

Rule of law in Romania: the neverending story of an EU member State

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This brief provides an overview of the latest rule of law developments in Romania, as observed under the Cooperation and Verification Mechanism (CVM) of the European Union (EU), with a special focus on the judicial independence and justice reform. It is also of some relevance for the Macedonian authorities as it reaffirms the importance of ensuring a framework for long-term evaluation of the ongoing judicial reforms as a precondition for sustainable and effective reform, which will also continue to be carried out following the country's accession to the EU.

Background

The **Cooperation and Verification Mechanism (CVM)** was introduced when Romania and Bulgaria joined the EU in 2007, as a transitional measure to facilitate two countries' continued efforts to reform their judiciaries and step up the fight against corruption.¹ Its reports are based on careful analysis and monitoring, drawing on a continuous dialogue between the Bulgarian and Romanian authorities and the European Commission (the Commission, EC), but also on the dialogue established with the civil society, international organisations, independent experts and a variety of other sources.²

Since its first report of 27 June 2007, the Commission reports on progress contain the Commission's assessment and recommendations to the respective authorities against each of the criteria ('benchmarks') set out in the CVM Decision. In particular, the benchmarks for Romania deal with: 1) the transparency and efficiency of the judicial system; 2) the integrity framework and the National Integrity Agency; 3) fighting high-level corruption and 4) tackling corruption at all levels and corruption prevention.

Another useful tool in this context is the **European Rule of Law Mechanism** which provides a process for an annual dialogue between the Commission, the Council and the European Parliament together with Member States as well as national parliaments, civil society and other stakeholders on the rule of law. The foundation of this process is **the Rule of Law Report**, which monitors significant developments relating to the rule of law in Member States. Its scope goes beyond the specific context of post-accession which triggered the CVM and it covers four pillars: the justice system, the anti-corruption framework, media pluralism, and other institutional issues such as the role of independent institutions in ensuring checks and balances.³ It should serve as a basis for discussions as well as to enable identifying challenges as soon as possible which should help respective Member States find solutions to safeguard and protect the rule of law.

- ¹ Commission Decision 2006/928 of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption (OJ 2006 L 354/ 56).
- ² Unlike Romania, the October 2019 CVM report on Bulgaria concluded that Bulgaria had fulfilled the remaining CVM recommendations satisfactorily, that Bulgaria has made sufficient progress in meeting its commitments at the time of its accession to the EU and that all benchmarks can be satisfactorily closed. Since then, Bulgaria is no longer monitored or reported upon under the CVM and it is monitored within the annual rule of law cycle, and more concretely, in the Commission's annual Rule of Law Report. See COM/2019/498 final.
- ³ The Commission has adopted three Rule of Law reports so far: COM(2020) 580; COM(2021) 700; and COM(2022) 500. They included specific chapters on Romania: SWD(2020) 322; SWD(2021) 724; SWD(2022) 523.



With respect to Romania, the positive stocktaking by the Commission of January 2017 (ten years after the mechanism had been established) led to the twelve key recommendations, the implementation of which was monitored through further four assessments. Reports from 2017 to 2019 were characterized by a waning reform momentum, and eight additional recommendations had to be made. In the June 2021 report the Commission was able to mark substantial progress across all the CVM benchmarks and a strong renewed impetus to reform and repair the backtracking of the 2017-2019 period.⁴ The Commission's latest report on Romania under the CVM of 22 November 2022 takes stock of progress made on the outstanding recommendations and the fulfilment of the CVM benchmarks since the June 2021 CVM report.⁵

Key findings relevant to the judicial system in Romania

Regarding the first benchmark, in response to the concerns raised by the EC that the amendments to the three justice laws⁶ which define the status of magistrates and organise the judicial system and the Superior Council of Magistracy (SCM), in 2018 and 2019, had a serious impact on the independence, quality and efficiency of the justice system, the Romanian authorities made an overall revision by adopting new justice laws in October 2022.⁷

The latest November 2022 CVM report noted that the revised justice laws reformed the **civil liability regime for judges and prosecutors**, addressing a long-standing issue identified in the CVM reports,⁸ Rule of Law Reports as well as in the case-law of the CJEU.⁹ They removed the rules previously in place which assigned power to the Ministry of Finance to assess whether a judicial error was committed in bad faith or by gross negligence and, subsequently, to initiate recovery actions against judges for the damage caused. They place a new safeguard by providing that, when a plaintiff lodges a claim for compensation for a miscarriage of justice, the Ministry of Finance may lodge a recourse action against the magistrate only if the relevant section of the SCM finds the existence of bad faith or grave negligence in the miscarriage of justice, on the basis of a report drawn up by the Judicial Inspection.

Certain safeguards were also put in place as regards the **disciplinary liability of magistrates**. On substance, the EC welcomed the abolishment of certain disciplinary offences which generated concerns for judicial independence, as well as the offences which questioned the primacy of EU law¹⁰. On the other hand, while noting the extension of another disciplinary offence to cover the expression of political opinions not only in the exercise of duties, but also more generally the expression of such views in public, the EC highlighted the need to monitor the practice to ensure that this offence does not restrict unduly the magistrates' freedom of speech.¹¹

As to the procedural aspects, the amendments to the justice laws envisage that decisions of the SCM in disciplinary matters must be reasoned and notified without delay to the magistrate concerned. They provide for the deletion of disciplinary sanctions from the magistrate's record three years from their date of enforcement if the magistrate is not subject to a new disciplinary sanction during this period.

4 See COM(2021) 370 final of 8 June 2021.

5 See COM(2022) 664 final of 22 November 2022.

6 Law 207/2018 amending Law 304/2004 on the judicial organization; Law 234/2018 for amending Law no. 317/2004 on the Superior Council of Magistracy; Law 242/2018 amending Law no. 303/2004 on the status of judges and prosecutors. The laws were further modified through Government Emergency Ordinances in 2018 and 2019.

7 A special joint parliamentary Committee of the two Chambers examined the laws under an urgent parliamentary procedure starting on 12 September 2022. The parliamentary process concluded on 17 October 2022 after a positive vote in the Senate. These laws were challenged before the Romanian Constitutional Court, which rejected all challenges and they were promulgated by the President of Romania on 15 November 2022. The laws were published in the Official Journal on 16 November 2022. Although the final drafts had not been specifically sent for consultation prior to their submission to Parliament, the Venice Commission prepared an urgent opinion on the three justice laws, published on 18 November 2022.

8 See notably 2018 Technical report (SWD(2018) 551 final), and 2021 Rule of Law report - country chapter on the rule of law situation in Romania.

9 In its Judgment of 18 May 2021, *Asociația 'Forumul Judecătorilor Din România' and Others*, in joined cases C-83/19, C-127/19, C-195/19, C-294/19, C-355/19 and C-379/19, §§ 233-241, the CJEU ruled that the rights of defense of judges should be fully respected, that a court should rule on the personal liability of judges and that the law must provide clearly and precisely the necessary guarantees ensuring that neither the investigation nor the action for indemnity may be converted into an instrument of pressure on judicial activity. For an in-depth analysis of this case, see Moraru, M., & Bercea, R. (2022). *The First Episode in the Romanian Rule of Law Saga: Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, Asociația 'Forumul Judecătorilor din România, and their follow-up at the national level*. *European Constitutional Law Review*, 18(1), 82-113.

10 For further details, see the judgment of the CJEU of 22 February 2022, *RS*, in case C-430/21, §§ 79-93.

11 See COM(2022) 664 final of 22 November 2022 at p.4.

The 2022 CVM report also notes the overall increase of the seniority requirement for **promotions to higher courts and prosecutor offices**. The law maintains the two existing types of promotion at courts of appeal, tribunals and prosecutors' offices attached to them—the “on-the-spot” promotions, which are based on results obtained in promotion competitions, and the effective promotions, which are based on the evaluation of the magistrates' activity over the past years.¹² Moreover, the promotion of judges to the High Court of Cassation and Justice (HCCJ) on the basis of a competitive written test has been replaced by a selection based on an evaluation of the judicial decisions taken by candidates during their entire activity at the Court of Appeal and an interview before the section for judges of the SCM¹³. Once promoted to the HCCJ, judges are also excluded from further professional evaluations.

The adoption of the **Law for dismantlement of the Section for the Investigation of Offences in the Judiciary (SIJ)**¹⁴ was embraced given the ineffectiveness of the SIJ. However, concerns were raised as regards the transfer of competence to investigate offences committed by magistrates to ‘designated prosecutors’ within the Prosecutor’s Offices attached to the HCCJ and the Courts of Appeal. The 2022 Rule of Law report noted that concerns were raised about the impact of the new system on judicial independence¹⁵, as over 95% of the transferred files processed so far appear to have been based on unfounded allegations (‘vexatious complaints’) being used as a means of pressure against magistrates. It appears that the new law missed the opportunity to address such concerns, also taking into account that in its opinion of March 2022, the Venice Commission held that any dismantlement of the SIJ should ensure more efficacy in investigating allegations of corruptions by judges and prosecutors¹⁶.

As regards the **appointments and dismissals of prosecutors**, the previous CVM reports have also highlighted the need for merit-based appointments of the most senior prosecutors and for sufficient checks and balances in the appointment procedure, as well as a reflection on the extent to which the same appointment and dismissal procedure would apply at lower management levels within the prosecution¹⁷. The Venice Commission has also underlined that public confidence calls for an adequate balance between the requirement of democratic legitimacy of such appointments, and the requirement of depoliticisation¹⁸.

In the 2022 CVM report on Romania, the Commission noted that revised justice laws have introduced a more transparent and robust process of selection for appointments to leadership posts in the prosecution, with additional safeguards against politicisation to enhance the accountability of the Minister of Justice in putting forward nominations. In particular, they have envisaged that the high-ranking prosecutors (including the Prosecutor General and the Chief Prosecutors of the National Anticorruption Directorate (DNA) and the Directorate for Investigating Organized Crime and Terrorism (DIICOT)), as well as their deputies, are to be appointed by the President of Romania upon a reasoned nomination submitted by the Minister of Justice, following a selection process launched and organised by the Ministry of Justice and an opinion of the Prosecutors’ Section of the SCM.¹⁹ Though the opinion of the SCM is not binding on the Minister, the procedure foresees that in case of a negative opinion, a new interview with the proposed candidate would need to take place, which should take into

12 However, the law puts on hold the provisions related to competitive on-the-spot promotions until December 2025, allowing only for effective promotions during this period. As of 2025, on-the-spot promotions are foreseen to be capped to 20% of the total number of vacant positions. These restrictions on what is seen to be a more objective and meritocratic promotion procedure have been criticized by some magistrates' associations in Romania.

13 This modification has also been criticized by some magistrates' associations and civil society organizations, who argued that the meritocratic and competitive character of the procedure has been reduced. On the other hand, the SCM has argued that the current system was not performing efficiently and that, at that level of seniority, knowledge-based tests for judges are less relevant than an analysis of their performance on the bench.

14 Law No 49 of 11 March 2022 on the abolition of the Section for the Investigation of Offences in the Judiciary, as well as for the amendment of Law no. 135/2010 on the Code of Criminal Procedure, published in the Official Gazette No 244 of 11 March 2022. The law was challenged before the Constitutional Court, which declared it constitutional by Decision No. 88 of 9 March 2022.

15 Statement by the Romanian Judges Forum Association, the Movement for the Defense of the Statute of Prosecutors Association and the ‘Initiative for Justice’ Association, of 24 January 2022.

16 Venice Commission, Opinion on the draft law dismantling the section for investigating criminal offences committed within the judiciary (CDL-AD(2022)003), § 37

17 In the 2016 CVM report it was noted that the arbitrariness allowed by law in the process of dismissals showed the need to ensure clarity and introduce safeguards. Moreover, it was recommended that a procedure which involves a political element should not be applied to lower management posts, deputies and heads of section (which would be left to the SCM and leadership of the organisations concerned).

18 CDL-AD(2015)039, Joint Opinion of the Venice Commission, the 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, § 19; CDL-AD(2017)028, Poland - Opinion on the Act on the Public Prosecutor’s office, § 33. See also CDL-PI(2022)023, Compilation of Venice Commission Opinions and Reports Concerning Prosecutors.

19 Article 144 of the Law on the Status of Judges and Prosecutors.

account the arguments laid out in the SCM opinion. Following the new interview, the Minister can either send the nomination proposal to the President or withdraw the nomination and organise a new selection process. The President can either accept the Minister's nomination proposal and proceed with the appointment, or can refuse this proposal, giving reasons.²⁰

Similarly, the procedure for dismissal of senior prosecutors is initiated by a request from the Minister of Justice for an opinion to the Prosecutors' Section of the SCM. The opinion is not binding, and after it is issued, the Minister may propose a dismissal to the President of Romania, who can only refuse the proposal on grounds of legality. This change follows the ruling of the European Court of Human Rights (ECtHR) in *Kovesi v. Romania*.²¹ The latter drew attention to the growing importance of involving an authority independent of the executive and the legislative branch in decisions affecting the appointment and dismissal of prosecutors, and the risk that the dismissal could have a chilling effect on the willingness of magistrates to participate in public debate on issues concerning the judiciary.²² Accordingly, a review procedure before an administrative court has been added to the procedure for dismissal of prosecutors from leadership functions, giving the dismissed prosecutor 15 days to challenge the dismissal.

It was further welcomed in the 2022 CVM report that **codes of conduct for parliamentarians and ministers** were in place and can contribute to increased awareness and a significant reduction in the number of incidents of disregard of judicial independence and criticism of the judicial system and of individual magistrates both by Members of Parliament and by government officials.

As regards the **Superior Council of Magistracy (SCM)**, successive CVM reports have consistently underlined the need for the SCM to contribute to the judicial reforms, playing a constructive role in key decisions for the organisation and the functioning of the judiciary and articulating clear collective positions and securing confidence through transparency and accountability²³. Despite all shortcomings, it was stressed that in contrast to 2020 in 2022 the Council has been able to adopt formal positions on key legislative projects and to participate in the ensuing parliamentary debates with further proposals for amendments. While noting a sufficient level of transparency, also in respect of disciplinary decisions, the Commission maintained its previous recommendation that the SCM should take measures to promote transparency and accountability. In addition to the possibility to recuse SCM members when judging disciplinary cases on grounds of non-fulfillment of duties, conflicts of interest and impartiality, the Commission noted that transparency should also include holding regular open meetings and discussing the annual reports with the assemblies of judges and prosecutors at all levels, as well as with civil society and professional organisations.

20 The new legislative solutions have also been appreciated positively by the Venice Commission. According to the Venice Commission, while the appointment procedure continues to give the Minister of Justice a decisive role, the political responsibility for the appointment is shared with the President of Romania and the role of the SCM is strengthened. The involvement of several institutional actors in the procedure ensures a good degree of transparency and the amendment represents an improvement in terms of guarding against the risk of partisan appointments. See Venice Commission, Urgent Opinion on three laws concerning the justice system (CDL-AD(2022)045), §§ 36-43.

21 *Kovesi v. Romania*, app. no. 3594/19, judgment of 5 May 2020.

22 In particular, the ECtHR has found a violation of the right to a fair trial under Article 6 of the European Convention on Human Rights (ECHR) given the inability of the applicant to effectively challenge premature termination of her mandate as chief prosecutor of the DNA. All possibility of judicial review had been limited to the formal review of the removal decree, while any examination of the appropriateness of the reasons, the relevance of the alleged facts on which the removal had been based or the fulfilment of the legal conditions for its validity, had been specifically excluded. Therefore, the Court held that the extent of the judicial review available to the applicant in the circumstances of the current case could not be considered "sufficient". In addition, an interference with the applicant's right to freedom of expression under Article 10 of the ECHR. The Court held that the impugned measure had not served protecting the rule of law or any other legitimate aim and it had not been necessary in a democratic society. On the contrary, it had been a consequence of the previous exercise of the applicant's right to freedom of expression and in particular, it had been prompted by the views and criticisms that the applicant had publicly expressed. The Court attached particular importance to the office held by the applicant, whose functions and duties included expressing her opinion on legislative reforms which were likely to have an impact on the judiciary and its independence and, more specifically, on the fight against corruption conducted by her department. Accordingly, the applicant's position and statements, which clearly fell within the context of a debate on matters of great public interest, called for a high degree of protection for her freedom of expression and strict scrutiny of any interference. Her removal and the reasons justifying it could hardly be reconciled with the particular consideration to be given to the nature of the judicial function as an independent branch of State power and to the principle of the independence of prosecutors, which was a key element for the maintenance of judicial independence. It had been a particularly severe sanction, which undoubtedly had a "chilling effect" in that it had to have discouraged not only her but also other prosecutors and judges in future from participating in public debate on legislative reforms affecting the judiciary and more generally on issues concerning the independence of the judiciary.

23 For more details, see 2021 CVM report.

The new legislation addressed the structural concerns raised in the June 2021 CVM report related to the **Judicial Inspection**²⁴ also in the light of the judgement of the ECJ in *Asociația 'Forumul Judecătorilor Din România'* and *Others*²⁵ and the 2022 Rule of Law report. It amended substantially the legislative framework related to the Judicial Inspection by including several provisions to remedy the lack of accountability of the Judicial Inspection and to reduce the excessive concentration of power in the hands of the Chief Inspector. The powers of the Chief Inspector are now balanced by a newly introduced Board, with a series of powers to ensure an adequate counterweight.

Concerning the appointment of the Chief and Deputy Chief Inspectors, stronger oversight powers have been given to the SCM and the National Institute of Magistracy has been, to a certain extent, involved in the competitions for entering the Judicial Inspection. The revocation procedure for the Chief Inspector has also been altered, from a requirement for a decision from the full SCM plenary to initiation by five SCM members or by the General Assembly of the Judicial Inspection. The Commission held that the resulting balance between considerations of independence, accountability and stability in the leadership of the Judicial Inspection will need to continue to be monitored in practice. A remaining concern relates to the possibility for the Chief Inspector to overrule a decision to dismiss a case, or any decision taken by an inspector following a preliminary investigation, which requires to monitor the effectiveness of the existing safeguards stipulating that the Chief Inspector can overrule such decisions only once and with an obligation to provide reasoned grounds.²⁶

The CJEU has made clear that judicial independence could be undermined if the disciplinary regime is diverted from its legitimate purposes and used to exert political control over judicial decisions or pressure on judges.²⁷ Some disciplinary investigations against judges were also perceived as a form of pressure and retaliation for sentences given, notably in high-level corruption-related cases. It would, therefore, be up to the Judicial Inspection to ensure that disciplinary investigations are no longer used as an instrument to exert pressure on the activity of judges and prosecutors, in line with the case-law of the CJEU.

Concluding remarks and next steps

The CVM, as an inherent part of Romania's accession process, offered a way to address remaining issues where further progress was still necessary to ensure the capacity of the Romanian judicial system and law enforcement bodies to implement and apply the measures adopted to establish the internal market and the area of freedom, justice and security.

In its November 2022 CVM report, the Commission has reiterated that a balance is needed between the need to inject urgency in priority commitments and to ensure a transparent and inclusive legislative process and sustainable as well as effective judicial reforms. It has observed that the swift process of adopting the law that dismantled the SIIJ led to concerns that there had been little opportunity for interlocutors to comment on the new arrangements;²⁸ the justice laws have also been subject to the urgency procedure of the Parliament, without sufficient time during the parliamentary debates to discuss amendments in substance²⁹. In a similar vein, in the framework of the 2022 Rule of Law report the Commission has noted that frequent changes of legislation and the regular use of emergency ordinances continued to raise concerns regarding the stability and predictability of legislation and, therefore, it issued a more general recommendation to Romania to ensure effective public consultation before the adoption of draft legislation.³⁰

24 They mainly relate to the concentration of power in the hands of the Chief Inspector and his deputy and the lack of accountability of the Chief Judicial Inspector, the high proportion of cases brought by the Inspection and eventually rejected in court, as well as the limits to the oversight by the SCM. In the June 2021 CVM report it was also noted that there remain cases where disciplinary investigations and heavy sanctions on magistrates critical of the efficiency and independence of the judiciary. According to the Rule of Law report 2022, such investigations have been opened by the Judicial Inspection either ex officio or at the request of the SCM (see Country chapter on Romania for more details).

25 § 207 of the judgment.

26 Nonetheless, a request for a preliminary ruling is pending before the CJEU on the question whether the extensive powers vested in the Chief Inspector are in line with the requirements of judicial independence (see C-817/21, *R.I. v Inspecția Judiciară, N.L.*).

27 Judgments of the Court of Justice of 15 July 2021, *Commission v. Poland (Disciplinary regime for judges)*, C791/19, ECLI:EU:C:2021:596, para. 138, and of 21 December 2021, *Euro Box Promotion e.a., in joined cases C357/19, C379/19, C547/19, C811/19 and C840/19*, ECLI:EU:C:2021:1034, § 239.

28 This concern was also echoed by the Venice Commission itself. See Venice Commission, *Opinion on the draft law dismantling the section for investigating criminal offences committed within the judiciary (CDL-AD(2022)003)*, § 15.

29 Observations from NGOs present at the debates, and media reports.

30 2022 Rule of law report - Country Chapter on the rule of law situation in Romania, p. 2.

While in its latest urgent opinion of December 2022 on the new justice legislation the Venice Commission did voice regret that the Romanian government did not send the respective laws for consultation, Romania has committed to take the utmost account of its opinions.³¹

The latest CVM report is significantly important as the Commission concluded that the progress made by Romania was sufficient to meet the CVM commitments made at the time of its accession to the EU and that all benchmarks can be satisfactorily closed. As a result, from now on, the Commission will no longer monitor or report on Romania under the CVM, but monitoring will continue within the annual rule of law cycle and reporting will be consolidated in the Commission's annual Rule of Law Report and other established parts of the rule of law toolbox applying to all Member States. This will enable the implementation of many of the agreed judicial reforms to continue to be followed-up in practice, including the operation of the new regime succeeding the SIJ, the functioning of the Judicial Inspection, as well as the broader legislative framework of the justice laws and the work of the Superior Council of Magistracy. These issues will be part of the monitoring of the justice system and anti-corruption, two of the core pillars of the Rule of Law Report. In parallel, the new justice laws will also be assessed under the dedicated procedure in Romania's Recovery and Resilience Plan and further assistance in this respect will also be provided under other relevant EU programmes, in particular the Technical Support Instrument.

³¹ In its urgent opinion of December 2022, the Venice Commission issued several recommendations which may imply further legislative changes to the laws with a view to extension of the duration of the mandates of high-ranking prosecutors and eliminating the possibility of mandate renewals to guarantee their functional independence (§ 47), as well as reinforcing the safeguards if the General Prosecutor overrules the decisions of regular prosecutors (§ 50) and competitive selection for deputy managers in courts and prosecution offices (§ 35).

