Romania
under the CVM

Are we there yet?

October 2022

FUNKY CITIZENS

Romania and the Cooperation and Verification Mechanism in the light of the recent justice laws changes

EXECUTIVE SUMMARY

The Government promised to respect the CVM, GRECO, and Venice Commission's recommendations, but the draft laws **failed to do so in some key areas**. Also, the draft laws lack the opinion of the Venice Commission even though the Government promised to send them together with it in the Parliament, through its Governmental Programme 2021-2024.

The fast-track legislative process does no good. It is said that it's done in the interest of having the CVM lifted, but the same argument was used in 2009 for adopting the Criminal and criminal procedure codes, as well as the Civil and civil procedure codes. This led to **many unconstitutional provisions** and affected a significant number of high-level corruption cases.

Some of the last-minute amendments solved some of the issues raised by the initial drafts (especially some related to the Judicial Inspection), but unfortunately they are not bringing us any closer to the finish line related to CVM, especially when it comes to **the problematic appointment and dismissal of high-ranking judges and prosecutors**.

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The minister of Justice and the ruling coalition repeatedly recognized that the current package of justice laws is a "balanced one" or a **"compromise"**, the maximum that could be achieved under current conditions. Not that it respects the standard for judicial independence or that it solved the remaining issues under the CVM. As if judicial independence could be partially achieved or subject to political negotiation.

CONTEXT > how the CVM came to be

The Cooperation and Verification Mechanism (CVM) was established at the accession of Romania to the EU in 2007 as **a transitional measure** to facilitate Romania's continued efforts to reform its judiciary and step up the fight against corruption, to be closed when all the benchmarks applying to Romania are satisfactorily met.

ANNEX

Benchmarks to be addressed by Romania, referred to in Article 1:

1. Ensure a more transparent, and efficient judicial process notably by enhancing the capacity and accountability of the Superior Council of Magistracy. Report and monitor the impact of the new civil and penal procedures codes.
2. Establish, as foreseen, an integrity agency with responsibilities for verifying assets, incompatibilities and potential conflicts of interest, and for issuing mandatory decisions on the basis of which dissuasive sanctions can be taken.
3. Building on progress already made, continue to conduct professional, non-partisan investigations into allegations of high-level corruption.
4. Take further measures to prevent and fight against corruption, in particular within the local government.

Key moments

Since 2007, Romania has mostly registered a steady progress, but two key turning points put under doubt the commitment to reforms and the political will to achieve the benchmarks.

The first such moment was in July 2012, when a ruling coalition made of PSD and PNL-PC (then in a Coalition called USL - The Social Liberal Union)) passed Emergency Ordinances affecting the judicial independence, as well as the National Anticorruption Directorate. This led to an immediate reaction from the European Commission and the reversal of these measures.

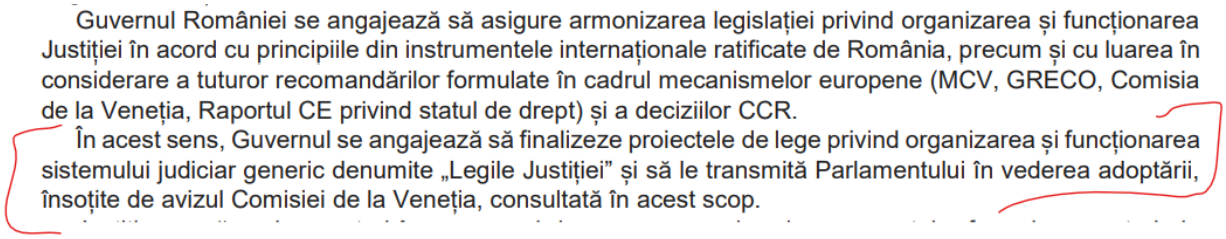
In January 2017, the Commission undertook a comprehensive assessment of progress over the ten years of the mechanism, registered the progress made in the meantime, and set out twelve specific recommendations which, when met, would suffice to end the CVM process. The CVM "to do list" from 2017 required fulfilling the recommendations in an irreversible way, but also not to reverse the course of progress.

However, immediately after this, the new PSD-led government passed an Emergency Ordinance affecting the fight against corruption and that led to huge street protests. Since then, that Government started an assault on the judiciary, with proposed changes to the package of the so-called "justice laws" (Law 207/2018 amending Law 304/2004 on the judicial organisation; 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 statute of judges and prosecutors; laws were further modified through Governement Emergency Ordinances in 2018 and 2019 + the Special Section was re-shaped through Law 49/2022 amending Law 304/2004) and to the Criminal and Criminal procedure codes. Eventually, the justice laws were changed in the Parliament in 2018.

On the following assessments, the regress was noted:

Nov 2017	Nov 2018	Oct 2019	2020	2021
Progress on some recommendations, but also that the reform momentum had been lost, warning of a risk of re-opening issues which the January 2017 report had considered as closed.	Developments had reversed or called into question the irreversibility of progress, and additional recommendations had to be made.	Welcomed the intention of the Romanian government to reset the approach, but regretted that Romania did not engage with all the recommendations.	No CVM report, but continued monitoring and the first Rule of Law report.	Progress on remaining CVM recommendations and caution on the Romanian authorities translating their commitment into concrete legislative and other measures.

The rule of law in general, and the independence of the judiciary, restoring the fight against corruption and the fact that "In the area of Justice and the rule of law, the most important national objective is the completion of Romania's monitoring through the Cooperation and Verification Mechanism (MCV)" **are included** in the programme of the Government, which took office in late December 2021.



Guvernul României se angajează să asigure armonizarea legislației privind organizarea și funcționarea Justiției în acord cu principiile din instrumentele internaționale ratificate de România, precum și cu luarea în considerare a tuturor recomandărilor formulate în cadrul mecanismelor europene (MCV, GRECO, Comisia de la Veneția, Raportul CE privind statul de drept) și a deciziilor CCR.

În acest sens, Guvernul se angajează să finalizeze proiectele de lege privind organizarea și funcționarea sistemului judiciar generic denumite „Legile Justiției" și să le transmită Parlamentului în vederea adoptării, însoțite de avizul Comisiei de la Veneția, consultată în acest scop.

The "justice laws"

The package of the three laws on the judiciary were the major points of regression under the CVM were caused. While the Emergency ordinances were repealed and the changes to the criminal codes (affecting the fight against corruption) are still suspended, the three laws were changed after **a harsh legislative process**.

Their adoption and their provisions are the key to achieving Benchmark 1 (Judicial Independence and Judicial Reform) and they have an important impact also on Benchmark 3 (Tackling High-level Corruption). Besides them, the Criminal codes are also part of the puzzle. However, here is where we were in terms of progress in this area in the latest (2021) CVM Report and where we are with the new laws as adopted by the Romanian Parliament:

RECOMMENDATION **STATUS**

Legal guarantees for judicial independence

2018

Recommendations:

Revise the Justice laws taking fully into account the recommendations under the CVM and issued by the Venice Commission and GRECO.

There are several areas in which the Justice laws do not respect the recommendations under the CVM (and we will analyze them below).

However, it is important to also note that the recommendations issued by the Venice Commission and GRECO are also ignored. The GRECO Ad hoc Report on Romania clearly recommends that:

- "i) the impact of the changes on the future staff structure of the courts and prosecution services be properly assessed so that the necessary transitional measures be taken and
- ii) the implementing rules to be adopted by the CSM for the future decisions on appointments of judges and prosecutors to a higher position provide for adequate, objective and clear criteria taking into account the actual merit and qualifications.".

Probably the most important and consequential areas are the ones introduced through the Law on the statute of judges and prosecutors.

– 1 –

The appointment of judges including in leadership positions to the High Court of Cassation and Justice.

Instead of going back or developing meritocratic criteria, the adopted law provide for several backlashes:

- ➔ The appointment procedure (Chapter VI, section 1) consists of a test with the object of evaluating the judicial decisions drafted by the candidates (by a subcommittee consisting of two HCCJ judges, appointed by the president of the HCCJ and a university professor, appointed by the Section for Judges) and an interview conducted in front of Section for judges of the Superior Council of Magistracy
- ➔ The National Institute of Magistracy is completely bypassed and the role of the president of the HCCJ increases (as member of the Section for judges and by directly appointing the majority of the members of the subcommittee for the evaluation of drafted court decisions).

- ➔ By maintaining the interview test and abandoning the written test to verify legal knowledge, the professional standards are relativized, the dose of subjectivity is increased.
- ➔ The leadership positions (president, vicepresident, section presidents – art. 142) at the HCCJ can be filled by judges that were active in the court for at least 2 years and had no disciplinary sanctions against them in the past 3 years. They only have to present a managerial plan in an interview infront of the Section for judges of the SCM, that has full discretion in appointing the preferred candidate.

– 2 –

Effective promotion to appeal courts, tribunals and prosecutor's offices attached to them as well as to leadership position challenges the independence of magistrates

In this area, the issues are generated mainly by the significant differences between the effective promotion and on-the-spot promotion:

- ➔ The effective promotion competition (art. 139) consists of taking a test with the objective of evaluating the activity and conduct of the candidates in the last 3 years of actual activity; the assessment is subjective and lead by the members of a committee appointed to the proposals of the presidents of the courts of appeal
- ➔ The on-the-spot promotion procedure (art. 132-138) is more meritocratic, through a written exam and through a practical exam; the evaluation includes outside actors like those from INM, but this procedure seems to favor those preferred by the presidents of the courts of appeal etc
- ➔ In the context of extended powers for the presidents of courts and first prosecutors, the promotion procedures become increasingly subject to the influence of a small circle of makers and breakers.

2017 Recommendation:

Put in place a robust and independent system of appointing top prosecutors, based on clear and transparent criteria, drawing on the support of the Venice Commission.

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2018 Recommendation:

Respect negative opinions from the Superior Council on appointments or dismissals of prosecutors at managerial posts, until such time as a new legislative framework is in place in accordance with recommendation 1 from January 2017

This point was always a contentious one that was signaled as such by many Progress reports under the CVM. Unfortunately, the proposed solution (in the Law on the statute of judges and prosecutors) does not fully take into account the need for a procedure that goes beyond doubt of political interference, nor the realities on the ground.

- ➔ Art 144-149 set up the procedure for the appointment of top prosecutors, a procedure that is *de facto* dominated by the Minister of Justice. These conditions apply for the positions of Chief General Prosecutor, First-Deputy General Prosecutor, Deputy General Prosecutor, Chief and Deputy Chief Prosecutors for the National Anticorruption Directorate (DNA) and Directorate for investigation of organised crime and terrorism (DIICOT), as well as for all section presidents in these Prosecutor's Offices.
- ➔ The candidates must have at least 15 years experience and are evaluated on the basis of a managerial project, past work, and mainly through an interview led by the Minister of Justice.
- ➔ Even though the Section for prosecutors at the SCM is involved in the process of the MoJ (it has two members participating in the interview commission) and by interviewing and giving an opinion with regards to the proposed candidates, its decisions can be overturned by the Minister of Justice. Art. 148 clearly gives the possibility for the Minister to interview again the candidate that receives a negative opinion from the Section for prosecutors of the SCM and continue the appointment procedure no matter what.
- ➔ The proposal of the Minister is further sent to the President, who can refuse only once a proposal (at difference from the pre-2018 regulation that put no such limit)
- ➔ This procedures goes against the clear recommendation of the CVM, to "[p]ut in place a robust and independent system of appointing top prosecutors, based on clear and transparent criteria, drawing on the support of the Venice Commission." The fulfilment of this recommendation "will also need to ensure appropriate safeguards in terms of transparency, independence and checks and balances, even if the final decision were to remain with the political level."
- ➔ The Venice Commission opinion related to these provisions remains valid: "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. The current system [n.a. before the 2018 amendments], by involving two

political organs, allows the balancing of various political influences. This is important since the President, contrary to the Minister of Justice, does not necessarily belong to the majority"

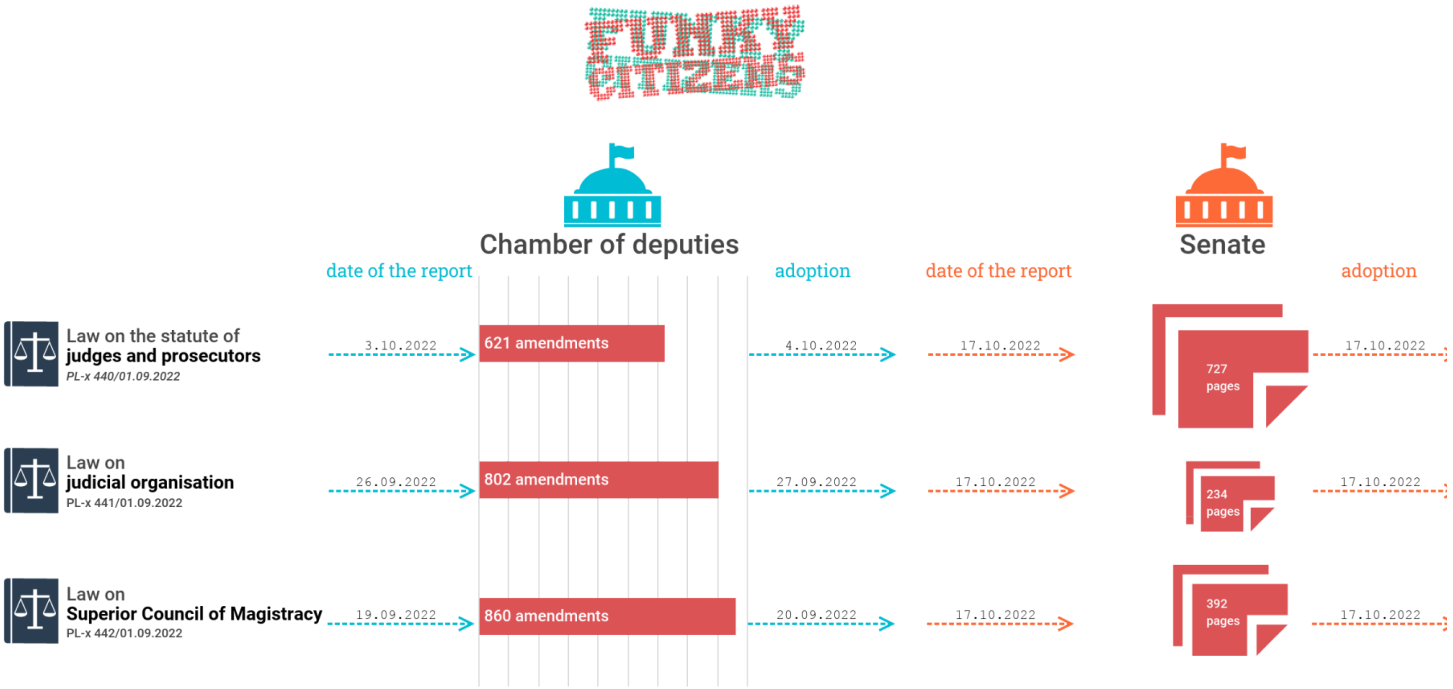
- ➔ The proposed appointment system must be read together with the dismisal procedure associated to the same positions (Art. 172) that reinforces the dominance of the Minister of Justice. The dismisal procedure can be initiated by the Minister from his own initiative or as a result of a notification from the General assemblies of the prosecutors of the respective institution or from the Chief general prosecutor or Chief prosecutors of DNA/ DIICOT.
- ➔ No matter the opinion of the SCM, the Minister of Justice can proceed with the dismisal procedure and send it to the President, that can only refuse it for legality reasons. The decision can be attacked by the dismissed prosecutor under an emergency procedure at the HCCJ.
- ➔ Thus, the possibility that the Minister of Justice explicitly has to ignore a negative opinion from the Section for prosecutors of the SCM in both the appointment and the dismissal of high-ranking prosecutors ignores the Venice Commission previous recommendation that "it would be important, in particular in the current context, to strengthen the independence of prosecutors and maintain and increase the role of the institutions, such as the President or the SCM, able to balance the influence of the Minister" as well as the GRECO recommendation "that the procedure for the appointment and revocation for the most senior prosecutorial functions other than the Prosecutor General, under article 54 of Law 303/2004, include a process that is both transparent and based on objective criteria, and that the Supreme Council of Magistracy is given a stronger role in this procedure."
- ➔ These provisions are of particular interest also in the light of the benchmark related to the investigation and prosecution of high-level corruption cases, conducted through the DNA. Recent history shows that the appointment and dismissal processes for the Chief prosecutor of DNA can lead to important political clashes with impact on the fight against corruption.

2018 Recommendation: Even though some progress was made in the transparency of the legislative process related to the justice laws adoption, not the same thing can be said with regards to the predictability of the process and to the possibility to ensure a real parliamentary debate:

In order to improve further the transparency and predictability of the legislative process, and strengthen internal safeguards in the interest of irreversibility, the Government and Parliament should ensure full transparency and take proper account of consultations with the relevant authorities and stakeholders in decision-making and legislative activity on the Criminal Code and Code for Criminal Procedures, on corruption laws, on integrity laws (incompatibilities, conflicts of interest, unjustified wealth), on the laws of justice (pertaining to the organization of the justice system) and on the Civil Code and Code for Civil Procedures, taking inspiration from the transparency in decision-making put in place by the Government in 2016.

- ➔ Although the public consultation period for the draft package of the „Justice laws" period was long, the drafts underwent multiple changes that sometimes lead to the impossibility to track the final version of the texts or the reason behind various policy options.
- ➔ Stakeholders from the judiciary and civil society had the opportunity to participate to the works of the Special Commission set up for the Justice laws, a welcome improvement.
- ➔ However, the parliamentary procedure was excessively fast, not only in the special commission, but also in the plenary session of the Chamber of Deputies and the Senate. Most of the amendments and decisions were taken along partisan lines.
- ➔ Given the huge amount of amendments that were filled in, the time allocated for debate raises serious doubts with regards to the attention paid to this process of collecting input from stakeholders and/ or members of the Parliament.

See below a graphic depicting the speed of the legislative processs



View full-size graph on Infogr.am

The Judicial Inspection (JI)

2018 Recommendation:

The Superior Council of Magistracy to appoint immediately an interim team for the management of the Judicial Inspection and within three months to appoint through a competition a new management team in the Inspection.

This recommendation refers to substantial concerns about the Judicial Inspection, not only to the context of 2018.

The JI showed a pattern of disciplinary proceedings against magistrates publicly opposing the direction of reform of the judiciary as well as the prolongation of the management team terms outside the regular procedure.

These structural concerns remain to be addressed, including in the light of a 2021 CJEU judgment that ruled that national legislation cannot give rise to doubts that the powers of a judicial body responsible for conducting disciplinary investigations and bringing disciplinary proceedings against judges and prosecutors might be used an instrument to exert pressure on, or political control over, the activity of those judges and prosecutors.

The changes brought in the Senate to the Law on the Superior Council of Magistracy represent a significant improvement from the current legislation as well as in comparison with the form that passed through the Chamber of Deputies, but some concerns remain:

- ➔ The management of the judicial inspection is now appointed through a more meritocratic process that includes a management plan and a written exam that are taken by the Chief Inspector, Deputy Chief Inspector and

the Directors of the two specialized inspections (for judges and prosecutors)

- ➔ Some of the issues raised in CVM reports or settled through the decisions such as the CJUE are addressed, especially when it comes to the possibility of the Chief Inspector to maintain his position even after the term has ended
- ➔ The dismissal procedure is also providing more checks and balances – even though the dismissal procedure can now be initiated by a lower number of members of the SCM (5 for the Chief Inspector and 3 for the Directors of the specialized sections), the Plenary still has to approve such request. Moreover, the general assembly of the inspectors can also request such a procedure to be initiated. However, the relatively low number of SCM members that can start the procedure can of course open the way to pressure on the Chief Inspector.
- ➔ The possibility of the Judicial Inspection attacking the solutions to reject the disciplinary actions pronounced by the disciplinary sections of the CSM (Art. 51) is contrary to the principles developed by the Venice Commission.
- ➔ Similarly problematic are the vague provisions related to the possibility that the competent section in disciplinary matters may, ex officio or at the request of the parties, change the legal classification of the disciplinary violations for which the exercise of the disciplinary action was ordered. Even though the disciplinary court is obliged to discuss the change of classification with the parties, and at their request, to give them a deadline to submit written conclusions regarding the change of classification, this lack of predictability can open ways for abuse.

CONCLUSIONS AND NEXT STEPS

The extraordinary haste through which the Justice Laws were adopted was justified by the need to have the CVM lifted in a very strict calendar and to meet some milestones under the National Recovery and Resilience Plan. However, these arguments are not holding water for various important facts and reasons:

Fact 1:

The milestones related to the justice laws as they appear in the NRRP are planned for the second quarter of 2023, which would have left enough time for real parliamentary debates.

423	R5. Garantarea independenței justiției, creșterea calității și eficienței acesteia	Jalon	Intrarea în vigoare a „legilor justiției" (legi privind statutul magistraților, organizarea judiciară, Consiliul	Dispoziție legală care indică intrarea în vigoare a legilor justiției				Q2	2023	Noile legi ale justiției vor prevedea următoarele: (1) consolidarea independenței judecătorilor și procurorilor; (2) recrutarea și promovarea în carieră pe principii meritocratice, împreună cu consolidarea rolului Institutului Național al Magistraturii în organizarea și desfășurarea examenelor și a concursurilor;

Număr secvențial	Măsură conexă (reformă sau investiție)	Jalon/ Țintă	Denumire	Indicatori calitativi (pentru jaloane)	Indicatori cantitativi (pentru ținte)			Calendar orientativ pentru atingerea jaloanelor/ țintelor		Descrierea fiecărui jalon și a fiecărei ținte
					Unitate de măsură	Valoare de referință	Obiectiv	Trim	An	
			Superior al Magistraturii)							(3) funcționarea eficientă a instanțelor, a Consiliului Superior al Magistraturii, precum și a Parchetului; (4) responsabilitatea efectivă a magistraților, dar și protecția acestora împotriva oricăror interferențe și abuzuri; (5) eficientizarea inspecției judiciare, asigurarea unor garanții mai mari de independență și imparțialitate.

Fact 2:

Even assuming that the justice laws were perfectly addressing the requirements made under the CVM, GRECO or by the Venice Commission, there are some other recommendations of the CVM that were not even tackled so far. Some examples:

- ➔ 2017 Recommendation: Ensure that the Code of Conduct for parliamentarians now being developed in Parliament includes clear provisions on mutual respect between institutions and making clear that parliamentarians and the parliamentary process should respect the independence of the judiciary. A similar Code of Conduct could be adopted for Ministers
- ➔ 2018 Recommendation: Freeze the entry into force of the changes to the Criminal Code and Criminal Procedure Code
- ➔ 2018 Recommendation: Reopen the revision of the Criminal Code and Criminal Procedure Code taking fully into account the need for compatibility with EU law and international anti-corruption instruments, as well as the recommendations under the CVM and the Venice Commission opinion
- ➔ 2017 Recommendation: The current phase in the reform of Romania's Criminal Codes should be concluded, with Parliament taking forward its plans to adopt the amendments presented by the government in 2016 after consultation with the judicial authorities
- ➔ 2017 CVM Recommendation: The Government should put in place an appropriate Action Plan to address the issue of implementation of court decisions and application of jurisprudence of the courts by public administration, including a mechanism to provide

accurate statistics to enable future monitoring. It should also develop a system of internal monitoring involving the Superior Council of the Magistracy and Court of Auditors in order to ensure proper implementation of the Action Plan

Fact 3:

The Government of Romania assumed in its Governance Programme that the Venice Commission opinion will be requested and there is an ongoing assessment at this point. At this point, the documents that have been sent to the Parliament do not respect the promise made in the Governmental Programme with regards to having the Opinion of the Venice Commission on them first. In the meantime, PACE has decided to ask for such an Opinion. It is unclear if the Romanian authorities will wait for it or not. If we are to look at the experience of the reorganization of SIIJ, this will not happen, leading to a new incongruence in this area.