

The new justice laws as adopted by the Parliament

Reform or the return of old habits from the pre-accession period?



In September 2022, EFOR analysed the draft justice laws as adopted by the Romanian Government at the end of August and identified the most problematic provisions. EFOR concluded then that aside from not solving the problems generated by the 2017-2018 justice reforms, the draft laws return the justice system to pre-accession standards¹.

On the 17th of October 2022, the Romanian Parliament adopted the draft laws². Some of the problematic provisions identified by EFOR in September have been solved, in whole or in part, while others remain unchanged. We briefly analyse below which of the issues identified by EFOR in September 2022 have been solved and which have remained unresolved, as well as some problematic amendments introduced in Parliament.

¹ <https://expertforum.ro/noile-legi-ale-justitiei-reforma-sau-intoarcerea-la-metehne-din-perioada-de-preaderare/>

² <https://www.mediafax.ro/justitie/legile-justitiei-adoptate-de-senat-21248484>

What has been resolved (in whole or in part)

1. Transitional provisions are introduced with regard to the judicial police

The draft law on judicial organisation adopted by the Government in August 2022 eliminates the provisions related to the appointment and dismissal of judicial police officers by order of the Prosecutor General, as well as all aspects related to the secondment of a number of judicial police officers to prosecutors' offices at the request of the Prosecutor General. Following the debates in Parliament, some provisions have been introduced which partly solve the problem.

Firstly, an express provision has been introduced in Parliament concerning judicial police officers working in DNA and DIICOT, as well as those seconded to the European Prosecutors. The provisions of the special laws regulating DNA and DIICOT will apply to them.

Parliament also adopted an amendment stipulating that judicial police officers carrying out technical surveillance (wiretapping) on the basis of Article 142 para. (1) of the Code of Criminal Procedure shall be subject to the provisions of a joint order of the Minister of the Interior and the Prosecutor General. This order will be adopted no later than 90 days after the entry into force of the new law on the organisation of the judiciary. Pending the adoption of this joint order, the provisions in force today on the method of appointment will continue to apply to these police officers.

However, the debates in Parliament did not resolve the issue of abolishing article 120² of Law 304/2004 on the secondment of judicial police officers to prosecutors' offices with the purpose of detecting and prosecuting economic, financial, fiscal and customs crimes. These provisions have not been reintroduced in Parliament.

Art. 120² of Law no. 304/2004

(1) For the purpose of prompt and thorough detection and prosecution of economic, financial, fiscal and customs offences, officers and agents of the judicial police shall be seconded to the public prosecutor's offices of the tribunals, within the limits of the positions approved by law.

2. The new holders of disciplinary action against magistrates have been eliminated

The Government proposal added two new holders of disciplinary action against magistrates: the Prosecutor General and the President of the HCCJ. In the case of actions initiated by the latter two, the role of the Judicial Inspectorate became a formal one as the Prosecutor General and the President of the HCCJ could decide to start the preliminary disciplinary investigation even if the Judicial Inspectorate proposed the opposite, i.e. to close the case.

Following debates in Parliament, these provisions were amended and the two holders were removed.

3. The reservation of management positions for magistrates elected to the SCM has been eliminated

The draft laws adopted by the Government stipulated that judges and prosecutors elected to the SCM were no longer obliged to relinquish their management positions, as the law currently provides. These positions would have been reserved for the duration of their mandate in the SCM. This means that the management positions held by magistrates elected to the SCM would have remained vacant for a period of 6 years, the equivalent of two terms of office under today's law. De facto, SCM members would have continued to run the respective courts and prosecutors' offices from the position of elected SCM member.

Following the debates in Parliament, the provision on the reservation of management positions for SCM members has been removed and they are obliged to opt for one of the two positions.

4. A mechanism has been introduced for the dismissal of SCM members at the initiative of general assemblies of judges or prosecutors

According to the draft laws adopted by the Government, SCM members could no longer be dismissed by the general assemblies of the courts or prosecutors' offices which elected them for failing to perform their duties or for performing them inadequately. The existing mechanism in the current law (Article 55(c) of Law 317/2004) had been completely removed from the draft law on the Superior Council of Magistracy.

This mechanism was reintroduced in Parliament with a detailed procedure including the right of the SCM member to address the judges or prosecutors to defend his or her point of view.

5. The possibility of recusing SCM members in disciplinary proceedings has been introduced

According to the drafts adopted by the Government, the request for recusal of SCM members deciding on disciplinary action was inadmissible. Following the debates in Parliament, the draft was amended and limitative circumstances in which a request for recusal may be made were regulated:

"(a) if the disciplinary action concerns them, their spouse or their relatives up to and including the fourth degree;

(b) whenever, in view of the quality of the person concerned by the disciplinary proceedings, their impartiality might be affected;

(c) in the event of a conflict of interest."

6. The possibility of calculating the pension in relation to the salary currently paid for a management position held in the past has been eliminated

According to the draft law on the status of judges and prosecutors adopted by the Government, if the magistrate has held a management position for a whole term of office, he or she could request that the basis for calculating the pension be the gross monthly salary corresponding to the management position at the time of his/her retirement. In other words, a judge who had served as President of the Tribunal 5 years previously would have received a pension calculated by reference to the gross monthly salary received by the President of the Tribunal now. This provision was eliminated in Parliament.

7. The directors of the two directorates of the Judicial Inspection will be appointed on the basis of a competition

In the draft law adopted by the Government, the two directors of the inspection directorates would have been appointed following a competition organised directly by the CSM, and not by the Judicial Inspection as under the current law. Moreover, the original draft eliminated the written test as part of the competition. In the final form adopted by the Senate, the written test was reinstated, but the competition remains to be organised by the SCM.

8. In case of a negative opinion of the SCM on the proposal for the appointment of a senior prosecutor, the Minister of Justice has to reorganise the interview

As part of the procedure for appointing senior prosecutors (Prosecutor General, Chief Prosecutor of DNA and DIICOT), the Minister of Justice organises an

interview with the candidates who apply and then submits his/her proposals to the SCM for an advisory opinion.

Parliament has introduced a new provision stipulating that in case of a negative opinion of the SCM on the candidate proposal submitted by the Minister of Justice, the Minister of Justice is required to hold a new interview with the candidate who received a negative opinion. The Minister of Justice may then continue the procedure by sending his/her proposal to the President of Romania or initiate a new appointment procedure.

The introduction of this provision is welcomed as, while the Minister of Justice retains the power to decide on the proposal submitted to the President, the role of the SCM is also enhanced. According to the newly introduced provisions, the issues highlighted in the negative opinion of the SCM will be those to be re-examined in the new interview organised by the Minister of Justice.

What has not been solved

1. Senior positions in courts and prosecutors' offices will be occupied on a non-competitive basis (with the exception of the position of head of court or prosecutor's office)

The magistrates who will occupy lower management positions in courts and prosecutors' offices will be chosen by the head of the institution and appointed by the relevant section of the SCM. There are no provisions in the draft laws on the criteria to be considered by the presidents of courts or chief prosecutors or chief public prosecutors when choosing the persons to occupy lower management positions.

Under these conditions there is a real risk of concentrating all decision-making power in the hands of one person: the head of the court or prosecutor's office. Since 2005, leadership positions in courts and prosecutors' offices have been filled through competitive procedures, and today's proposed changes would return the judiciary to lower standards than in the pre-accession period.

2. NIM has been removed from the promotion procedure for judges at the HCCJ, introduce an unclear integrity vetting procedure. HCCJ judges will no longer be regularly evaluated

According to the drafts approved by the Parliament, the promotion competition at the HCCJ is organised whenever necessary and consists of an interview before the Section for Judges of the SCM, as well as an evaluation of the documents drawn up by the candidate. Unlike other promotion procedures to a higher court, promotion to the HCCJ does not include a written test. The written test was a step in the promotion to the ICCJ until 2018 when it was

eliminated. In addition, the NIM will no longer be part of the process.

Also, HCCJ judges will no longer be regularly evaluated, unlike other judges and prosecutors.

The new law also provides for a procedure to check the integrity of eligible candidates by the Judicial Inspectorate. The inspectorate draws up a report which is taken into account in the assessment made by the evaluation committee on the basis of the interview. As this report is part of the evaluation of the candidate, its content and the limits of the evaluation are very important as they can have a considerable influence on the decision of the evaluation committee.

EFOR considers it should also be clarified whether there is a possibility to challenge the assessment report. In its current form this procedure remains unclear and unpredictable. Under these circumstances, there is a risk that this mechanism is not an objective assessment tool, but a highly subjective one that could be used precisely to eliminate certain candidates. From the point of view of the case law of the Constitutional Court, these loopholes may lead to the declaration of these provisions as unconstitutional.

3. The Judicial Inspectorate will no longer be a main budget holder, but a tertiary budget holder

In the debates in Parliament, the SCM called for the reintroduction of the status of main budget holder for the Judicial Inspection. However, in the law on the CSM as adopted by Parliament, the Judicial Inspection remains a tertiary budget holder. The budget of the Judicial Inspectorate, an essential element of ensuring its independence, will now be included in the SCM budget and the Chief Inspector becomes a tertiary budget holder.

4. Dismissal of the Chief Inspector

The draft law adopted by Parliament provides that the procedure for the dismissal of the Chief Inspector may be initiated following a reasoned request of at least 5 members of the SCM or a reasoned request of the general assembly of judicial inspectors.

The new law makes it easier to initiate the dismissal procedure. According to the current law, the Chief Inspector can be dismissed following a procedure initiated by the Plenary of the SCM.

5. The HCCJ takes over from the Ministry of Justice in its budget judges'salary rights and all costs intrinsically linked to salary rights. All other court-related expenses will also be transferred to the HCCJ at a later date.

This new provision is included in the draft law on judicial organisation adopted by the Government and kept in the form of the law adopted by the Parliament. EFOR pointed out back in September that in addition to the problem of the capacity in terms of human resources of the HCCJ to manage these costs, it is unclear what is meant by the phrase "other categories of costs intrinsically linked to salary rights". If this includes salaries obtained through court decisions, it is necessary to provide for the payment of these in instalments, as is currently the case when the budget is administered by the Ministry of Justice. Otherwise, there is a risk of budgetary deadlock.

These changes will apply from the date of entry into force of the State Budget Law for 2023 and the Ministry of Justice will provide logistical support, human and material resources for up to 6

months. It is unclear whether after the 6-month period, the HCCJ will receive additional resources to take over these budget-related tasks.

Statements made by the Minister of Justice, Cătălin Predoiu, at the Government meeting of 24 August 2022, when the draft justice laws were adopted³

"Another principle we have pursued has been to make justice accountable for its own results, for its own functionality, because here there are still unmet expectations from citizens, from companies and even from the system itself. (...) And I would give just a few examples of provisions that tend to make this system accountable. I would perhaps start with a surprising one, namely a provision that anticipates the transfer of the management and responsibility of justice budgets to the High Court of Cassation and Justice, an objective constantly requested by judges and prosecutors as an element of strengthening their independence, but, without a doubt, it is also an element of accountability in relation to the spending of public funds allocated to justice. Of course, according to the same rules, in coordination with the Ministry of Finance, but with a greater role in the allocation of resources to the judiciary".

6. Vacant senior positions in DNA, DIICOT and PHCCJ can no longer be filled through secondment

The positions of Prosecutor General of the Prosecutor's Office of the High Court of Cassation and Justice, Chief Prosecutor of the National Anticorruption Directorate (DNA) and of the Directorate for the Investigation of Organised Crime and Terrorism Offences (DIICOT) cannot be filled by secondment in case of vacancy. The Minister of Justice is obliged to initiate the procedure for filling these positions within 60 days of the vacancy.

³ <https://gov.ro/ro/stiri/sedinta-de-guvern-din-24-august>

7. The Prosecutor General, the Chief Prosecutor of DNA and the Chief Prosecutor of DIICOT will be able to overrule the measures of all subordinate prosecutors, in writing and with reasons

According to the law in force, the measures of prosecutors can be reversed only by the directly superior prosecutor, not by other senior prosecutors.

According to the draft laws adopted by Parliament, the Prosecutor General will be able to overturn, in writing and with reasons, the decisions and measures of all prosecutors in the system when he/she finds that they are unlawful or unfounded. As regards DNA and DIICOT, similarly, measures and decisions ordered by prosecutors working in these specialised directorates will be overturned directly by the Chief Prosecutor of the directorate.

8. The annual reports of DNA and DIICOT are no longer stand-alone, but part of the annual report of the PHCCJ

Unlike the law in force, the draft law on judicial organisation adopted by the Government provided that the annual report of DNA and DIICOT would be sent to the Prosecutor General for approval. The specialised structures will no longer send a stand-alone report to the Minister of Justice and the Prosecutors' Section of the SCM. EFOR believes that this change will affect the visibility of these two structures, whose profile will be reduced in the public eye.

⁴ See Government Programme for 2021-2024, Chapter on Ministry of Justice, Justice and Rule of Law, Vision and Principles (https://gov.ro/fisiere/programe_fisiere/Program_de_Guvernare_2021%E2%80%942024.pdf)

In addition to these changes, the form of the law adopted by Parliament stipulates that before being sent to the Prosecutor General, the report must be submitted to the general assembly of prosecutors of the structure for approval. The Prosecutor General will also review the overall degree of implementation of the criminal policy priorities.

9. The Romanian Parliament adopted the laws without waiting for the Venice Commission Opinion

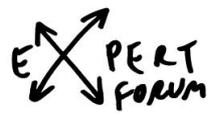
As EFOR pointed out in September 2022, the Government of Romania has committed itself in the Government Programme to send the draft justice laws to Parliament only after obtaining the opinion of the Venice Commission⁴. The Government failed to ask for this opinion before sending the laws to the Parliament. However, the opinion of the Venice Commission was requested by the Parliamentary Assembly of the Council of Europe⁵. The Venice Commission has announced that it will publish its opinion in December. The analysis carried out by the Venice Commission's experts would be an objective guarantee that the proposed texts do indeed meet the objectives set.

At the end of September 2022, the European Commissioner for Justice, Didier Reynders, stated that Romania must wait for the Venice Commission's opinion before adopting the three draft laws in the field of justice⁶. However, on 17 October 2022 the Romanian Parliament adopted the draft laws without waiting for the Venice Commission opinion.

⁵ <https://www.agerpres.ro/politic/2022/09/14/comisia-de-la-venetia-sesizata-la-solicitarea-usr-pe-proiectele-legilor-justitiei--979022>

⁶ <https://romania.europalibera.org/a/comisar-european-justitie-comisia-de-la-venetia-pentru-legile-justitiei/32046136.html>

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