



Strasbourg, 11 June 2021

CDL(2021)027*

Opinion No. 1036 / 2021

Or. Engl.
(tg/ew)

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

ROMANIA

DRAFT OPINION

**ON THE DRAFT LAW FOR DISMANTLING
THE SECTION FOR THE INVESTIGATION OF OFFENCES
COMMITTED WITHIN THE JUDICIARY**

on the basis of comments by

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

**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.
This document will not be distributed at the meeting. Please bring this copy.*

Contents

I.	Introduction	3
II.	Scope of the opinion.....	3
III.	Establishment of the Section for the Investigation of Offences committed within the Judiciary (SIOJ)	4
A.	Conformity to the Constitution of Romania and EU Law	4
B.	Criticism of the SIOJ.....	5
1)	National level.....	5
2)	Venice Commission opinions.....	6
IV.	Abolition of the SIOJ.....	7
A.	General issues regarding the dismantling of the SIOJ	7
B.	Transitional measures regarding the SIOJ – pending cases and the transfer of staff. 7	
V.	Amendments of the Chamber of Deputies	9
A.	Judges and prosecutors – standards regarding inviolability	10
B.	Amendments by the Chamber of Deputies	11
VI.	Conclusions.....	13

I. Introduction

1. By letter of 29 March 2021, Mr Stelian-Cristian Ion, Minister of Justice of Romania, requested an opinion from the Venice Commission on the *draft Law for dismantling the Section for the Investigation of Offences committed within the Judiciary* (as adopted by the Government) and the amended version of *the draft Law for dismantling the Section for the Investigation of Offences committed within the Judiciary, as well as for the amending and completing some normative acts in the field of justice* (as adopted by the Chamber of Deputies) (CDL-REF(2021)042).

2. Both drafts will hereinafter be referred to as the “draft Law,” unless specific reference is being made to the amendments by the Chamber of Deputies, in which case reference will be made to the “Amendments by the Chamber of Deputies”.

3. Mr Johan Hirschfeldt, Mr Jean-Claude Scholsem, Ms Hanna Suchocka and Mr Kaarlo Tuori acted as rapporteurs for this opinion.

4. Owing to the sanitary situation due to the COVID-19 pandemic, a visit to Bucharest with the rapporteurs was replaced with online meetings organised on 12 and 14 May 2021 with the relevant stakeholders. These included: the Minister of Justice, the High Court of Cassation and Justice, the Superior Council of Magistracy, the National Anti-Corruption Directorate, the Prosecutor General, Parliament (President of the Legal Committee of the Senate and President of the Legal Committee of the Chamber of Deputies), professional associations of judges and prosecutors, representatives of the international community and NGOs.

5. The Venice Commission delegation was informed by the President of the Senate, during the online meetings, that the Senate would wait with the adoption of the draft Law until this opinion was adopted by the Venice Commission at its next Plenary Session on 2-3 July 2021.

6. This opinion was prepared in reliance on the English translation of the above-mentioned provisions. The translation may not accurately reflect the original version on all points, therefore certain issues raised may be due to problems of translation.

7. *This opinion was drafted on the basis of comments by the rapporteurs. Following an exchange of views with ..., the opinion was adopted by the Venice Commission at its ... Plenary Session (...).*

II. Scope of the opinion

8. Dismantling the Section for the Investigation of Offences committed within the Judiciary (hereinafter, the “SIOJ”) has been referred to (in the explanatory memorandum to the draft Law and during the online meetings) as an essential and urgent first step in the current reform of the “Justice Laws” of Romania led by the Ministry of Justice. The aim of this reform is to enhance the quality of the laws and ensure legal certainty and coherence in Romania’s national legal framework with respect to the judiciary.

9. For this reform, the Government has introduced a memorandum on 20 January 2021, setting out a timetable for the adoption of “*essential legal provisions aimed at consolidating the organisation and functioning of the judiciary*”. To that end, the Government proposed two steps, the first of which was to approve the draft Law for dismantling the SIOJ (of 18 February 2021) and the second was to adopt three draft laws, one on the status of judges, another on judicial organisation and the last one on the Superior Council of Magistracy (hereinafter, the “SCM”) (initially scheduled for the end of April 2021, but falling behind schedule according to the information received by the Venice Commission delegation during the online meetings).

10. Within the context of the larger reform of the judiciary envisaged by the Romanian authorities, rather than be asked to provide an opinion with a holistic/global approach, the Venice Commission has been requested to focus specifically on the urgent first step of this reform: the dismantling of the SIOJ. The scope of this opinion is therefore the draft Law in the light of the amendments made to this text by the Chamber of Deputies.

III. Establishment of the Section for the Investigation of Offences committed within the Judiciary (SIOJ)

11. While the establishment of the SIOJ, as such, was neither in contradiction with the Constitution of Romania nor with EU Law, it was nonetheless heavily criticised in Romania and by the Venice Commission.

A. Conformity to the Constitution of Romania and EU Law

12. In December 2017, the Constitutional Court of Romania was seized by the Secretary General of the Senate regarding an *objection of unconstitutionality* against the provisions of the Law amending and supplementing Law no. 304/2004 on judicial organisation. This Law proposed, among other things, the creation of the SIOJ in the Prosecutor's Office attached to the High Court of Cassation and Justice.

13. With respect to the creation of the SIOJ, the Constitutional Court noted in its decision of 2018 that the objective sought was *"to establish a specialised structure with a determined investigative purpose and constitutes a legal guarantee of the principle of the independence of the judiciary, under the aspect of its individual component, the independence of the judge. (...)"*¹ The Constitutional Court, however, also noted *"that the rules on the jurisdiction of the courts competent to hear criminal cases concerning judges and prosecutors remain unchanged (...)"*² Stating also that *"the establishment of special jurisdiction rules regarding a certain category of persons is not an element of novelty in the current criminal procedural framework"* and that it does not infringe the principle of equality of rights under the ECHR (the Court referred to military courts as an example) nor the right to access to justice.³ Hence, the Constitutional Court of Romania did not oppose the creation of the SIOJ as such.

14. On 18 May 2021, the Court of Justice of the European Union rendered a Preliminary Ruling⁴ with respect to six requests brought by Romanian courts in proceedings between legal or natural persons and authorities or bodies, including the question of whether *"national legislation providing for the creation of a specialised section of the Public Prosecutor's Office with exclusive competence to investigate offences committed by judges and prosecutors [i.e. the SIOJ] is compatible with EU law"* (text in square brackets added).

15. The CJEU explained that *"in order to be compatible with EU law, such legislation [creating the SIOJ] must, first, be justified by objective and verifiable requirements relating to the sound administration of justice and, secondly, ensure that that section cannot be used as an instrument of political control over the activity of those judges and prosecutors and that the section exercises its competence in compliance with the requirements of the Charter of*

¹ Constitutional Court of Romania, Decision no. 33 of 23 January 2018 on the objection of unconstitutionality against the provisions of the Law amending and supplementing the Law no. 304/2004 on judicial organisation, paragraph 141.

² Ibid.

³ Ibid., paragraph 142.

⁴ CJEU, Judgment in Joined Cases, 18 May 2021, C-83/19 Asociația 'Forumul Judecătorilor Din România' v Inspekția Judiciară, C-127/19 Asociația 'Forumul Judecătorilor Din România' and Asociația 'Mișcarea Pentru Apărarea Statutului Procurorilor' v Consiliul Superior al Magistraturii and C-195/19 PJ v QK and in Cases C-291/19 SO v TP and Others, C-355/19 Asociația 'Forumul Judecătorilor din România', Asociația 'Mișcarea Pentru Apărarea Statutului Procurorilor' and OL v Parchetul de pe lângă Înalta Curte de Casație și Justiție - Procurorul General al României and C-397/19 AX v Statul Român - Ministerul Finanțelor Publice.

Fundamental Rights of the European Union ('the Charter'). If it fails to fulfil those requirements, that legislation could be perceived as seeking to establish an instrument of pressure and intimidation with regard to judges, which would prejudice the trust of individuals in justice. The Court adds that the national legislation at issue cannot have the effect of disregarding Romania's specific obligations under Decision 2006/928 in the area of the fight against corruption" (text in square brackets in first sentence added). However, the CJEU left it to the national court to ascertain that the result of introducing the SIOJ and the rules relating to the appointment of prosecutors assigned to the SIOJ would not expose the SIOJ to external influences.

16. In sum, both the Constitutional Court of Romania and the CJEU were not opposed to the creation of the SIOJ, if it fulfils the requirements of being in line with the Constitution of Romania, the ECHR, the requirements of the EU Charter of Fundamental Rights and Decision 2006/928 in the area of the fight against corruption⁵. This means that it is up to the Romanian authorities to decide whether the SIOJ is useful and meets these requirements.

B. Criticism of the SIOJ

1) National level

17. According to the explanatory memorandum to the draft Law, the magistrates were consulted about the draft Law in 2019, the result of which was that 85.47% of the consulted prosecutors and 72.22% of the consulted judges agreed with the dismantling of the SIOJ.

18. In addition, 1000 magistrates signed a memorandum, published on 24 March 2021, expressly stating that the SIOJ should be dismantled without there being any need for the introduction of further safeguards for magistrates.

19. With respect to the issue of additional safeguards, which now appear in the Amendments by the Chamber of Deputies as a form of judicial inviolability (see below), there seems to be much tension within the judiciary itself regarding the need for these.

20. However, the SCM, in its opinion, indicated that additional safeguards were necessary, basing themselves on their interpretation of paragraph 88 of the Venice Commission's 2018 Opinion.

21. On closer inspection, the Venice Commission found an error in the reference to the 2018 Opinion in the SCM's opinion. It was meant to refer to paragraph 89 (not paragraph 88) of the 2018 Opinion, which states that: *"One may wonder whether the recourse to specialised anti-corruption prosecutors, with increased procedural safeguards for investigated judges and prosecutors, without creating a special structure for this purpose, would not be a more appropriate solution, if the objective of the legislator is indeed to combat and sanction corruption within the judiciary. The Venice Commission has acknowledged, in its work, the advantages of the recourse to specialised prosecutors, associated with appropriate judicial control, for investigating very particular areas or offences including corruption, money laundering, trading of influence etc. Otherwise, for other offences, the regular jurisdiction framework should be applicable, as for all other Romanian citizens"* (underlining in the text added). This, however, is not an argument in support of introducing additional safeguards into the draft Law once the SIOJ has been dismantled. It is rather an argument in support of using specialised prosecutors.

⁵ Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption (OJ 2006 L 354, p. 56).

22. Hence, after having been operational for nearly three years, the SIOJ is now to be dismantled following criticism and controversies with respect to its functioning and efficiency. This is to be achieved by the draft Law with the addition of the Amendments by the Chamber of Deputies, which were submitted to the Senate, where they still are at the time of the drafting of this opinion.

2) Venice Commission opinions

23. The Venice Commission, in its Opinion of October 2018 on the draft amendments to Law no. 303/2004 on the status of judges and prosecutors, Law no. 304/2004 on judicial organisation, and Law no. 317/2004 on the Superior Council of Magistracy (hereinafter, the “2018 Opinion”) criticised the plan to establish the SIOJ: *“The establishment of the new structure has raised questions and strong concerns, in particular as regards the reasons for its existence, its impact on the independence of judges and prosecutors and on the public confidence in the criminal justice system and in the Romanian judicial system, more generally. Possible conflicts of competence with specialised prosecutor’s offices (such as DNA or DIICOT, especially with respect to already well-advanced investigations), and issues of effectiveness of centralising all such investigations in one single location are additional aspects that have raised concern. Finally, but not of a lesser concern, the possible rerouting of high-profile cases of corruption, which are pending with the DNA, has been pointed out as one of the most serious risks entailed, as, together with investigated judges and prosecutors, other persons investigated for corruption will be removed from the specialised jurisdiction of the DNA; this would undermine both DNA’s anti-corruption work and DNA as an institution”*.⁶

24. According to paragraph 84 of the 2018 Opinion *“questions have been raised as to the actual purpose of the creation of the new structure, and hence of the choice of applying a different legal treatment, in the framework of a highly sensitive field (criminal prosecution), to magistrates”*. The Venice Commission expressed its concern that *“singling out judges and prosecutors as the target of a special structure of public prosecution could also be interpreted as acknowledging a phenomenon of widespread corruption and criminality throughout the judiciary; this can only be detrimental to the image of the profession in Romania”*.

25. In paragraph 90 of the 2018 Opinion, the Venice Commission considered legitimate *“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”*. As a conclusion, the Venice Commission recommended in paragraph 65 of the 2018 Opinion that the Romanian authorities *“reconsider the proposed establishment of a separate prosecutor’s office structure for the investigation of offences committed by judges and prosecutors; the recourse to specialized prosecutors, coupled with effective procedural safeguards appears as a suitable alternative in this respect”*.

26. In its Opinion of June 2019 on emergency ordinances GEO no. 7 and GEO no. 12 amending the Laws of Justice, the Venice Commission stated that *“the reasons for the creation of the special Section for the investigation of criminal offences in the judiciary (the Section), with loosely defined jurisdiction, remain unclear”*.⁷ In this opinion, the Venice Commission also observed that *“it is uncertain to what extent the prosecutors of the Section and its Chief Prosecutor are under the full hierarchical control of the Prosecutor General”*.⁸ The Venice Commission concluded that

⁶ Venice Commission, Romania - Opinion on draft amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organisation, and Law No. 317/2004 on the Superior Council for Magistracy, adopted by the Commission at its 116th Plenary Session (Venice, 19-20 October 2018), ([CDL-AD\(2018\)017](#)), paragraph 83.

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

⁸ Ibid.

*“since the Section would be unable to effectively deal with all cases within its competence, it risks being an obstacle to the fight against corruption and organised crime”.*⁹

27. Neither the 2018 Opinion nor the 2019 Opinion were taken into account by the Romanian authorities and the SIOJ was established and introduced into Romania’s legal system.

IV. Abolition of the SIOJ

A. General issues regarding the dismantling of the SIOJ

28. The dismantling of the SIOJ is welcomed by a large part of the judges and prosecutors of Romania as well as by the international community and NGOs, who see the SIOJ as a structure that has reduced the efficiency of the legal system with respect to bringing to justice corrupt judges and prosecutors.

29. Taken purely from the perspective of the 2018 Opinion, the Venice Commission could agree that the draft Law is in line with its recommendation by abolishing the SIOJ and transferring the pending cases to the Prosecutor’s Offices competent under the law. The same applies to the re-establishment of the competence of the National Anti-Corruption Directorate *vis-à-vis* judges and prosecutors, as provided by the draft Law in Article 3.

30. Notwithstanding the above-mentioned comments in favour of dismantling the SIOJ, the first general question must be why this should be done after such a short period of the SIOJ’s existence. The replies the Venice Commission delegation received to this question from the online meetings all agreed that the SIOJ was, at best, underperforming due to the fact that it was understaffed and centralised without any satellite offices on the territory of Romania – making quick and efficient investigations impossible. At worst, it contributed to corruption by not dealing with cases – which may well have been due to the sheer caseload it had (some 6000 cases) combined with a lack of sufficient staff to deal with it.

31. The general consensus seems to be that the legal system, as it was before the establishment of the SIOJ, functioned better than it was functioning now and should be re-established.

B. Transitional measures regarding the SIOJ – pending cases and the transfer of staff

32. The 2018 Opinion was adopted almost three years ago, under different circumstances in which the SIOJ did not exist. Now the SIOJ not only exists, but has been active for nearly three years, conducting cases, and is to be dismantled. This generates a series of new procedural questions.

33. Article 1 (2) of the draft Law sets out that *“Cases currently being examined at the Section level shall be transmitted administratively, within 5 working days from the date of entry into force of this law, by the Prosecutor’s Office attached to the High Court of Cassation and Justice, to the competent prosecutor’s offices according to the law, which continues to solve the cases.”* Paragraphs 5 and 6 of the draft Law set out that *“The dismissal, the waiver of criminal prosecution and the indictment solutions ordered by the prosecutors of the Section, which were not subject to the hierarchical control prior to the entry into force of this law (...)”* (paragraph 5) as well as *“The acts performed and the measures taken by the prosecutors of the Section in the cases provided in para. (2), which were not subject to the hierarchical control prior to the entry into force of this law, are subject, from the date of the dismantling of the Section, to the control exercised by the General Prosecutor of the Prosecutor’s Office attached to the High Court of Cassation and Justice (...)”* (paragraph 6).

⁹ Ibid.

34. The above-mentioned hierarchical control derives from the Constitution of Romania according to which the prosecutorial institution, with its different offices and its staff of prosecutors, form a part of the judiciary and the prosecutors are placed under the hierarchical control of the general public prosecutor of the Public Prosecutor's Office. The main models of the organisation of the prosecution service in Europe and the internal and external independence of a prosecutor have been commented on by the Venice Commission in previous opinions.¹⁰ The prosecution system in Romania is a part of the judiciary and has, as is the case for prosecutors in other European countries, a duty to act in accordance with the principle of the rule of law, respecting the necessary safeguards for the protection of citizens. From this duty must follow an obligation to protect the independent decision-making process of the individual prosecutor. This is the reason for which the Venice Commission adopted certain principles concerning such issues as the requirements of instructions from a superior prosecutor to an acting prosecutor and the principles for the assigning of cases etc.¹¹ As concerns the transfer of staff, this is also a common theme in Venice Commission opinions notably with respect to judges.¹² Although the issue of the transfer of prosecutors is less common, it has also been dealt with by the Venice Commission.¹³

35. Generally speaking, changes in the prosecutorial service within the judiciary, introduced as a result of a reorganisation in the judiciary, could be carried out in such a manner as to not cause any problems with respect to the administration of justice and the treatment of prosecutors, who were initially in charge. Nevertheless, caution should be exercised when applying these changes to ensure that the principle of the independence of the individual prosecutors is not affected. In this respect, such issues as instructions to junior prosecutors and decisions to assign an ongoing case to another prosecutor have, as noted above, been dealt with by the Venice Commission in previous opinions, which can serve as guidance.

36. The fate of the prosecutors of the SIOJ is regulated by Article 2(2) of the draft Law, which states that *"Starting with the date of abolition of the Section, the prosecutors within the Section, including those with leading positions, shall return to the prosecutor's offices where they come from"*. The proposed transfer in the draft Law of the prosecutors in the SIOJ, who are to be transferred to other positions within the prosecution service, is not related to the individual

¹⁰ See Venice Commission, 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) ([CDL-AD\(2010\)040](#)), paragraphs 23-33 and, more generally the Compilation of Venice Commission opinions and reports concerning prosecutors ([CDL-PI\(2018\)001](#)), 3.2.1. on the place of the prosecution service within the system of separation of powers: is it a part of the executive, the judiciary, or a power on its own?

¹¹ Ibid., paragraphs 53-60, especially paragraphs 57-59; Compilation of Venice Commission opinions and reports concerning prosecutors ([CDL-PI\(2018\)001](#)), 3.2.4 on the Hierarchical organization of the prosecutorial system: instructions and reporting obligations; Venice Commission, Hungary – Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, adopted by the Venice Commission at its 91st Plenary Session (Venice, 15-16 June 2012) ([CDL-AD\(2012\)008](#)), paragraph 32; Venice Commission, Poland – Opinion on the Act on the Public Prosecutor's office, as amended, adopted by the Venice Commission at its 113th Plenary Session (Venice, 8-9 December 2017) ([CDL-AD\(2017\)028](#)), paragraphs 27-28 and 45-60.

¹² See the Venice Commission, Rule of Law Checklist, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016) ([CDL-AD\(2016\)007](#)), II.E.1.c and paragraph 80; Compilation of Venice Commission opinions and reports concerning courts and judges ([CDL-PI\(2019\)008](#)), 3.5.1 on transfers and missions; "The former Yugoslav Republic of Macedonia" - Opinion on the draft amendments to the Law on Courts, adopted by the Venice Commission at its 117th Plenary Session (Venice, 14-15 December 2018) ([CDL-AD\(2018\)033](#)), paragraph 21-24.

¹³ See Venice Commission, Montenegro - Opinion on the draft amendments to the Law on the State Prosecution Service and the draft law on the Prosecutor's Office for organised crime and corruption, adopted by the Venice Commission at its 126th plenary session (online, 19-20 March 2021) ([CDL-AD\(2021\)012](#)); Venice Commission, Rule of Law Checklist, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016) ([CDL-AD\(2016\)007](#)), II.E.1.d., paragraphs 91-96 and Compilation of Venice Commission opinions and reports concerning prosecutors ([CDL-PI\(2018\)001](#)), 3.1.2.3 on appointment procedure and 3.2.5 on transfers and secondments etc.; Venice Commission 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) ([CDL-AD\(2010\)040](#)), paragraph 59.

prosecutor in person or dependent on his or her professional behaviour, but are of a general nature as a result of the dismantling of the SIOJ. The prosecutors will return to their earlier positions (before the existence of the SIOJ) and keep their individual salaries, which they earned in the SIOJ. The situation of prosecutors who began their careers in the SIOJ is, however, not covered by Article 2(2), but should be covered by an equivalent provision, if such positions exist at all.

37. Even if the hierarchal organisation of the SIOJ prosecutors is respected in their transfer within the judiciary and the principle of the independence of the individual prosecutor is respected, treating them in an objective manner, it cannot be excluded that certain conflicts may arise in individual cases because of the transfer. In this respect, it is recommended that the right of the prosecutor to request review of their case be provided. Such reviews could possibly be set up within the SCM.

38. As regards cases that have been handled by SIOJ prosecutors, these are to be transferred to the Prosecutors' Office, where they will be dealt with further and possibly be reconsidered in substance under the provisions of procedural law, the draft Law and ultimately the ECHR, especially Articles 5-7.

39. In this way, earlier decisions or actions in cases dealt with by SIOJ prosecutors may well be overturned by a new prosecutor assigned to the case according to ordinary provisions under procedural law and Article 1 (paragraphs 5, 6 and 8) of the draft Law. For this reason, the Venice Commission would like to recommend that new decisions or actions in these cases be substantiated, reasoned, and documented objectively under the law. These requirements are important, because it cannot be ruled out that some SIOJ prosecutors, in certain cases, may be subjected to disciplinary sanctions etc. as a result of alleged wrongdoings. Moreover, such decisions and actions could have consequences for the parties concerned.

40. Such an overturned decision could for instance result in a correction of earlier irregularities or illegal measures. This could of course also have consequences for the parties concerned, the judges and the prosecutors as well as other persons affected by a corruption case. Delays and other burdensome consequences may also lead to increased procedural costs for a party or to other violations that may harm an individual party. This may, for example, give rise to justified claims for compensation (Article 13 ECHR).

41. In sum, the change introduced as a result of a reorganisation in the judiciary could be performed in such a manner as not to cause any problems with respect to the administration of justice and the treatment of prosecutors initially in charge. However, caution should be exercised when applying these changes to ensure that the principle of the independence of the individual prosecutors is not affected. Prosecutors should always be treated with due respect to their position within the prosecutorial service as such. Their position is therefore to be regarded as independent to a certain point, but not to the extent of that of judges. Finally, simply transferring the SIOJ cases "back" to where they would have been dealt with prior to the existence of the SIOJ, may not be enough without further consideration, i.e. allowing for the tackling of problems that may lie in the details and in the implementation of the reform in practice.

V. Amendments of the Chamber of Deputies

42. The draft Law prepared by the Government was submitted in February 2021 to the Chamber of Deputies of Parliament, which amended the text by introducing additional safeguards in the form of judicial inviolability. The introduction of these amendments therefore raises issues with respect to standards regarding the inviolability of judges and prosecutors.

A. Judges and prosecutors – standards regarding inviolability

43. The Venice Commission would like to reiterate that judges and prosecutors should enjoy purely functional immunity for actions carried out in good faith in pursuance of their duties or in the exercise of their functions. There should be no immunity for intentional crimes, e.g. taking bribes¹⁴.

44. For judges, the Venice Commission, in its 2010 Report on the Independence of the Judicial System – Part I: The Independence of Judges, endorsed the general rule that judges must not enjoy any form of criminal immunity for ordinary crimes committed outside the exercise of their function: *“It is indisputable that judges have to be protected against undue external influence. To this end they should enjoy functional (but only functional) immunity (immunity from prosecution for acts performed in the exercise of their functions, with the exception of intentional crime, e. g. taking bribes)”*.¹⁵

45. This was repeated in the *Amicus curiae* brief on the Immunity of Judges for the Constitutional Court of Moldova, in which the Venice Commission said that *“While functional safeguards are needed to guarantee judicial independence against undue external influence, broad immunity is not. Judicial independence does not depend on wide immunity and judges should answer for any alleged crimes on the presumption that normal procedures of defence, appeal and other elements of the rule of law are at their full disposal.”*¹⁶

46. Purely functional immunity for judges is endorsed by the Committee of Ministers of the Council of Europe, in its [Recommendation CM/Rec\(2010\)12 on judges: independence, efficiency and responsibilities](#), which sets out two fundamental principles: *“The interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to criminal liability, except in case of malice”* (paragraph 68); *“When not exercising judicial functions, judges are liable under civil, criminal and administrative law in the same way as any other citizen”* (paragraph 71). In addition, the Committee of Ministers, in its [Resolution \(97\) 24 on the Twenty Guiding Principles for the Fight against Corruption](#), insisted on the objective *“to limit immunity from investigation, prosecution or adjudication of corruption offences to the degree necessary in a democratic society”* (Principle 6).

47. Functional immunity for judges is also endorsed, *a contrario*, by the Council of Europe’s Consultative Council of European Judges (CCJE), which states in its Opinion no. 3 that *“Judges who in the conduct of their office commit what would in any circumstances be regarded as crimes (e.g. accept bribes) cannot claim immunity from ordinary criminal process”* (paragraph 52).

48. The UN also endorses functional immunity for judges in its *Basic Principles on the Independence of the Judiciary*, setting out that *“[w]ithout prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions”*.¹⁷

¹⁴ For judges, see notably Venice Commission, *Amicus curiae brief on the Immunity of Judges for the Constitutional Court of Moldova* (CDL-AD(2013)008). See also, Venice Commission, Opinion on draft constitutional amendments on the immunity of Members of Parliament and judges of Ukraine (CDL-AD(2015)013), paragraph 25; Venice Commission, Report on the Independence of the Judicial System – Part I: the Independence of Judges (CDL-AD(2010)004). For prosecutors, see notably Venice Commission, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service (CDL-AD(2010)040).

¹⁵ Venice Commission, Report on the Independence of the Judicial System – Part I: the Independence of Judges (CDL-AD(2010)004), paragraph 6.

¹⁶ Venice Commission, *Amicus curiae brief on the Immunity of Judges for the Constitutional Court of Moldova* (CDL-AD(2013)008), paragraph 54.

¹⁷ [Basic Principles on the Independence of the Judiciary](#), adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and

49. For prosecutors, in its Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, with regards to immunity, the Venice Commission explained that “Prosecutors should not benefit from a general immunity, which could even lead to corruption, but from functional immunity for actions carried out in good faith in pursuance of their duties.”¹⁸

50. Functional immunity for prosecutors is also endorsed by the Council of Europe’s Consultative Council of European Prosecutors (CCPE), which states in its [Opinion no. 9 \(2014\) on European norms and principles concerning prosecutors](#) that “X. Prosecutors should not benefit from a general immunity, but from functional immunity for actions carried out in good faith in pursuance of their duties.” It adds in paragraph 88 that “Prosecutors should not benefit from a general immunity that would protect them from prosecution for crimes they have committed, and for which they have to answer before the courts, as this may lead to lack of public trust or even to corruption. States may establish special procedures to bring prosecutors to justice as a guarantee for their independence and impartiality.”

51. Functional immunity for prosecutors is also endorsed by the [OHCHR Guidelines on the Role of Prosecutors](#) (1990), which set out that “4. States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.”

52. In sum, therefore, neither judges nor prosecutors should benefit from general immunity (which could, among other things, promote corruption), but should benefit from functional immunity for actions carried out in good faith in pursuance of their duties or in the exercise of their functions.

B. Amendments by the Chamber of Deputies

53. As a result of a proposal made by a Member of Parliament, the Chamber of Deputies introduced three new articles (Articles 4-6) to the draft Law prepared by the Government, which purport to provide additional safeguards for the judges and prosecutors.

54. Under the amendment introduced by Article 4 of the Amendments by the Chamber of Deputies (referring to Article 95 of Law no. 303/2004 on the status of judges and prosecutors), judges and prosecutors may be “sent to court” for offences against justice, corruption offences, service offences or offences assimilated to corruption offences, only with the approval of the Section for Judges or, as the case may be, the Section for Prosecutors of the SCM.

55. This amendment therefore introduces a type of inviolability which can be lifted by the SCM (similar to that accorded by the Constitution of Romania to Members of Parliament, which can only be lifted by Parliament) despite the fact that the existing legal framework seems to provide sufficient safeguards. These are provided by current Law 303/2004 on the status of judges and prosecutors (independence, professionalism and specialisation of magistrates applicable for all citizens, including magistrates); by guarantees provided in the Criminal Procedure Code; by guarantees provided by the National Anticorruption Directorate (DNA) and by special guarantees for magistrates (competence according to the quality of the person, cases of suspension of judges and prosecutor from office, defending the judges and prosecutors and special guarantees during the criminal investigations).

endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, paragraph 16.

¹⁸ Venice Commission, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service ([CDL-AD\(2010\)040](#)), paragraph 61.

56. Singling out judges and prosecutors as needing additional special safeguards – beyond those rightly enjoyed under functional immunity – may send the wrong signal and could be further detrimental to the image of the profession in Romania.

57. Then, Article 6 of the Amendments of the Chamber of Deputies (in line with Article 4) provides for a new competence of the SCM in paragraph 5: *“The section for judges of the Superior Council of Magistracy approves sending to court the judges for committing a crime against the justice, corruption offences, service offences or offenses assimilated to corruption offenses.”*

58. Article 134(2) of the Constitution of Romania gives the SCM the role of a court of law for the disciplinary liability of judges and prosecutors. However, Article 6 of the Amendments by the Chamber of Deputies also seems to give the SCM control over initiating criminal cases against judges and prosecutors. Such a control mechanism is not compatible with the proper administration of justice in criminal cases, which must be performed by ordinary courts under the rule of law including the application of the principle of equal treatment of parties. The amendment therefore raises concerns because it gives the relevant section of the SCM the exclusive competence to decide on actions in criminal matters against judges and prosecutors.

59. The Romanian provisions on criminal, civil and disciplinary responsibility of judges and prosecutors and on the role and organisation of the SCM in some of these matters have been commented on, to some extent, in the Venice Commission’s 2018 Opinion and 2019 Opinion.¹⁹ However, this is a far-reaching amendment and would need to be discussed with the relevant stakeholders in an open procedure and not be introduced by way of amendments in Parliament after consultations with the relevant stakeholders have already taken place.

60. In addition, any inviolability, as a rule, must be rooted in the Constitution because the inviolability of a specific group of people violates the principle of equality. The amendments proposed give the impression that the introduction of a new type of inviolability combined with the abolition of the SIOJ could serve as a kind of protection (safeguard) against liability for acts of corruption. This is obviously not the aim to be achieved and the Venice Commission is highly critical of such immunity, as inviolability hinders the fight against corruption²⁰.

61. The Council of Europe’s Group of States against Corruption (GRECO) is still more critical: *“Greco has come across several national situations where a large number of holders of public office enjoyed similar inviolability as members of parliament. In one extreme case, this included most members of the judiciary, members of the State and regional executive power, members of the national and regional elected councils, members of several State administrations etc. Greco has recommended to reduce the categories of the holders of public offices benefiting from such immunities as no valid reason could be identified to maintain such situations”*²¹.

62. The Venice Commission observed a trend in many countries of Central and Eastern Europe, which make great use of inviolability (with the adverse effect on the fight against corruption) and observed the opposite trend in a number of Western European countries where inviolability has been reduced (Austria, Belgium, France and Italy)²². This use of inviolability may be caused by various factors, and one is uncertainty and lack of stability of the legal system and framework – which needs to be tackled, urgently.

¹⁹ See Venice Commission, Opinion of October 2018 on the draft amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organisation, and Law No. 317/2004 on the Superior Council for Magistracy ([CDL-AD\(2018\)017](#)); Venice Commission, Opinion on draft amendments to the Criminal Code and the Criminal Procedure Code ([CDL-AD\(2018\)021](#)); Venice Commission, Opinion on Emergency Ordinances GEO No. 7 and GEO No. 12 amending the Laws of Justice ([CDL-AD\(2019\)014](#)).

²⁰ Venice Commission, Report on the scope and lifting of parliamentary immunities ([CDL-AD\(2014\)011](#)), paragraph 124.

²¹ *Ibid.*, paragraph 104 and footnote 24.

²² *Ibid.*, paragraphs 124 and 125.

63. The reason for the introduction of this type of inviolability may come as a result of something that seems to be plaguing Romanian judges (and prosecutors), according to the information received by the Venice Commission delegation during the online meetings. This concerns notably vexatious complaints by private individuals against judges (and prosecutors), which often lead to pointless and unfounded criminal investigations or proceedings. If that is the case, then the Venice Commission would like to suggest that a different solution be found to discourage these sorts of proceedings (see paragraph 67 below).

64. The CCJE refers to vexatious complaints in its [Opinion no. 3](#), which recommends that *“in countries where a criminal investigation or proceedings can be started at the instigation of a private individual, there should be a mechanism for preventing or stopping such investigation or proceeding... when there is no proper case for suggesting that any criminal liability exists on the part of the judge”* (paragraph 54).

65. In sum, the Venice Commission would like to reiterate that a clear separation needs to be drawn between functional immunity that applies to judges and prosecutors in the exercise of their functions and the inviolability proposed in the Amendments by the Chamber of Deputies, which provides an immunity that goes beyond that of functional immunity and is akin to the immunity afforded to Members of Parliament under the Constitution. As such, this type of immunity is not transferable to judges and prosecutors and therefore should not be pursued. In addition, adequate safeguards already exist under the current legislation of Romania (see paragraph 55, above).

66. It is the Venice Commission’s view that it is crucial for criminal proceedings, which fall outside the remit of functional immunity, not fall within the competence of the SCM. The SCM is an administrative body which should not have any judicial (which in Romania includes prosecutorial) tasks. It is also an issue of the separation of powers, and as such, a constitutional issue. Such cases should be brought directly before the courts of law without the SCM’s prior screening.

67. As regards vexatious complaints (often criminal complaints) by private individuals against judges and prosecutors (e.g. dilatory or frivolous appeals brought following the rendering of a judgment/decision), this is a matter that should be handled by the ordinary prosecutorial service through a sorting mechanism or filtering procedure (i.e. a system with a special fast-track mechanism for the prosecutorial handling and decision-making of obvious vexatious complaints) to ensure that there is no abuse of process.

VI. Conclusions

68. The Venice Commission welcomes the Romanian authorities’ intention to reform the judiciary and understands that the first urgent step in this wider reform is to dismantle the Section for the Investigation of Offences committed within the Judiciary (SIOJ).

69. To this end, the Venice Commission has been requested to prepare an opinion on the *draft Law for dismantling the Section for the Investigation of Offences committed within the Judiciary* (as adopted by the Government) and the amended version of the *draft Law for dismantling the Section for the Investigation of Offences committed within the Judiciary, as well as for the amending and completing some normative acts in the field of justice* (as adopted by the Chamber of Deputies) – which are the focus of this opinion.

70. The Venice Commission notes that, although its 2018 Opinion criticised the establishment of the SIOJ, its dismantling after nearly three years of conducting cases is not to be taken lightly and will generate a series of new procedural questions. Simply transferring the cases “back” to where they would have been dealt with at the time, may not be enough without further

consideration. The problems may lie in the details and in the implementation of the reform in practice. The effects are hard to foresee.

71. In this context, the Venice Commission's key recommendations are as follows:

- Article 4 of the Amendments of the Chamber of Deputies introduces a new type of inviolability for judges and prosecutors within the framework of a highly sensitive field (criminal prosecution) which goes far beyond functional immunity and should therefore be removed.
- Article 6 of the Amendments of the Chamber of Deputies (in line with Article 4) provides for a new competence of the SCM by giving the relevant section of the SCM the exclusive competence to decide on actions in criminal matters against judges and prosecutors, which should not be pursued. Criminal proceedings that fall outside the remit of functional immunity should not fall within the competence of the SCM and should be brought directly before the courts of law without the SCM's prior screening.
- Vexatious complaints (often criminal complaints) by private individuals against judges and prosecutors should be dealt with by the ordinary prosecutorial service by means of a sorting mechanism or filtering procedure (i.e. a system with a special fast-track mechanism for the prosecutorial handling and decision-making of obvious vexatious complaints) to ensure that there is no abuse of process.
- Article 1 paragraphs 5, 6 and 8 of the draft Law concerning the redistribution of SIOJ's pending cases: decisions/actions in cases before the SIOJ may be reversed and therefore new decisions/actions must be substantiated, reasoned and documented objectively under the law (especially where SIOJ prosecutors face disciplinary sanctions etc.) as they may have consequences for the parties to these cases. This needs to be provided for.
- Article 2 of the draft Law regarding the transfer of SIOJ prosecutors to existing institutions: prosecutors should be treated with respect for their independence within the prosecutorial service as such.

72. Overall, the Amendments by the Chamber of Deputies raise many doubts as well as both substantive legal and procedural questions. They address the systemic organisation of the judiciary and are of such importance that, if they were to be pursued, they should undergo a proper, full legislative procedure. However, the Venice Commission recommends that these Amendments by the Chamber of Deputies be set aside completely.

73. The Venice Commission would like to stress that, as the dismantling of the SIOJ is only the first step in this reform, it would like to encourage the Romanian authorities to continue with their wider reform and remains at their disposal for any further assistance they may require.