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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

ROMANIA

DRAFT LAW

**ON THE DISMANTLING
OF THE SECTION FOR INVESTIGATING CRIMINAL OFFENCES
WITHIN THE JUDICIARY**

AND

EXPLANATORY NOTE

DRAFT LAW**on the dismantling of the Section for investigating criminal offences
within the judiciary****The Romanian Parliament adopts this law:**

Art. 1 – (1) On the date of entry into force of this law, the Section for investigating criminal offences within the judiciary within the Prosecutor's Office attached to the High Court of Cassation and Justice, hereinafter referred to as the *Section*, shall be dismantled.

(2) Cases currently being examined at the Section level shall be transmitted administratively, within 60 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 art. 3, which continues to solve the cases.

(3) The completed cases whose files are in the archives of the Section shall be transmitted by administrative means within 180 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 art. 3.

(4) The acts of procedure accomplished in the cases provided in par. (2) and (3), in compliance with the legal provisions in force at the date of their fulfilment, remain valid.

(5) 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, are subject, from the date of 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, the provisions of art. 318, 328, 335 and of art. 339 of Law no. 135/2010 on the Code of Criminal Procedure, as subsequently amended and supplemented, applying accordingly.

(6) The acts performed and the measures taken by the prosecutors of the Section in the cases provided in par. (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, the provisions of art. 304 and of art. 336-339 of Law no. 135/2010, with subsequent amendments and completions, applying accordingly.

(7) From the date of dismantling of the Section, at the trial of the cases transmitted according to para. (2) and (3), as well as in the settlement of proposals, appeals, complaints or any other requests made in these cases, prosecutors from the prosecutor's offices attached to the courts before these requests are brought participate. These provisions also apply with regard to the cases related to the offences provided by art. 3 which were pending before the courts at the date of the operationalization of the Section and were not completed until the date of entry into force of this law.

(8) Appeals declared by the Section may be withdrawn only by the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice.

Art. 2 - (1) The positions in the scheme of functions and staff of the Section at the date of entry into force of this law remain in the scheme of the Prosecutor's Office attached to the High Court of Cassation and Justice and are taken over by the Section for investigating criminal offences.

(2) Starting with the date of dismantling of the Section, the prosecutors within it, including those with leading positions, return to the prosecutor's offices where they come from or to the prosecutor's offices where they promoted according to the law during the activity within the Section. From the date of returning to the prosecutor's office where they come from or to the prosecutor's offices where they promoted according to the law, the prosecutors who worked in the Section shall regain their professional degree of execution and the corresponding salary they had previously or those acquired as a result of promotion, under the law, during the activity within the Section.

(3) Ongoing staff secondments on the other categories of posts from those provided in para. (1) shall be maintained within the Section for investigating criminal offences of the Prosecutor's Office attached to the High Court of Cassation and Justice, until the fulfilment of the term for which these were ordered.

Art. 3 - (1) From the date of entry into force of this law, the criminal offences committed by judges and prosecutors, members of the Superior Council of Magistracy, by judges of the High Court of Cassation and Justice and by the prosecutors from the Prosecutor's Office attached to the High Court of Cassation and Justice, by the judges from the courts of appeal and the Military Court of Appeal, as well as by the prosecutors from the prosecutor's offices attached to these courts are also within the competence of the Criminal Prosecution Section of the Prosecutor's Office attached to the High Court of Cassation and Justice.

(2) From the date of entry into force of this law, the offences committed by judges from courts of first instance, tribunals, military tribunals and by prosecutors from prosecutor's offices attached to these courts are also within the competence of the prosecutor's office attached to the court of appeal.

(3) For the offences provided in para. (1) and (2), the criminal investigation is carried out by prosecutors specially appointed by General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and, at the proposal of the Plenum of the Superior Council of Magistracy, for a period of four years, according to the procedure provided by this law.

(4) The prosecutors appointed according to para. (3) solve other cases than those provided in para. (1) and (2) of the competence of the Criminal Prosecution Section of the Prosecutor's Office attached to the High Court of Cassation and Justice, respectively of the prosecutor's offices attached to the courts of appeal.

(5) The specific appointed prosecutors carry out the criminal investigation also in the situation where, together with the persons provided in para. (1) and (2), other persons are also investigated, if, for reasons of good conduct of the prosecution, the case cannot be disjoined.

(6) In the situation where, together with the persons provided in para. (2), are investigated other persons for whom, according to the law, the competence to carry out the criminal investigation belongs to the Prosecutor's Office attached to the High Court of Cassation and Justice, the criminal investigation is carried out by prosecutors appointed from the Criminal Prosecution Section of the Prosecutor's Office attached to the High Court of Cassation and Justice.

(7) In the cases regarding the offences provided in para. (2) taken over under the conditions of art. 325 of Law no. 135/2010 regarding the Code of Criminal Procedure, with the subsequent amendments and completions, the criminal investigation is carried out by the specifically appointed prosecutors provided in para. (3).

(8) In the case of offences committed by military judges and prosecutors, the provisions of art. 56 para. (4) of Law no. 135/2010 on the Code of Criminal Procedure, as subsequently amended and supplemented, are not applicable.

Art. 4 - (1) They may be appointed to carry out the criminal investigation in the cases provided in art. 3 para. (1) prosecutors who meet the following conditions:

- a) have a professional rank corresponding to the Prosecutor's Office attached to the High Court of Cassation and Justice;
- b) have a seniority of at least 15 years in the position of prosecutor;
- c) have the grade "very good" at the last 2 professional evaluations and have not been subject to disciplinary sanctions in the last 3 years;
- d) have an impeccable moral conduct;
- e) have significant professional experience in supervising or prosecuting criminal files.

(2) The significant professional experience of the prosecutors to be proposed for appointment shall be assessed also by reference to the specifics and complexity of the cases investigated by the respective prosecutors, based on information or documents relevant to their activity, requested from the prosecutor's offices within they have activated.

(3) In order to be appointed, the prosecutors who meet the conditions provided in para. (1) submit their option to the Superior Council of Magistracy.

(4) The specialized department within the Superior Council of Magistracy checks the fulfilment of the conditions provided in para. (1) points a) - c) and, in order to check the fulfilment of the condition provided in para. (1) point e), requests from the prosecutor's offices within they have activated statistical data regarding the activity for the last 5 years, including the rate of acquittals, restitutions, convictions, possible notifications made by the investigated persons and the solutions given to them, as well as any other relevant aspects.

(5) In order to check the fulfilment of the condition provided in para. (1) point d), the specialized department within the Superior Council of Magistracy requests from the prosecutor's offices where the prosecutor has activated for the last 5 years, from the courts attached to them and the from the bar the opinion on the conduct in the exercise of professional duties, relations with prosecutors, judges, other staff of the prosecutor's office and of the court, with lawyers, litigants, experts and interpreters, conduct in society, integrity, avoidance of conflicts of interest of any kind and impartiality, as well as any other relevant issues. The specialized department also requests the Judicial Inspection to communicate the data and information on the integrity and impartiality of the prosecutor from its records and attaches the data and information of the same nature from the records of the Superior Council of Magistracy. The Judicial Inspection makes available to the Plenum of the Superior Council of Magistracy the dismissal resolutions regarding the activity of the prosecutor.

(6) The Plenum of the Superior Council of Magistracy proposes to the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice the prosecutors who will carry out the criminal investigation for the offences provided in art. 3 para. (1). If it deems it necessary, the Plenum of the Superior Council of Magistracy may invite the prosecutors to hold an interview.

(7) Within 30 days from the date of receipt of the proposals, the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice shall rule on them. Reasons shall be given for refusal.

(8) From the date of appointment, the prosecutors shall activate within the Criminal Prosecution Section of the Prosecutor's Office attached to the High Court of Cassation and Justice, in positions specifically assigned for this purpose.

(9) Upon termination of the capacity as a appointed prosecutor, the appointed prosecutors shall return in the positions previously held.

Art. 5 - (1) They may be appointed to carry out the criminal investigation in the cases provided in art. 3 para. (2) prosecutors who activate in the criminal prosecution sections of the prosecutor's offices attached to the courts of appeal, who meet the following conditions:

- a) have a seniority of at least 12 years in the position of prosecutor;
- b) have the qualification "very good" at the last 2 professional evaluations and have not been subject to disciplinary sanctions in the last 3 years;
- c) have an impeccable moral conduct;
- d) have significant professional experience in supervising or prosecuting criminal files.

(2) The specialized department within the Superior Council of Magistracy draws up the list of all prosecutors who meet the conditions provided in para. (1) points a) and b) and, in order to check the fulfillment of the condition provided in para. (1) point d), requests from the prosecutor's offices where they activated statistical data regarding the activity of the last 5 years, including the rate of acquittals, restitutions, convictions, possible notifications made by the investigated persons and the solutions given to them, as well as any other relevant aspects.

(3) The provisions of art. 4 para. (2) and para. (5) - (7) shall apply accordingly.

Art. 6 - Appointment of prosecutors to carry out the criminal investigation in the cases provided in art. 3 para. (1) or art. 3 para. (2) may be renewed, for a new period of 4 years, the provisions of art. 4 and art. 5 being applicable accordingly.

Art. 7 – Prosecutors appointed under this law may not be moved to another section of the prosecutor's office without their consent.

Art. 8 - (1) The cessation of the quality of prosecutor appointed in order to carry out the criminal investigation of the offences provided in art. 3 para. (1) and (2) may be ordered in the following cases:

- a) for professional inefficiency which is assessed according to the efficiency and quality of the activity;
- b) at the request of the appointed prosecutor, for duly justified reasons;
- c) in case of application of a disciplinary sanction;
- d) the impossibility of exercising the attributions for a period longer than 3 months by the appointed prosecutor.
- e) moving the prosecutor to another section of the prosecutor's office, delegating, seconding or transferring him.

(2) The Plenum of the Superior Council of Magistracy, ex officio or at the notification of the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice, analyses the existence of one of the cases provided in para. (1) and, if necessary, makes proposals for the cessation of the quality of designated prosecutor in order to carry out criminal investigation in cases concerning offences committed by judges and prosecutors.

(3) The General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice orders the cessation of the quality provided in para. (1) within 10 days from the communication of the decision of the Plenum of the Superior Council of Magistracy.

Art. 9 - For the prosecutors with senior positions performing the duties of superior prosecutor of the appointed prosecutors, the designation according to the provisions of Article 4 or, where applicable, of Article 5 is not necessary, for exercising hierarchical control.

Art. 10 – (1) The maximum number of prosecutors within the Criminal Prosecution Section designated under the terms of Article 4 is 14, and the maximum number of prosecutors in the prosecution offices attached to the courts of Appeal designated under the terms of Article 5 is three for each of them.

(2) Assessing the need for prosecutors appointed in order to prosecute the offences provided by art. 3 para. (1) and (2) shall be made once every 6 months, the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation Justice making appropriate proposals to modify the number of prosecutors provided in para. (1).

Art. 11 - (1) In order to carry out quickly and thoroughly the prosecution of offences, within the Prosecutor's Office attached to the High Court of Cassation and Justice and the prosecutor's offices attached to the courts of appeal operates, by secondment, officers and judicial police officers, within the limits of the positions approved according to the law.

(2) Art. 120² para. 2, 4 and 5, art. 120³ and Article 120⁴ of Law No 304/2004 on the judicial organization republished, as amended and supplemented, shall apply accordingly to the officers and police officers referred to in paragraph 1.

Art.12 - (1) The Chief Prosecutor of the Criminal Prosecution Section within the Prosecutor's Office attached to the High Court of Cassation and Justice, in the case of the offences provided in art. 3 para. (1), as well as the General Prosecutor of the prosecutor's office attached to the court of appeal, in the case of the offences provided in art. 3 para. (2), performs the activity of criminal prosecution without the need for designation according to art. 4 or, as the case may be, art. 5:

a) in case the appointed prosecutor is unable to exercise his duties for a period longer than 3 months or in case of incompatibility, and within the prosecutor's office there is no other prosecutor specifically designated according to this law;

b) in case the appointed prosecutor is unable to exercise his duties for a period of less than 3 months, the execution of the criminal prosecution acts is not postponed, and within the prosecutor's office there is no other prosecutor specifically designated according to this law.

c) until the appointment of the prosecutors, under the conditions of the present law, for the performance of the criminal investigation acts that do not suffer postponement.

Art. 13 - When judging the cases investigated by the prosecutors appointed according to the provisions of art. 4 or, as the case may be, of art. 5, as well as in the settlement of proposals, appeals, complaints or any other requests formulated in the respective cases prosecutors from the prosecutor's offices attached to the competent courts before which these cases are brought take part in.

Art. 14 - The Plenum of the Superior Council of Magistracy proposes to the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice the prosecutors to be appointed under the conditions of art. 4 and 5 within a maximum of 60 days from the entry into force of this law.

Art. 15 - On the date of entry into force of this law, Section 2¹ - "Section for the investigation of criminal offences in the judiciary" of Law no. 304/2004 regarding the judicial organization, republished in the Official Gazette of Romania, Part I, no. 827 of September 13, 2005, as subsequently amended and supplemented, is repealed.

Art. 16 - At the date of entry into force of this law, art. 38 para. (1) point f) of Law no. 135/2010 on the Code of Criminal Procedure, published in the Official Gazette of Romania, Part I, no. 486 of July 15, 2010, as subsequently amended and supplemented, is amended as follows: "f) the offences committed by the assistant magistrates of the High Court of Cassation and Justice;"

Art. 17 - At the date of entry into force of this law, art. 40 para. (1) of Law no. 135/2010 on the Code of Criminal Procedure, published in the Official Gazette of Romania, Part I, no. 486 of July 15, 2010, as subsequently amended and supplemented, is amended as follows: “(1) The High Court of Cassation and Justice rules in the first instance on the offences of high treason, the offences committed by Romanian senators, deputies and members of the European Parliament, members of the Government, judges of the Constitutional Court, members of the Superior Council of Magistracy, judges of the High Court of Cassation and Justice and the prosecutors from the Prosecutor's Office attached to the High Court of Cassation and Justice, the judges from the courts of appeal and the Military Court of Appeal, as well as the prosecutors from the prosecutor's offices attached to these courts ”.

EXPLANATORY NOTE

to the draft law on the dismantling of the section for the investigation of criminal offences within the judiciary

This draft law proposes a solution based on two main dimensions:

- the dismantling of the Section for investigating criminal offences within the judiciary;
- the taking over of the competence of the Section for investigating criminal offences within the judiciary by ordinary prosecutor's offices, these cases to be investigated only by prosecutors specifically appointed for this purpose, according to the procedure proposed by the present draft law.

Thus, the draft law proposes the dismantling of the Section for investigating criminal offences within the judiciary on the date of entry into force of the law. As a result, it is proposed to repeal the section on the organization, functioning and competence of the Section for investigating criminal offences within the judiciary of *Law no. 304/2004 on the organization of the judiciary* and the establishment of transitional provisions regarding the staff situation and files pending before the Section on the date of entry into force of this law.

The draft law expressly establishes the competence to carry out criminal investigation in cases that are currently within the competence of the Section for investigating criminal offences within the judiciary, as follows:

- **The Criminal Prosecution Section within the Prosecutor's Office attached to the High Court of Cassation and Justice**, for offences committed by judges and prosecutors, members of the Superior Council of Magistracy, by judges of the High Court of Cassation and Justice and by the prosecutors from the Prosecutor's Office attached to the High Court of Cassation and Justice, by the judges from the courts of appeal and the Military Court of Appeal, as well as by the prosecutors from the prosecutor's offices attached to these courts.
- **The prosecutor's offices attached to the courts of appeal**, for offences committed by judges from courts of first instance, tribunals, military tribunals and by prosecutors from prosecutor's offices attached to these courts.

It should be noted that this competence governed by this draft law is applicable in case of any offence, regardless of the prosecutor's office that would have been competent before the establishment of the Section for investigating criminal offences within the judiciary (Prosecutor's Office attached to the High Court of Cassation and Justice, National Anticorruption Directorate, Directorate for the Investigation of Organized Crime and Terrorism and the prosecutor's offices attached to the courts of appeal).

Prior to the establishment of the Section for investigating criminal offences within the judiciary, the Prosecutor's Office attached to the High Court of Cassation and Justice and the Prosecutor's Offices attached to the Courts of Appeal were competent to prosecute in the case of offences committed by judges and prosecutors - the Prosecutor's Office attached to the High Court of Cassation and Justice for the offences committed by members of the Superior Council of Magistracy, by judges of the High Court of Cassation and Justice and by prosecutors from the Prosecutor's Office attached to the High Court of Cassation and Justice, and the prosecutor's offices attached to the courts of appeal for the offences committed by other magistrates - in both cases, the rules on the competence of these prosecutor's offices did not apply in the case of offences within the competence of the National Anticorruption Directorate and, respectively, of the Directorate for the Investigation of Organized Crime and Terrorism.

With regard to the offences committed by military magistrates, the competence to carry out the criminal investigation will belong, according to the draft law, in all cases, to the non-military prosecutor's offices - for more clarity of regulation and in order to avoid questioning the legality of the criminal investigation acts performed by non-military prosecutors, it is expressly provided that the provisions of art. 56 para. (4) of Law no. 135/2010 on the Code of Criminal Procedure, as subsequently amended and supplemented, according to which "*The criminal investigation in*

the case of offences committed by the military is necessarily carried out by the military prosecutor" are not applicable.

The proposed solution is mainly justified by the insufficient number of military prosecutors, but also by their status as magistrates. A similar solution to the proposed one is found, *de lege lata*, as regards the competence of the Directorate for the Investigation of Organized Crime and Terrorism (where criminal investigation is carried out by non-military prosecutors even in the case of offences committed by the military). The competence of the Section for investigating criminal offences within the judiciary also included the conduct of criminal investigation in cases relating to offences committed by military magistrates.

It is noted that the solution proposed by this draft law regarding the establishment of the competence is not an absolute novelty, the competence according to the quality of the person being regulated by the Constitution and by the Code of Criminal Procedure.

The manner of regulating the competence by this draft law, according to which the competence to carry out criminal investigation in case of offences committed by judges or prosecutors is granted, as the case may be, both to the central structure of the Public Ministry (to the Prosecutor's Office attached to the High Court of Cassation and Justice), as well as some of its territorial structures (at the level of the prosecutor's offices attached to the courts of appeal), this is not a novelty either. The newly created European Public Prosecutor's Office operates at central level (Luxembourg), as well as at territorial level (at the level of Member States - parties of this form of enhanced cooperation). The manner of regulating the competence proposed by the draft law will allow the use of the entire existing infrastructure at the level of the competent prosecutor's offices in terms of human and material resources, so that dealing with criminal investigation files can be done quickly and efficiently.

In order to avoid situations in which, by abusively formulating a complaint against a magistrate, cases investigated by specialized prosecutor's offices could be removed from their competence, also taking in consideration that in the reports of some international bodies the practice of SIJ was criticized for intervening in high-level corruption cases investigated by National Anti-corruption Directorate (practice based on the provisions of art. 88¹ para. (2) of Law no. 304/2004 on the organization of the judiciary), the draft law stipulates that the specifically appointed prosecutors carry out the criminal investigation in the situation in which, together with the magistrates, other persons are also investigated, only if for serious reasons of good conduct of the prosecution, the case cannot be disjointed (the rule being disjunction).

In the situation where, together with judges from courts of first instance, tribunals, military tribunals or prosecutors from prosecutor's offices attached to these courts, are investigated other persons for whom, according to the law, the competence to carry out the criminal investigation belongs to the Prosecutor's Office attached to the High Court of Cassation and Justice, the criminal investigation is carried out by prosecutors appointed from the Criminal Prosecution Section of the Prosecutor's Office attached to the High Court of Cassation and Justice.

The draft also stipulates that the appointed prosecutors deal not only with cases related to crimes committed by judges and prosecutors, but also any other cases for which the competence belongs, according to the law, to the prosecutor's office within which they carry out their activity. Also, regarding the cases related to crimes that are within the competence of the prosecutor's office attached to the court of appeal according to this Law, taken over under the conditions of art. 325 of Law no. 135/2010 on the Code of Criminal Procedure, as subsequently amended and supplemented, it is stipulated that criminal prosecution is carried out by specifically appointed prosecutors within the Criminal Prosecution Section of the Prosecutor's Office attached to the High Court of Cassation and Justice.

With regard to the procedure for appointing prosecutors to prosecute offenses committed by judges and prosecutors, this is regulated by the draft taking into account the following coordinates:

- the prosecutors are specifically appointed by the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice, at the proposal of the Plenum of the Superior Council of Magistracy, for a period of four years.



This method of regulation ensures in a balanced way both the exercise of the role of head of the Public Ministry of the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice, and the attribute of the Plenum to conduct the selection of prosecutors who will prosecute cases with magistrates.

- Carrying out criminal investigation in cases concerning magistrates only by prosecutors who are appointed by the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice, at the proposal of the Plenum of the Superior Council of Magistracy and who meet certain conditions of seniority and professional experience is an additional mechanism, as a guarantee, in order to ensure adequate protection of magistrates against any potential pressure exerted on them and against abuses committed through arbitrary complaints / denunciations.

It should be mentioned that, by Decision no. 225/15 October 2020 of the Plenum of the Superior Council of Magistracy, the Judicial Inspection Report no. 5488/IJ/2510/DIJ/1365/DIP/2018 on "compliance with the general principles governing the activity of the Judicial Authority in cases within the competence of the National Anticorruption Directorate regarding magistrates or in connection with them" was approved.

The control on which the report of the Judicial Inspection was based covered the period January 1, 2014 - July 31, 2018, and based on the data resulting from the mentioned control, by the mentioned decision, the Plenum of the Superior Council of Magistracy noted that a series of practices of National Anticorruption Directorate prosecutors dealing with cases with judges, in the modalities mentioned by the decision of the Plenum, represented forms of pressure on them, with direct consequences in terms of the administration of justice. By the same decision, the Plenum of the Superior Council of Magistracy noted that "In view of the above circumstances, it can be concluded that the independence of the magistrates who were investigated in these cases has been affected, as a direct consequence of the way in which the criminal investigation was conducted. In the course of criminal proceedings, judicial bodies must ensure strict compliance with the law, which is imperative both with regard to the actions of other parties to the criminal proceedings and, in particular and especially, with regard to the actions of the judicial bodies themselves."

An action for the annulment of the Decision of the Plenum of the Superior Council of Magistracy no. 225/15 October 2020 in administrative proceedings was dismissed by the Bucharest Court of Appeal, the solution of the first instance being maintained by Decision no. 6144 / December 7, 2021 of the High Court of Cassation and Justice pronounced in the file no. 7433/2/2020.

➤ **Conditions for participation in the appointment procedure and its conduct:**

❖ At the level of the Prosecutor's Office attached to the High Court of Cassation and Justice, prosecutors who meet the following conditions may be proposed in order to be appointed:

- a) have a professional rank corresponding to the Prosecutor's Office attached to the High Court of Cassation and Justice;
- b) have a seniority of at least 15 years in the position of prosecutor;
- c) got the qualification "very good" at the last two professional assessments and have not been disciplinary sanctioned in the last 3 years;
- d) have impeccable moral conduct;
- e) have significant professional experience in supervising and conducting criminal investigations.

The significant professional experience of the prosecutors to be proposed for appointment shall be assessed, including by reference to the specifics and complexity of the cases investigated by those prosecutors, based on information or documents relevant to their work, requested from the prosecutor's offices where they worked.

In order to be appointed, the prosecutors who meet the conditions provided by law submit their option to the Superior Council of Magistracy.

The specialized directorate of the Superior Council of Magistracy shall verify that the conditions laid down by law are fulfilled and, in order to verify the condition concerning professional

experience, shall request the prosecutor's offices where they worked statistical data regarding the activity of the last 5 years, including the rate of acquittals, returns of cases, convictions, possible notifications made by the investigated persons and the solutions given to them, as well as any other relevant issues.

In order to assess the fulfilment of the condition of the impeccable moral conduct of the prosecutor, the specialized directorate of the Superior Council of Magistracy shall request from the prosecutor's offices where the prosecutor worked in the last 5 years, the courts attached to them and the bar to give their opinion on the conduct in the exercise of professional duties, relations with prosecutors, judges, other staff of prosecutor's office and of court, lawyers, litigants, experts and interpreters, conduct in society, integrity, avoidance of conflicts of interest of any kind and impartiality, as well as any other relevant aspects. The specialized directorate also requests the Judicial Inspection to communicate the data and information on the integrity and impartiality of the prosecutor existing in its records and attaches the data and information of the same nature in the records of the Superior Council of Magistracy. The Judicial Inspection makes available to the Plenum of the Superior Council of Magistracy the dismissal resolutions concerning the activity of the prosecutor in question.

Within 30 days from the date of receipt of the proposals, the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice shall rule on them. If he refuses to appoint a prosecutor, he is obliged to give reasons for such refusal.

From the date of appointment, prosecutors shall operate in The Criminal Prosecution Section within the Prosecutor's Office of the High Court of Cassation and Justice, on posts specifically allocated for that purpose.

The draft provides that upon termination of the capacity as a appointed prosecutor, the appointed prosecutors shall return in the positions previously held.

❖ At the level of prosecutor's offices attached to the courts of appeal, prosecutors who meet the following conditions may be proposed in order to be appointed:

- a) have a seniority of at least 12 years in the position of prosecutor;
- b) got the qualification "very good" at the last two professional assessments and have not been disciplinary sanctioned in the last 3 years;
- c) have impeccable moral conduct;
- d) have significant professional experience in the supervision or conduct of criminal investigations.

The specialized directorate of the Superior Council of Magistracy shall draw up the list of all prosecutors who meet the conditions regarding seniority and professional qualifications and, in order to verify the condition of professional experience, shall request the prosecutor's offices where they worked statistical data regarding the activity of the last 5 years, including the rate of acquittals, returns of cases, convictions, possible notifications made by the investigated persons and the solutions given to them, as well as any other relevant issues. The Plenum of the Superior Council of Magistracy proposes to the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice the prosecutors who will carry out the criminal investigation for the crimes committed by judges or prosecutors.

The Plenum of the Superior Council of Magistracy may, if deemed necessary, invite the prosecutors proposed to be appointed for an interview.

The proposed regulations, which include elements such as seniority or professional experience as conditions for selection for appointment, establish a genuine mechanism to ensure adequate protection of judges and prosecutors against any pressure.

After the expiration of the four-year period for which they were appointed, in accordance with the law, the respective prosecutors may be appointed for a new period of 4 years, according to the same procedure.

➤ The cessation of the quality of prosecutor appointed may be ordered in the following cases:

- a) for professional inefficiency which is assessed according to the efficiency and quality of the activity;
- b) at the request of the appointed prosecutor, for duly justified reasons;
- c) in case of application of a disciplinary sanction;

- d) the impossibility of exercising the attributions for a period longer than 3 months by the appointed prosecutor;
- e) moving the prosecutor to another section of the prosecutor's office, delegating, seconding or transferring him.

As regards professional inefficiency, as a cause for the cessation of the appointment, it should be noted that the cessation of the appointment for this reason does not have the effect of a dismissal from office (such as, for example, the dismissal of prosecutors of National Anticorruption Directorate or Directorate for the Investigation of Organized Crime and Terrorism) and does not affect the professional degree of the prosecutor. In relation to the fact that the appointment has the nature of an administrative distribution with a special procedure, and not of an *ad validitatem* condition for the functioning of the prosecutor according to the acquired professional degree, the criterion of professional inefficiency does not require detailing, being covered by indicators of quality and promptness of the criminal investigation activity (imputable acquittals, imputable objections, accepted appeals based on the provisions of art. 488¹ of the Criminal Procedure Code).

The Plenum of the Superior Council of Magistracy, ex officio or at the notification of the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice, examines the existence of one of the cases of cessation of appointment provided for by law and, if necessary, proposes the cessation of the quality of prosecutor appointed for prosecuting cases of offenses committed by judges and prosecutors.

The Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice orders the cessation of the quality of appointed prosecutor within 10 days from the communication of the decision of the Plenum of the Superior Council of Magistracy.

In order to avoid non-unitary interpretations of the provisions on the competence to carry out criminal prosecution in the case of offences committed by judges and prosecutors, it is necessary to regulate the fact that prosecutors with leading positions perform their duties as hierarchically superior prosecutor of the specifically appointed prosecutors, in order to exercise hierarchical control, without the need to appoint them according to the provisions of the draft.

The draft expressly stipulates the maximum number of appointed prosecutors:

- 14 within the Criminal Prosecution Section;
- three for each prosecutor's office attached to the Court of Appeal.

➤ For objective situations, in which the appointed prosecutor is unable to exercise his duties for a period longer than 3 months or in case of incompatibility, and within the prosecutor's office there is no other specifically appointed prosecutor, or if the appointed prosecutor is unable to exercise his duties for a period of less than 3 months, in order to carry out the criminal investigation operations that do not suffer postponement, and within the prosecutor's office there is no other specifically appointed prosecutor, the criminal investigation is carried out by the chief prosecutor of the Criminal Prosecution Section within the Prosecutor's Office attached to the High Court of Cassation and Justice or, as the case may be, by the Prosecutor General of the Prosecutor's Office attached to the Court of Appeal (without the need of appointing them according to the provisions of the draft).

➤ In order to carry out quickly and thoroughly the activities of discovery and prosecution of crimes, the draft also provides that, within the Prosecutor's Office attached to the High Court of Cassation and Justice and the prosecutors' offices attached to the courts of appeal shall operate, by secondment, judicial police officers and agents, within the limits of the positions approved according to the law.

➤ The draft contains a series of transitional provisions regarding the appointment of prosecutors, as well as the situation of cases and of SIJ staff at the time of its dissolution.

Thus, the draft stipulates that until the appointment of prosecutors, according to the law, the execution of criminal prosecution acts which cannot be postponed in the case of crimes committed by magistrates is to be carried out, as appropriate, by the chief prosecutor of the Criminal Prosecution Section within the Prosecutor's Office attached to the High Court of

Cassation and Justice or by the Prosecutor General of the Prosecutor's Office attached to the Court of Appeal.

With regard to the cases pending before the Section on the date of entry into force of the law, they are proposed to be transmitted administratively, within 60 working days from the date of entry into force of the law, to the competent prosecutors' offices, according to the law, by the Prosecutor's Office attached to the High Court of Cassation and Justice. For the solved files existing in the archives of the Section at the date of its dissolution, the deadline for transmission is 180 working days.

Also, the procedural acts carried out in these cases prior to the entry into force of the law, in compliance with the legal provisions in force at the time of their fulfilment, remain valid.

In order to comply with the constitutional principle of hierarchical subordination of prosecutors within the Public Ministry and, taking into account the case-law of the Constitutional Court regarding its reflection in infra-constitutional regulations (for example, we mention Constitutional Court Decision no. 547/2020, previously quoted), the draft provides that the solutions ordered by the prosecutors of the Section, which prior to the entry into force of the law were not subject to hierarchical control, are, after this date, subject to the control exercised by the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice, the rule being applicable in the case of *ex officio* control, as well as in the case of the control carried out following a referral (complaint).

Starting with the date of the dismantling of the Section, the representation of the Public Ministry in the cases taken over from the Section will be ensured by prosecutors from the prosecutors' offices attached to the courts where they are pending.

These provisions also apply to the cases relating to the offenses committed by judges and prosecutors, which were pending before the courts at the time of the operationalization of the Section **and were not solved until the date of entry into force of this law.**

Also, in order to comply with the principle of hierarchical subordination, the appeals exercised by the Section may be withdrawn only by the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice.

The positions in the functions and personnel scheme of the Section at the date of entry into force of the law remain in the scheme of the Prosecutor's Office attached to the High Court of Cassation and Justice, being taken over by the Criminal Prosecution Section.

Regarding the situation of the staff within SIIJ, the prosecutors within the Section, including those with leading positions, return to the prosecutors' offices where they come from or to the prosecutors' offices where they promoted according to the law during the activity within the Section. From the date of returning to the prosecutor's office where they come from or where they promoted, the prosecutors regain their professional degree of execution and the corresponding salary they previously had or those acquired as a result of promotion, in accordance to the law, during the activity within the Section for investigating criminal offences within the judiciary.

The ongoing secondments of staff to the other categories of positions are maintained within the Criminal Prosecution Section of the Prosecutor's Office attached to the High Court of Cassation and Justice, until reaching the deadline for which they were ordered.

When solving the cases investigated by the prosecutors appointed according to this law, as well as in the settlement of proposals, appeals, complaints or of any other requests formulated in the respective cases, prosecutors from the prosecutors' offices attached to the competent courts before which these cases are brought take part in.

On the date of entry into force of this law, Section 2¹ - "Section for the investigation of criminal offences in the judiciary" of Law no. 304/2004 on the judicial organization, republished in the Official Gazette of Romania, Part I, no. 827 of September 13, 2005, as further amended and supplemented, is repealed.

Considering that it is appropriate to return to the solution provided for by the previous Code of Criminal procedure, namely to assign the High Court of Cassation and Justice the competence to judge in first instance cases concerning offenses committed by the judges of the courts of appeal and the prosecutors of the prosecutor offices attached to them, the draft also contains provisions on the modification of the provisions of Article 38(1)(f) and, in correlation, of Article 40(1) of *Law No 135/2010 on the Code of Criminal procedure*, published in the Official Gazette of Romania, Part I, No. 486 of 15 July 2010, with subsequent amendments and completions.