bad faith" or "serious negligence", judges/prosecutors may not be held liable for their rulings that are subject to legal remedies (Article 269(3)). The Ministry of Public Finance is to notify the SCM Plenum whenever an assessment is needed of whether the judicial error was caused by "bad faith" or "serious negligence" on the part of a judge/prosecutor. Checks are to be carried out, as before, by the Judicial Inspection, but at the request of the SCM Plenum, not the Ministry of Public Finance. The Ministry may no longer carry out its own evaluation, parallel to the drafting of the Inspection report, being obliged to exercise an action in regress only if the SCM Plenum, after analysing the Inspection report, decides that the judicial error is indeed the consequence of "bad faith" or "serious negligence" on the part of a judge/prosecutor. "

65. GRECO, while noting that the right of the state to recuperate damage from individual judges and prosecutors in itself is a questionable institution, notes that, overall, the draft law seems to go in the direction of the recommendation to ensure clarity and predictability of the rules on the liability of judges and prosecutors for judicial errors, to reduce the involvement of the Ministry of Public Finance as an institution outside the judiciary, and to grant a central role in this process to the SCM as guarantor of the independence of the judiciary. However, given that the draft law is still at an early stage of development and has not been submitted to Parliament, GRECO can only conclude that this recommendation remains not implemented.

66. GRECO concludes that this Rule 34 recommendation v remains not implemented.

[19] In this connection, GRECO also referred to the Opinion of the Venice Commission CLD-AD (2018)21.

III. CONCLUSIONS

67. **In view of the foregoing, GRECO concludes that Romania has implemented satisfactorily or dealt with in a satisfactory manner four of thirteen recommendations contained in the Fourth Round Evaluation Report, and one of the five recommendations of the Follow-up Report to the Ad hoc Report (Rule 34 Report).**

68. More specifically, recommendations v, vii, x, xii, as well as Rule 34 recommendation iv, have been implemented satisfactorily or dealt with in a satisfactory manner. Recommendations ii, viii, xi, as well as Rule 34 recommendations i and ii remain partly implemented, and recommendations i, iii, iv, vi, ix, xiii, as well as Rule 34 recommendations iii and v remain not implemented.

69. With respect to members of parliament, since the Interim Compliance Report, the level of implementation has only seen a very minor improvement relating to the lifting of an informal requirement for prosecutorial bodies to submit the whole file when prosecuting a minister or a former minister who is also a member of Parliament. Otherwise, the level of implementation remains unchanged, with only two of nine recommendations implemented. Given the importance of these recommendations for the prevention of corruption among parliamentarians, more determined action is required to be taken to address these remaining recommendations.

70. With respect to both judges and prosecutors, following the heavily criticised reforms of the criminal justice system (2017-2018) in Romania and GRECO's decision to apply its ad-hoc procedure, GRECO now acknowledges that some measures have been taken and more promising initiatives are underway which have the potential to rectify many of the pending shortcomings. A new draft Law on the Status of Romanian Magistrates has been elaborated and currently undergoes public consultation. It envisages a more transparent procedure and more objective evaluation criteria for the appointment of prosecutors to the most senior posts, etc. This draft law also deals with judges' liability. On the negative side, a strengthened role for the SCM in this process is still to be seen, while the involvement of the Minister of Justice in the appointment/revocation of the most senior prosecutors remains considerable to the detriment of judicial independence. Likewise, whether objective and clear criteria for the promotion of judges and prosecutors to higher positions have been established, taking into account their actual merit and qualifications, remains to be clarified.

71. Concerning the general capacities of courts and prosecutorial bodies, the postponement of the early retirement system for judges and prosecutors is a positive step. Its removal is also foreseen in the draft Law on the Judicial Organisation. GRECO also welcomes the further strengthening of the supervisory powers of the Supreme Council of Magistracy (SCM) and of the Judicial Inspectorate and the carrying out of many training and awareness-raising initiatives aimed at reinforcing managerial competences in courts and prosecution offices, strengthening judicial integrity and providing for more uniform and swift disciplinary procedures in the judiciary.

72. Overall, the authorities seem to be determined to reverse or abandon many of the controversial judicial reforms, which is an evolution very much welcomed and supported by GRECO. Yet, given that the two important pieces of draft legislation are at an early stage of development, and bearing in mind that the bulk of GRECO's recommendations in respect of MPs have not been addressed, GRECO can only underline that the level of compliance remains very low. Only five of a total of 18 recommendations have been implemented satisfactorily or dealt with in a satisfactory manner.

73. GRECO therefore concludes that the current level of compliance with the recommendations remains "globally unsatisfactory" within the meaning of Rule 31 Revised, paragraph 8.3 of the Rules of Procedure. In application of paragraph 2.i) of Rule 32 of the Rules of Procedure, GRECO asks the head of the Romanian delegation to provide a report on measures taken to implement the pending recommendations (namely recommendations i-iv, vi, viii ix, xi and xiii of the Fourth Round Evaluation Report and recommendations i-iii and v of the Rule 34 Report) by 31 March 2022 at the latest.

74. In addition, in accordance with Rule 32, paragraph 2, sub-paragraph (ii.b), GRECO invites the President of the Statutory Committee to send a letter to the Permanent Representative of Romania to the Council of Europe, drawing attention to the non-compliance with the relevant recommendations.

75. Finally, GRECO invites the authorities of Romania to authorise, as soon as possible, the publication of this report, to translate it into the national language and to make the translation public.