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**CONSULTATIVE COUNCIL OF EUROPEAN PROSECUTORS  
(CCPE)**

**Opinion of the CCPE Bureau  
following a request by the Romanian Movement  
for Defending the Status of Prosecutors  
as regards the situation on the independence  
of prosecutors in Romania**

## INTRODUCTION

1. The CCPE received a request from the Romanian Movement for Defending the Status of Prosecutors, on 15 November 2018, to express its position as regards the independence of prosecutors in Romania. The request referred to an overall long history of tense battle in Romania, since 2017, for the preservation of the independence of prosecutors and judges, as well as certain other issues. The request also emphasised *inter alia* the problems, which have received widespread national and international attention, in the fight against corruption and, in particular, the dismissal, in July 2018, upon the request of the Minister of Justice, of the Chief Prosecutor of the National Anticorruption Directorate, Ms Laura Codruta Kovesti<sup>1</sup>.
2. As to issues of direct relevance to the CCPE mandate, the Romanian Movement for Defending the Status of Prosecutors pointed to the Amendments to the following Laws: 1) on the Superior Council for Magistracy which entered into force in October 2018; 2) on the Statute of Judges and Prosecutors which entered into force in October 2018; 3) on Judicial Organization which entered into force in July 2018.
3. The request described how these amendments were developed and proposed, without any meaningful dialogue and involvement of the judiciary and the prosecution. The request also referred in-depth to the Opinion of the Venice Commission on the above-mentioned Amendments which confirmed that “the legislative process took place in a context marked by a tense political climate, strongly impacted by the results of the country's efforts to fight corruption”<sup>2</sup> and that “this context makes any legislative initiative, which has the potential of increasing the risk of political interference in the work of judges and prosecutors, particularly sensitive”<sup>3</sup>.
4. As regards prosecutors in particular, the CCPE was requested to answer a list of questions, from the point of view of European standards on the independence of prosecutors, concerning the role and functioning of the Superior Council for Magistracy, appointing/dismissing high-ranking prosecutors, the material liability of prosecutors, the establishment of a separate prosecutor office structure for the investigation of offences committed by prosecutors, the freedom of expression of prosecutors, repeated and unprecedented attacks against prosecutors directed by political actors, and the right of prosecutors to stand against any policies or actions affecting their independence.
5. In considering these issues, the CCPE Bureau takes note of the Venice Commission's above-mentioned Opinion, as well as of the Progress Report issued by the European Commission, on 13 November 2018, in the framework of the Cooperation and Verification Mechanism (CVM), which *inter alia* called on Romania to suspend immediately the implementation of the above-mentioned Amendments, and to revise them taking fully into account the recommendations under the CVM and those issued by the Venice Commission<sup>4</sup>.

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<sup>1</sup> She was dismissed by the President of Romania who initially objected to the dismissal and eventually dismissed Ms Kovesti only after a decision by the Constitutional Court of Romania that upheld the Justice Minister's decision and required the President to sign the dismissal.

<sup>2</sup> See the Venice Commission's Opinion on Amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organization, and Law No. 317/2004 on the Superior Council for Magistracy in Romania, CDL-AD(2018)017, para 13.

<sup>3</sup> See the Venice Commission's Opinion on Amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organization, and Law No. 317/2004 on the Superior Council for Magistracy in Romania, CDL-AD(2018)017, para 17.

<sup>4</sup> See at [http://europa.eu/rapid/press-release\\_IP-18-6365\\_en.htm](http://europa.eu/rapid/press-release_IP-18-6365_en.htm) .

6. In this way, having examined the request of the Romanian Movement for Defending the Status of Prosecutors in the light of the relevant European standards, including the Council of Europe Committee of Ministers' Recommendations, CCPE and Venice Commission standards, as well as the case law of the European Court of Human Rights (ECtHR), the CCPE Bureau has delivered the present Opinion. It comprises a legal analysis of the Amendments together with corresponding recommendations in bold at the end of each section. A summary of the recommendations appears at the beginning of the Opinion in order to make it reader-friendly and to facilitate a quick reference to the key findings and recommendations of the CCPE Bureau.

### **Summary of Recommendations**

7. **The Bureau of the CCPE, which represents the CCPE members who are serving prosecutors from all Council of Europe member States, agrees with the concerns expressed by the Romanian Movement for Defending the Status of Prosecutors as regards the independence of prosecutors in Romania and the adoption of Amendments to the Laws on the Superior Council for Magistracy, on the Statute of Judges and Prosecutors and on Judicial Organization.**
8. **As regards the role and functioning of the Superior Council for Magistracy (SCM), the CCPE Bureau recommends reconsidering the grounds for the revocation of SCM members and in particular to remove the possibility to revoke elected members of the SCM through a no-confidence vote of the general meetings of prosecutor's offices, including by way of a petition.**
9. **The CCPE Bureau also concludes that the exclusion of SCM members who are civil society representatives from all meetings of the SCM Sections – bodies entrusted with decision-making under the Amendments – runs contrary to European standards.**
10. **The CCPE Bureau consequently considers it inappropriate to have such a limited role of civil society representatives in the work of the SCM and recommends their full participation in all SCM activities and decision-making, along with other SCM members.**
11. **As regards the appointment/dismissal of the Prosecutor General and other high-ranking prosecutors, the CCPE Bureau recommends reconsidering the Amendments, as well as the related provisions of the current Constitution of Romania, in order to provide for a neutral and objective appointment/dismissal process in line with European standards.**
12. **As regards the material liability of prosecutors, the CCPE Bureau is concerned about the exclusion of the SCM from the procedure relating to such liability, as well as with the decisive role, at the initial stage, of the Ministry of Public Finance, which is an executive body and should therefore not be involved in assessing the existence or causes of any judicial error. The CCPE Bureau recommends that this involvement be fully reconsidered and also that the action for recovery take place only after a disciplinary procedure against the prosecutor in question has been duly concluded with a verdict of guilt.**

13. **The CCPE Bureau further points out that the new liability procedure is particularly worrying when seen in the context of other Amendments establishing a new body for investigating criminal offences of prosecutors and imposing limitations on their freedom of speech. In this context, there is a high risk of pressure on prosecutors undermining their independence and autonomy.**
14. **In addition to these procedural aspects, the CCPE Bureau recommends that the new definition of judicial error be supplemented by clearly stating that magistrates are not liable unless bad faith or gross negligence on their part have been previously established through due process.**
15. **As regards the establishment of a separate prosecutor's office structure for the investigation of offences committed by judges and prosecutors, the CCPE Bureau recommends abandoning this idea entirely.**
16. **The CCPE Bureau considers that the new obligation imposed on Romanian prosecutors, limiting their freedom of expression, is not necessary, raises many questions, and may be subject to arbitrary and abusive interpretations endangering prosecutorial independence. It therefore recommends removing it.**
17. **As regards the reported repeated and unprecedented attacks against prosecutors directed by political actors, the CCPE Bureau condemns any statements, comments or remarks in Romania which may overstep the boundaries of legitimate criticism and aim at attacking, intimidating or otherwise pressuring prosecutors or demonstrating disrespect towards them, using improper arguments or otherwise degrading the prosecutorial system or individual prosecutors.**
18. **As regards the right of prosecutors to stand against any policies or actions affecting their independence, the CCPE Bureau endorses the legitimate right of prosecutors in Romania and elsewhere to stand against any policies or actions affecting their independence and autonomy. Any criticism by the judiciary must of course be expressed in a climate of mutual respect, and in a way which is consistent with maintaining prosecutorial independence and/or impartiality.**

## **Legal Analysis**

### ***The role and functioning of the Superior Council for Magistracy (SCM)***

19. **First of all, the CCPE Bureau notes that, as regards the revocation of a SCM member, according to the Amendments to the Law on the Superior Council for Magistracy, this is possible at any time if he/she no longer meets the legal requirements for being an elected SCM member, is the subject of one of the disciplinary sanctions provided by law, and the majority of prosecutors in the prosecutor's offices which he/she represents withdraws confidence in respect of him or her.**
20. **Furthermore, a vote of no-confidence may be adopted by petition signed by a majority of prosecutors in those prosecutors' offices. This would mean that the revocation can be decided without holding a meeting and without giving the possibility to the concerned SCM member to address the prosecutors and defend his/her position<sup>5</sup>.**

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<sup>5</sup> See the Venice Commission's Opinion on Amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organization, and Law No. 317/2004 on the Superior Council for Magistracy in Romania, CDL-AD(2018)017, para 145.

21. Both the CCPE and the Venice Commission have underlined that setting up a Prosecutorial Council is a very welcome step towards the depoliticisation of the Prosecutor's Office and, in order to ensure the neutrality of this body the independence of the Prosecutorial Council and its members should be clearly stipulated<sup>6</sup>.
22. The introduction of the Councils for the Judiciary (which may also be responsible for prosecutors) has been also recommended by the Committee of Ministers of the Council of Europe, by the Consultative Council of European Judges (CCJE) and by the Venice Commission<sup>7</sup>. Over recent years, many European legal systems have introduced Councils for the Judiciary.
23. Therefore, even though the CCPE has not yet expressed itself on the issue of revocation of a member of such a Council, its independence certainly supposes the existence of safeguards against any arbitrary or otherwise unfounded or questionable revocation of any of its members.
24. The same logic applies to Recommendation of the Committee of Ministers of the Council of Europe on judges: independence, efficiency and responsibilities, which, while not addressing directly the issue of revocation of members, has underlined that "Councils for the judiciary are independent bodies, established by law or under the constitution, that seek to safeguard the independence of the judiciary"<sup>8</sup>.
25. Consequently, the CCPE Bureau agrees with the Venice Commission in that as concerns the first ground for revocation of a SCM member, it is not clear what exactly it means<sup>9</sup>, and that "the possibility to revoke an SCM member for having been the subject of one of the disciplinary sanctions provided by law for judges and prosecutors is also questionable, as it allows the dismissal of the person even for the lightest disciplinary sanctions"<sup>10</sup>. It may also be recalled in this context that "the Venice Commission is of the opinion that decisions on suspension of a member should take into account the gravity of the accusations and the existence of at least a probable cause that a serious disciplinary offence has been committed"<sup>11</sup>.
26. The CCPE Bureau also fully endorses what the Venice Commission has stressed regarding the third – most problematic – ground, allowing the revocation of elected SCM members by a withdrawal of confidence, i.e. by vote of the general meetings of prosecutor's offices. "The Venice Commission has consistently objected to the introduction of such a mechanism, because it involves a subjective assessment and may prevent the elected representatives from taking their decisions independently. A vote of confidence is rather specific to political institutions, and is not suitable for

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<sup>6</sup> See Joint Opinion of the Venice Commission, Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, CDL-AD(2015)039, paras 33-34.

<sup>7</sup> See Recommendation of the Committee of Ministers of the Council of Europe on judges: independence, efficiency and responsibilities (Rec(2010)12), paras 26-29; see also CCJE Opinion No. 10 (2007) on the Council for the Judiciary at the service of society; see also the Venice Commission's Report on the Independence of the Judicial System, Part I: the Independence of Judges, CDL-AD(2010)004, para 32, which all recommend the establishment of such Councils.

<sup>8</sup> See Recommendation of the Committee of Ministers of the Council of Europe on judges: independence, efficiency and responsibilities (Rec(2010)12), para 26.

<sup>9</sup> See the Venice Commission's Opinion on Amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organization, and Law No. 317/2004 on the Superior Council for Magistracy in Romania, CDL-AD(2018)017, para 141.

<sup>10</sup> *Ibid.*, para 142.

<sup>11</sup> See the Venice Commission's Opinion on the Draft Law on the Judicial Council in North Macedonia, CDL-AD(2019)008, para 37; see also the Venice Commission's Opinion on the Draft Amendments to the Law on the High Judicial Council of Serbia, CDL-AD(2014)028, para 30.

institutions such as judicial councils, and even less for individual members of such councils”<sup>12</sup>.

27. It is important to note that, as already mentioned in the Introduction to the present Opinion, the European Commission's Progress Report on Romania under the CVM, adopted on 13 November 2018, called on Romania to suspend immediately the implementation of the justice laws, including the Amendments to the Law on the Superior Council for Magistracy, and to revise the justice laws taking fully into account the recommendations under the CVM and those issued by the Venice Commission<sup>13</sup>. The Progress Report emphasised that the key problematic provisions included in particular the extended grounds for revoking SCM members<sup>14</sup>.
- 28. Accordingly, the CCPE Bureau recommends reconsidering, in line with the above-mentioned observations, the grounds for the revocation of SCM members and in particular to remove the possibility of revoking elected members of the SCM through a no-confidence vote of the general meetings of prosecutors' offices, including by way of a petition<sup>15</sup>.**
29. The CCPE Bureau further notes that according to the Amendments to the Law on the SCM, the decision-making on issues of specific relevance for the two professions - prosecutors and judges - is transferred from the SCM Plenum to the two SCM Sections (for prosecutors and for judges, respectively).
30. While this structural change, aiming at clearly separating the careers of prosecutors and judges, does not in itself contradict European standards, it has certain repercussions as regards some members of the SCM.
31. As regards in particular the SCM members who are representatives of civil society, they can participate only in the SCM Plenum meetings. The Amendments clearly prevent their participation in the SCM Sections meetings, which means that, as noted by the Venice Commission, they will not take part in the adoption of the decisions taken by the SCM Sections<sup>16</sup>.
32. In this context, both the CCPE and the Venice Commission have emphasised that a Prosecutorial Council should be conceived as a pluralistic body, which includes prosecutors, members of civil society and a government official<sup>17</sup>.
- 33. The CCPE Bureau therefore concludes that the exclusion of SCM members who are civil society representatives from all meetings of the SCM Sections – bodies entrusted with decision-making under the Amendments – runs contrary to the European standards.**

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<sup>12</sup> See the Venice Commission's Opinion on Amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organization, and Law No. 317/2004 on the Superior Council for Magistracy in Romania, CDL-AD(2018)017, para 143.

<sup>13</sup> See at [http://europa.eu/rapid/press-release\\_IP-18-6365\\_en.htm](http://europa.eu/rapid/press-release_IP-18-6365_en.htm).

<sup>14</sup> See the Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism (Strasbourg, 13.11.2018 COM(2018) 851 final), Section 3.1 (Benchmark one: judicial independence and judicial reform. Justice laws and legal guarantees for judicial independence), page 3.

<sup>15</sup> See the Venice Commission's Opinion on Amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organization, and Law No. 317/2004 on the Superior Council for Magistracy in Romania, CDL-AD(2018)017, para 165.

<sup>16</sup> Ibid., para 137.

<sup>17</sup> See Joint Opinion of the Venice Commission, Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, CDL-AD(2015)039, paras 33-34.

34. **The CCPE Bureau consequently considers it inappropriate to have such a limited role of civil society representatives in the work of the SCM and recommends their full participation in all SCM activities and decision-making, along with other SCM members.**

### ***Appointing/dismissing high-ranking prosecutors***

35. Currently in Romania, the Prosecutor General and the Chief Prosecutors of the National Anticorruption Directorate (DNA) and Department for Investigating Organised Crime and Terrorism (DIICOT), as well as their deputies, are appointed by the President of Romania upon the proposal of the Minister of Justice, and after receiving the opinion of the SCM. The President may refuse an appointment, providing reasons for such a refusal. The law in force before the adoption of the Amendments did not mention how many times the President could refuse.
36. The Amendments to the Law on the Statute of Judges and Prosecutors prescribe that the President may refuse only once. In this way, when the Minister of Justice proposes the second candidate, the President is bound to make the appointment, even in the case of a negative opinion of the SCM.
37. The CCPE Bureau wishes to recall that the manner in which the Prosecutor General is appointed, as well as dismissed, plays a significant role in the system guaranteeing the correct functioning of the prosecutor's office<sup>18</sup>. The establishment of a Prosecutorial Council, which would play a key role in the appointment of the Chief Prosecutor, can be considered as one of the most effective modern instruments to achieve this goal<sup>19</sup>. In countries, where the Prosecutor General is elected by Parliament, the obvious danger of a politicisation of the appointment process could also be reduced by providing for the preparation of the election by a parliamentary committee, which should take into account the advice of experts. The use of a qualified majority for the election of a Prosecutor General could be seen as a mechanism to achieve consensus on such appointments<sup>20</sup>.
38. Therefore, when the Minister of Justice is granted such a decisive unilateral role over the appointment as the one stipulated by the Amendments in Romania, it clearly runs contrary to European standards. This is especially true in the context of the Minister belonging to the dominant political force having the majority in Parliament, which is presently the case in Romania.
39. A different problem is, however, the one relating to the appointment of other prosecutors, namely the high-ranking prosecutors. In this regard, the CCPE has already stated that an independent professional authority, such as a Prosecutorial Council, should be competent for the appointment, promotion and discipline of prosecutors<sup>21</sup>, which excludes or at least restricts the intervention of other State bodies.

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<sup>18</sup> See Opinion No.9 (2014) of the CCPE on European norms and principles concerning prosecutors, Explanatory Note, paras 55, 56; see Venice Commission's Report on European Standards as Regards the Independence of the Judicial System: Part II – the Prosecution Service, CDL-AD(2010)040, paras 34-35.

<sup>19</sup> See Joint Opinion of the Venice Commission, Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, CDL-AD(2015)039, paras 19, 20 and 27.

<sup>20</sup> See Venice Commission's Report on European Standards as Regards the Independence of the Judicial System: Part II – the Prosecution Service, CDL-AD(2010)040, paras 35-38, 40.

<sup>21</sup> See Opinion No. 13 (2018) of the CCPE on independence, accountability and ethics of prosecutors, para 24 and Recommendation iii.

40. The Venice Commission has mentioned that the previous system in Romania, by involving two political organs – the President and the Minister of Justice – “allows the balancing of various political influences. The new system, allowing the President to refuse an appointment only once, makes the role of the Minister of Justice in such appointments decisive and weakens, rather than ensures, checks and balances. This is important since the President, contrary to the Minister of Justice, does not necessarily belong to the majority”<sup>22</sup>.
41. In the new conditions, if the President is bound to appoint the second candidate proposed by the Minister of Justice even in case of a negative opinion by the SCM, such opinion becomes meaningless. This is not compatible with the role that a body such as the SCM should play.
42. Moreover, this should also be considered within the context of the recent developments related to the proposal made by the Minister of Justice for the dismissal of the DNA Chief Prosecutor, and its refusal by the Romanian President, followed by the decision of the Constitutional Court. The latter established that, under the current Romanian Constitution, the President had no refusal power in the revocation process, and that the President’s power was limited only to verifying the legality of the procedure<sup>23</sup>.
43. The Constitutional Court of Romania further established that the position expressed by the SCM shall serve, for the Minister of Justice, as an advisory reference regarding both the legality and the soundness of the dismissal proposal, while for the President, it shall only serve as advice in respect of legality issues<sup>24</sup>.
44. The Bureau of the CCPE fully agrees with the Venice Commission that the decision of the Constitutional Court “gives the Minister of Justice the crucial power in removing high-ranking prosecutors, while confining the President in a rather ceremonial role, limited to certifying the legality of the relevant procedure. The weight of SCM is also considerably weakened”<sup>25</sup>.
45. The CCPE Bureau also notes that the European Commission's above-mentioned Progress Report on Romania under the CVM mentioned that the Amendments have weakened the role of the President of Romania and the SCM role in the appointment process for senior prosecutors, while strengthening the role of the Minister of Justice<sup>26</sup>.
46. **The CCPE Bureau consequently recommends reconsidering the system for the appointment/dismissal of the Prosecutor General and other high-ranking prosecutors, including the Amendments as well as the related provisions of the current Constitution of Romania, in order to provide for a neutral and objective appointment/dismissal process in line with European standards**<sup>27</sup>.

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<sup>22</sup> See the Venice Commission’s Opinion on Amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organization, and Law No. 317/2004 on the Superior Council for Magistracy in Romania, CDL-AD(2018)017, para 52.

<sup>23</sup> Ibid., para 56.

<sup>24</sup> Ibid., para 57.

<sup>25</sup> Ibid., para 58.

<sup>26</sup> See the Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism (Strasbourg, 13.11.2018 COM(2018) 851 final), Section 3.1 (Benchmark one: judicial independence and judicial reform. Justice laws and legal guarantees for judicial independence), page 7.

<sup>27</sup> See the Venice Commission’s Opinion on Amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organization, and Law No. 317/2004 on the Superior Council for Magistracy in Romania, CDL-AD(2018)017, para 165.

## ***Material liability of prosecutors***

47. The Amendments to the Law on the Statute of Judges and Prosecutors prescribe that the action for recovery brought by the state against a magistrate (including prosecutors)<sup>28</sup> having committed a judicial error in bad faith or as a result of gross negligence is no longer optional. Such action has become obligatory, and moreover it is an executive body - the Ministry of Public Finance – which is entrusted to start the procedure by requesting the Judicial Inspection to provide a report. Such a report is of a consultative nature, and the Ministry may depend on it, as well as on its own evaluation. It is important also to note that the new procedure will apply both to serving prosecutors and those who are no longer in office.
48. It is interesting to note that, as regards the definition of a judicial error, two successive versions were challenged before the Constitutional Court of Romania for being unclear and unpredictable and affecting the independence of magistrates, and they have both been declared unconstitutional<sup>29</sup>.
49. Under the Amendments, there is also a risk of two parallel procedures for acting in bad faith or with gross negligence - action for recovery and disciplinary procedure - with different possible outcomes. There is also reason for concern as regards the increased role of the Judicial Inspection in the recovery process and the broad powers of the Chief Inspector; and the exclusion of the SCM from the procedure.
50. The CCPE has established that “prosecutors should not benefit from a general immunity, but from functional immunity for actions carried out in good faith in pursuance of their duties”<sup>30</sup>.
51. In addition, the CCPE has found that “the proximity and complementary nature of the missions of judges and prosecutors create similar requirements and guarantees in terms of their status and conditions of service”<sup>31</sup> and that “unless they are found to have committed a disciplinary offence or to have clearly failed to do their work properly, prosecutors, similar to judges, may not be held personally responsible for their choices of public action once they have been the result of a personal intellectual and legal analysis”<sup>32</sup>, whereas the CCJE, in its turn, has stated that “as a general principle, judges personally should enjoy absolute freedom from liability in respect of claims made directly against them relating to their exercise in good faith of their functions”<sup>33</sup>.
52. What is also important is that “prosecutors may need protection from civil suits for actions done in good faith in pursuance of their duties”<sup>34</sup> and that the “member States should redress the damage stemming from prosecutors' professional action or

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<sup>28</sup> According to the constitutional provisions, prosecutors are, in the Romanian system, part of the judicial authority, see the Venice Commission's Opinion on Amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organization, and Law No. 317/2004 on the Superior Council for Magistracy in Romania, CDL-AD(2018)017, para 18.

<sup>29</sup> See Constitutional Court of Romania, Decision no.45 of 30 January 2018, Decision no. 252 of 19 April 2018.

<sup>30</sup> See Opinion No. 9(2014) of the CCPE on European norms and principles concerning prosecutors, Rome Charter, para X; see also Opinion No. 13(2018) of the CCPE on independence, accountability and ethics of prosecutors, paras 47-50; see also the Venice Commission's Report on European Standards as Regards the Independence of the Judicial System: Part II – the Prosecution Service, CDL-AD(2010)040, para 61.

<sup>31</sup> See Opinion No. 9(2014) of the CCPE on European norms and principles concerning prosecutors, Rome Charter, Explanatory Note, para 53.

<sup>32</sup> See Opinion No. 13(2018) of the CCPE on independence, accountability and ethics of prosecutors, para 48.

<sup>33</sup> See CCPE Opinion No. 3 (2002) on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, para 55; see also CCPE Magna Carta for Judges (2010), para 21.

<sup>34</sup> See Opinion No. 9(2014) of the CCPE on European norms and principles concerning prosecutors, Rome Charter, Explanatory Note, para 89.

omission and prosecutors should not be held personally liable for such damage, except in cases of deliberate offences and/or gross negligence”<sup>35</sup>.

53. Furthermore, “the accountability of prosecutors is not meant to interfere with their independence”. Prosecutors “are subject, where appropriate, to disciplinary proceedings which must be based on a law, in the event of serious breaches of duty (negligence, breach of the duty of secrecy, anti-corruption rules, etc.), for clear and determined reasons; the proceedings should be transparent, apply established criteria and be held before a body which is independent from the executive”<sup>36</sup>.
54. The CCPE Bureau also notes that the European Commission's above-mentioned Progress Report on Romania under the CVM has emphasised that the key problematic provisions included in particular the new provisions on material liability of magistrates for their decisions<sup>37</sup>.
55. **Therefore, the CCPE Bureau is concerned about excluding the SCM from the procedure relating to such liability, as well as about any decisive role, at the initial stage, of the Ministry of Public Finance, which is an executive body and should not be involved in assessing the existence or causes of any judicial error** <sup>38</sup>. The CCPE Bureau recommends that this involvement be fully reconsidered and also that the action for recovery take place only after a disciplinary procedure against the prosecutor in question has been duly concluded with a verdict of guilt.
56. The CCPE Bureau further points out that the new liability procedure is particularly worrying when seen in the context of other Amendments establishing a new body for investigating criminal offences of prosecutors and imposing limitations on their freedom of speech. In this context, there is a high risk of a pressure on prosecutors undermining their independence<sup>39</sup> and autonomy.
57. In addition to these procedural aspects, the CCPE Bureau recommends that the new definition of judicial error be supplemented by clearly stating that magistrates are not liable unless bad faith or gross negligence on their part has been previously established through due process<sup>40</sup>.

### ***Establishment of a separate prosecutor office structure for the investigation of offences committed by prosecutors***

58. The Amendments to the Law on the Judicial Organization prescribe the establishment, within the Prosecutor's Office attached to the High Court of Cassation and Justice, of a Section for the investigation of criminal offences in the judiciary. This Section will have exclusive competence for the prosecution of criminal offences committed by

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<sup>35</sup> See Opinion No. 13(2018) of the CCPE on independence, accountability and ethics of prosecutors, para 49.

<sup>36</sup> Ibid., para 47.

<sup>37</sup> See the Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism (Strasbourg, 13.11.2018 COM(2018) 851 final), Section 3.1 (Benchmark one: judicial independence and judicial reform. Justice laws and legal guarantees for judicial independence), page 3.

<sup>38</sup> See the Venice Commission's Opinion on Amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organization, and Law No. 317/2004 on the Superior Council for Magistracy in Romania, CDL-AD(2018)017, para 117.

<sup>39</sup> Ibid., para 121.

<sup>40</sup> Ibid., para 122.

prosecutors, as well as by judges, including SCM members, even when other persons, in addition to prosecutors and judges, are under investigation.

59. In this regard, the CCPE Bureau wishes to underline from the outset that it finds it difficult to identify references to such practices in member States, and moreover to standards in this respect elaborated in international or regional instruments. The CCPE has however *inter alia* indicated clearly that “the need of specialisation of prosecutors, as well as within the public prosecutors organisational structure, should be seen as a priority, to better respond to new forms of criminality”<sup>41</sup>. For example, when elaborating its Opinion on the quality and efficiency of the work of prosecutors, the CCPE combined it with the fight against terrorism and serious and organised crime which of course requires a certain degree of specialisation<sup>42</sup>.
60. By analogy, the CCJE has also found that the specialisation of judges “can help judges, by repeatedly dealing with similar cases, to gain a better understanding of the realities concerning the cases submitted to them, whether at the technical, social or economic levels, and therefore to identify solutions better suited to those realities”<sup>43</sup>.
61. The CCPE Bureau strongly doubts, however, that setting up a specific Section for the investigation of criminal offences in the judiciary, within the Prosecutor’s Office attached to the High Court of Cassation and Justice, will help in dealing with persons from a certain profession – as opposed to certain types of crime - i.e. prosecutors and judges. Such a separate structure may be considered as a breach of the principle of equality before the law. The problem to be addressed with the specialisation of prosecutors is not necessarily the nature of the offenders, but rather the type and gravity of the offenses they may commit. Therefore, a regular criminal department of the prosecution service should be able to handle the investigation of cases concerning judges and prosecutors. Moreover, given that the number of known cases of prosecution of these magistrates is relatively small in Romania, what would be important is to set up, within the SCM, a section concerned with the ethics of prosecutors and judges, charged *inter alia* with answering questions that may arise in this regard<sup>44</sup>.
62. Furthermore, setting up a separate prosecutor office structure for the investigation of offenses committed by judges and prosecutors may raise questions about the rationale for such an approach, its effectiveness and added value. It also raises concerns as regards the public image of the prosecution service because such a step may be interpreted by society as evidence of an inclination of the whole professional group to commit a specific type of crime, for example, corruption. In this way, it will not only be derogatory for this professional group but will also damage, possibly severely, the public confidence in the prosecution service in particular, and in the judiciary in general.
63. Moreover, in the context of the existence in Romania of the DNA, which is responsible for the specific crime of corruption committed by anybody and not just by a specific professional group, such a step as the establishment of a separate Section for the investigation of criminal offences of judges and prosecutors seems even more questionable.

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<sup>41</sup> See CCPE Opinion No. 9 (2014) on European norms and principles concerning prosecutors, Rome Charter, Explanatory Note, para 119.

<sup>42</sup> See CCPE Opinion No. 11 (2016) on the quality and efficiency of the work of prosecutors, including when fighting terrorism and serious and organised crime.

<sup>43</sup> See CCJE Opinion No. 15 (2012) on the specialisation of judges, para 11.

<sup>44</sup> See Opinion No. 13 (2018) of the CCPE on independence, accountability and ethics of prosecutors, para 64.

64. The Romanian Movement for Defending the Status of Prosecutors referred, in its request addressed to the CCPE (as well as to the CCJE), to the problems which received widespread national and international attention in the fight against corruption in Romania and, in particular, the dismissal, in July 2018, by the Minister of Justice of the Chief Prosecutor of the DNA (see above). This dismissal was also criticised by the European Commission's above-mentioned Progress Report on Romania under the CVM<sup>45</sup>.
65. The CCPE Bureau further notes that “according to many interlocutors of the Venice Commission, there is no reasonable and objective justification for the necessity of creating a separate structure to investigate offences perpetrated within the judiciary since, despite isolated cases, there appears to be no widespread criminality among Romanian magistrates”<sup>46</sup>. Consequently, the establishment of this new structure has raised questions and strong concerns as regards its rationale; its impact on the independence of judges and prosecutors and on the public confidence in the criminal justice system, possible conflicts of competence with the DNA and other bodies, and the possible rerouting of high-profile cases of corruption pending with the DNA. The latter has been pointed out as one of the most serious risks as, together with judges and prosecutors under investigation, other persons investigated for corruption will be removed from the specialised jurisdiction of the DNA. This would undermine both the DNA’s anti-corruption work and the DNA as an institution<sup>47</sup>.
66. The CCPE Bureau also notes that the European Commission's above-mentioned Progress Report on Romania under the CVM has emphasised that key problematic provisions include in particular the establishment of a special prosecution section for investigating offences committed by magistrates<sup>48</sup>.
- 67. Therefore, the CCPE Bureau recommends abandoning the establishment of a separate prosecutor’s office structure for the investigation of offences committed by judges and prosecutors.**

### ***Freedom of expression of prosecutors***

68. The Amendments to the Law on the Statute of Judges and Prosecutors prescribe that judges and prosecutors are obliged, in the exercise of their duties, to refrain from defamatory manifestation or expression, in any way, against the other powers of the state - legislative and executive.
69. It is notable that the notion of defamation is not clearly defined in Romania and the above-mentioned obligation relates specifically to other state powers<sup>49</sup>. It raises in fact

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<sup>45</sup> See the Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism (Strasbourg, 13.11.2018 COM(2018) 851 final), Section 3.1 (Benchmark one: judicial independence and judicial reform. Dismissal of the DNA Chief Prosecutor and political pressure on judicial institutions), page 4.

<sup>46</sup> See the Venice Commission’s Opinion on Amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organization, and Law No. 317/2004 on the Superior Council for Magistracy in Romania, CDL-AD(2018)017, para 84.

<sup>47</sup> Ibid., para 83; see also GRECO, Greco-AdHocRep(2018)2, para 34.

<sup>48</sup> See the Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism (Strasbourg, 13.11.2018 COM(2018) 851 final), Section 3.1 (Benchmark one: judicial independence and judicial reform. Justice laws and legal guarantees for judicial independence), page 3.

<sup>49</sup> See the Venice Commission’s Opinion on Amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organization, and Law No. 317/2004 on the Superior Council for Magistracy in Romania, CDL-AD(2018)017, para 130.

a lot of questions. First of all, it is not clear what is the rationale for the specific reservation “in the exercise of their duties” and how it will be applied. Secondly, the law should evidently protect all persons and legal entities from defamation, and not just the legislative and executive powers. Therefore, the selective approach of the new provision in these two key aspects is very questionable.

70. One may presume that prosecutors should refrain from defamatory statements in general and in respect of everybody, including the legislative and executive powers. The CCPE Bureau wishes to underline in this regard that the legislative and executive powers have the same obligations.
71. The CCPE Bureau wishes to recall that the European Court of Human Rights has recognised that it is of fundamental importance in a democratic society that the courts inspire confidence in the public<sup>50</sup>, and therefore judges must be protected against destructive attacks lacking any factual basis. Moreover, since they have a duty of discretion, judges cannot respond in public to various attacks, as, for instance, politicians are able to do<sup>51</sup>.
72. Even though the above-mentioned principles relate to judges, “the proximity and complementary nature of the missions of judges and prosecutors”<sup>52</sup> allow, in the opinion of the CCPE Bureau, to relate them also to prosecutors.
73. The prosecutors have, as a bottom line, the same right to freedom of expression<sup>53</sup> under the European Convention on Human Rights (ECHR) as everybody else. At the same time, “prosecutors should exercise their freedom of expression and association in a manner that is compatible with their office and that does not affect or appear to affect judicial and prosecutorial independence or impartiality. While they are free to participate in public debate on matters pertaining to legal subjects, the judiciary or the administration of justice, they must not comment on pending cases and must avoid expressing views which may undermine the standing and integrity of the court”<sup>54</sup>.
74. The CCPE has adopted a separate Opinion on relations between prosecutors and the media, pointing out that “communications between prosecutors and the media should respect the following principles: freedom of expression and of the press, duty of confidentiality, right to information, principle of transparency, right to private life and dignity as well as the confidentiality of investigations, presumption of innocence, equality of arms, the rights of the defense and to a fair trial”<sup>55</sup>.
75. In this way, it is clear that prosecutors’ freedom of expression is subject to certain limitations. However, these limitations are applicable, as shown above, rather to public debates or communications with the media, whereas the Amendments in Romania speak about prosecutors refraining from defamation in the exercise of their duties.
76. In the opinion of the CCPE Bureau, putting limitations on prosecutors in the exercise of their duties may result in arbitrary and abusive interpretations and it carries the risk of undue restrictions and obstructing prosecutors in the course of their work.

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<sup>50</sup> ECtHR *Olujic v. Croatia*, 2009.

<sup>51</sup> ECtHR *De Haes and Gijssels v. Belgium*, 1997.

<sup>52</sup> See Opinion No. 9(2014) of the CCPE on European norms and principles concerning prosecutors, Rome Charter, Explanatory Note, para 53.

<sup>53</sup> See CCPE Opinion No. 9 (2014) on European norms and principles concerning prosecutors, Rome Charter, para IX.

<sup>54</sup> *Ibid.*, Explanatory Note, para 82; see also CCPE Opinion No. 13 (2018), para 17.

<sup>55</sup> See CCPE Opinion No. 8 (2013) on relations between prosecutors and the media, Recommendation II.

77. Indeed, as it was also mentioned by the Venice Commission, “this provision has raised concerns among Romanian magistrates, who fear that it may prevent them from criticising other state powers when addressing cases involving the state and may be used as a tool for political pressure against them”<sup>56</sup>.
78. The CCPE Bureau also notes that the European Commission's above-mentioned Progress Report on Romania under the CVM has emphasised that the key problematic provisions included in particular restrictions on the freedom of expression for magistrates<sup>57</sup>.
- 79. In this context, the CCPE Bureau considers that the new obligation imposed on Romanian prosecutors, limiting their freedom of expression, is not necessary, raises many questions, and may be subject to arbitrary and abusive interpretations endangering prosecutorial independence. It recommends that it be removed.**

***Repeated and unprecedented attacks against prosecutors directed by political actors***

80. The Romanian Movement for Defending the Status of Prosecutors requested the CCPE to pronounce its position as regards the reported repeated and unprecedented attacks against prosecutors directed by political actors in Romania.
81. The Venice Commission has also mentioned that “there are reports of pressure on and intimidation of judges and prosecutors, including by some high-ranking politicians and through media campaigns”<sup>58</sup>.
82. The CCPE Bureau also notes that the European Commission's above-mentioned Progress Report on Romania under the CVM has stated that “judges and prosecutors have continued to face personal attacks in the media, with mechanisms for redress falling short”<sup>59</sup>.
83. In this regard, the CCPE Bureau wishes to repeat what was already mentioned in paras 71-72 of the present Opinion about the ECtHR case law, and proceed to clarifying also the CCPE and other applicable standards.
84. This subject was always considered by the CCPE to be of utmost importance. It has pointed out that “when an individual prosecutor is subject to an unfair attack through media, he/she is entrusted with the right of having the contested information rectified or other legal remedies according to the national law. Nevertheless, in such cases, as well as when false information is spread about persons or events involved in the proceedings which he/she deals with, any reaction should preferably come from the

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<sup>56</sup> See the Venice Commission's Opinion on Amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organization, and Law No. 317/2004 on the Superior Council for Magistracy in Romania, CDL-AD(2018)017, para 124.

<sup>57</sup> See the Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism (Strasbourg, 13.11.2018 COM(2018) 851 final), Section 3.1 (Benchmark one: judicial independence and judicial reform. Justice laws and legal guarantees for judicial independence), page 3.

<sup>58</sup> See the Venice Commission's Opinion on Amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organization, and Law No. 317/2004 on the Superior Council for Magistracy in Romania, CDL-AD(2018)017, paras 15 and 157.

<sup>59</sup> See the Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism (Strasbourg, 13.11.2018 COM(2018) 851 final), Section 2 (General Situation), page 2.

head or a spokesperson of the prosecution office and, in major cases, by the Prosecutor General”<sup>60</sup>.

85. Further in this context, and particularly taking into account that according to the constitutional provisions, in the Romanian system, prosecutors are part of the judiciary<sup>61</sup>, as well as “the proximity and complementary nature of the missions of judges and prosecutors”<sup>62</sup>, the CCPE Bureau recalls that, while the politicians enjoy a wide range of flexibility when they intervene in the political arena, “there is a clear line between freedom of expression and legitimate criticism on the one hand, and disrespect and undue pressure against the judiciary on the other. Politicians should not use simplistic or demagogic arguments to make criticisms of the judiciary during political campaigns just for the sake of argument or in order to divert attention from their own shortcomings”<sup>63</sup>.
86. Moreover, the executive and legislative powers should not only strictly abstain from the above-mentioned but they “are under a duty to provide all necessary and adequate protection where the functions of the courts are endangered by attacks or intimidations directed at members of the judiciary. Unbalanced critical commentary by politicians is irresponsible and causes a serious problem because public trust and confidence in the judiciary can thereby be unwittingly or deliberately undermined. In such cases, the judiciary must point out that such behaviour is an attack on the constitution of a democratic state as well as an attack on the legitimacy of another state power. Such behaviour also violates international standards”<sup>64</sup>.
- 87. The CCPE Bureau consequently condemns any statements, comments or remarks in Romania which overstep the boundaries of legitimate criticism and aim at attacking, intimidating or otherwise pressuring prosecutors or demonstrating disrespect towards them, using improper arguments or otherwise degrading the prosecutorial system or individual prosecutors.**

### ***The right of prosecutors to stand against any policies or actions affecting their independence***

88. In view of the difficult situation of the judiciary in general and prosecutors in particular, the Romanian Movement for Defending the Status of Prosecutors also requested the CCPE to confirm its position on the right of prosecutors to stand against any policies or actions affecting their independence.
89. “Transparency in the exercise of prosecutors’ functions is a key component of the rule of law and one of the important guarantees of a fair trial. Justice must be done and must be seen to be done”<sup>65</sup>. While this concerns the relations of prosecutors with media, in the Opinion of the CCPE Bureau, it is also applicable to the right of prosecutors to speak out in general.

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<sup>60</sup> See CCPE Opinion No. 8 (2013) on relations between prosecutors and the media, para 45.

<sup>61</sup> See the Venice Commission’s Opinion on Amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organization, and Law No. 317/2004 on the Superior Council for Magistracy in Romania, CDL-AD(2018)017, para 18.

<sup>62</sup> See Opinion No. 9(2014) of the CCPE on European norms and principles concerning prosecutors, Rome Charter, Explanatory Note, para 53.

<sup>63</sup> See CCJE Opinion No. 18 (2015) on the position of the judiciary and its relation with the other powers of state in a modern democracy, para 52.

<sup>64</sup> Ibid., para 52.

<sup>65</sup> See CCPE Opinion No. 8 (2013) on relations between prosecutors and the media, para 30.

90. Of course, when they speak about individual cases, prosecutors are bound by a “duty of confidentiality, right to information, principle of transparency, right to private life and dignity as well as the confidentiality of investigations, presumption of innocence, equality of arms, the rights of the defense and to a fair trial”<sup>66</sup>.
91. However, when they express themselves on other subjects, not related to individual cases, these principles should not necessarily apply. In such cases, prosecutors have the same right to freedom of expression<sup>67</sup> under the ECHR as everybody else, provided that it is exercised in a manner that does not affect or appear to affect judicial and prosecutorial independence or impartiality<sup>68</sup>.
92. The CCPE Bureau considers that prosecutors certainly have the right to stand against any other policies or actions affecting their independence when, for example, there is an interference or pressure concerning individual cases, or resulting from the adoption of new legislation or amendments to the existing one, as in Romania, or in the case of the executive power’s decisive role in the appointment of high-ranking prosecutors, as well as in other cases.
93. Further in this context, and particularly taking into account that according to the constitutional provisions, in the Romanian system, prosecutors are part of the judiciary<sup>69</sup>, as well as “the proximity and complementary nature of the missions of judges and prosecutors”<sup>70</sup>, the CCPE Bureau notes that courts may criticise legislation or the failure of the legislature to introduce what a court would regard as adequate legislation. However, just as with the other powers of the state in relation to the judiciary, criticism by the judiciary must be undertaken in a climate of mutual respect. Judges, like all other individuals, are entitled to take part in public debate, provided that it is consistent with maintaining their independence or impartiality<sup>71</sup>.
94. The CCJE has also emphasised that “it is not acceptable that reasonable critical comments from the judiciary towards the other powers of the state should be answered by removals from judicial office or other reprisals”<sup>72</sup>.
95. The CCPE Bureau also notes that even though the prosecutors, when subject to an unfair attack through the media, must have the right that the contested information be rectified or to other legal remedies<sup>73</sup>, the European Commission’s above-mentioned Progress Report on Romania under the CVM has clearly pointed to the “mechanisms for redress falling short”<sup>74</sup> in cases where judges and prosecutors faced personal attacks in media.

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<sup>66</sup> Ibid., Recommendation II.

<sup>67</sup> See CCPE Opinion No. 9 (2014) on European norms and principles concerning prosecutors, Rome Charter, para IX.

<sup>68</sup> Ibid., Explanatory Note, para 82; see also CCPE Opinion 13 (2018) on independence, accountability and ethics of prosecutors, para 17.

<sup>69</sup> See the Venice Commission’s Opinion on Amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organization, and Law No. 317/2004 on the Superior Council for Magistracy in Romania, CDL-AD(2018)017, para 18.

<sup>70</sup> See Opinion No. 9(2014) of the CCPE on European norms and principles concerning prosecutors, Rome Charter, Explanatory Note, para 53.

<sup>71</sup> See CCJE Opinion No. 18 (2015) on the position of the judiciary and its relation with the other powers of state in a modern democracy, para 42.

<sup>72</sup> Ibid., para 42.

<sup>73</sup> See CCPE Opinion No. 8 (2013) on relations between prosecutors and the media, para 45.

<sup>74</sup> See the Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism (Strasbourg, 13.11.2018 COM(2018) 851 final), Section 2 (General Situation), page 2.

96. Therefore, the CCPE Bureau endorses the legitimate right of prosecutors in Romania and elsewhere to stand against any policies or actions affecting their independence and autonomy. Any criticism by the judiciary must of course be expressed in a climate of mutual respect, and in a way which is consistent with maintaining prosecutorial independence and/or impartiality.