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Self-Governance of the Judiciary System in Romania: Dependent Judges in an Independent Judiciary

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1. Introduction

According to the settled case-law of the CJEU, judges must be protected from outside interference or pressure liable to jeopardise their independence, and the rules applicable to the statute of judges and to the exercise of their judicial office must in particular make it possible to exclude not only any direct influence in the form of instructions, but also forms of indirect influence which are liable to influence the decisions of the judges in question and, thus, to remove any lack of the appearance of their independence or impartiality which might undermine the confidence which the judiciary must inspire in individuals in a democratic society and a State governed by the rule of law.¹

The changes made to the justice laws in Romania between 2017 and 2019 are still in force and produce various legal effects, including the creation of a category of dependent judges within an independent judiciary, as we will see in the three examples provided below.

2. Examination for the effective promotion of judges in execution functions

Law no. 242/2018 amended the provisions of Law no. 303/2004 and changed the method of effective promotion of judges in execution functions in higher courts,² after 15 years of enforcing the promotion methodology based on a written examination, organized at central level. The change that has taken place gives priority to a selection procedure for effectively promoted judges largely conducted by the presidents of the courts of appeals. The need for this change has not been justified by any impact study carried out by the Superior Council of Magistracy, and it was criticised in the Ad-Hoc Report on Romania (Article 34 of the Regulation) adopted by GRECO during its 79th plenary meeting (Strasbourg, 19-23 March 2018): "31. (...) GRECO heard fears that this new system would leave more room for personal or political influences in career decisions, which could impact the neutrality and integrity of the justice system and it would thus be essential that the CSM develops appropriate rules to guard against such risks, including clear and objective criteria to guide the future decisions of the selection commission".

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¹ See Judgment of 18 May 2021 in 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 et al.*, para. 193.

² In Case C-216/21, *Asociația Forumul Judecătorilor din România*, CJEU will have to consider several questions raised by a Romanian court in this regard.

The legislative amendments adopted during 2018 depart from the logic of promoting judges to office. Practically, the judge would hold the professional grade afferent to the higher court (tribunal, court of appeals), but would not have the essence of this grade, i.e. the right to function at that court, which can only be acquired after a new, subjective and formal selection by a commission composed of the president of the hierarchical court of appeals where promotion is sought and four other judges from the court of appeals or the courts in its district, proposed by the college of the court of appeals.³ The National Institute of Magistracy has only a decorative role in the establishment of the evaluation panel, as it only forwards the proposals requested from the management colleges of the Courts of Appeals to the Judges' Section of the Superior Council of Magistracy.⁴

In other words, the president of the hierarchically superior court where promotion is sought acquires the power to select the magistrates to be promoted in the absence of objective and quantifiable criteria, and there is a risk that those elected will lose their subjective independence (the capacity to give a solution in accordance with the law and their own conscience) as they become "indebted" to the president of the court (a person who, in any case, holds a special power in the Romanian judicial system, as the person who decides on the subject of the judge's judgment, the degree of complexity of the panel which the judge will belong to, the auxiliary staff with whom the judge will collaborate and who will participate in the evaluation of the judge's work, evaluation on which the subsequent promotion to the higher court will depend).

Moreover, the condition of having first obtained the professional grade corresponding to the court to which the actual promotion is requested is an unreasonable restriction of the right to work. Hierarchical grades in the Romanian magistracy system are linked to the hierarchy of the courts, and they cannot be independent of it.

The evaluation of the work is mainly based on an assessment of 10-15 court decisions, 10 of which are chosen by the evaluation commission. An assessment of compliance with reasonable time limits for the settlement of cases is established on the basis of the number of hearings, the number of cases attended, the number of cases settled, the number of judgments unreasoned within the time limit, the average number of days by which the time limit was exceeded, the average period for settling the cases, the work of the court in relation to the average workload per judge, the average number of court appearances, the average time limit for settling the cases, the average number of judgments drawn up, the average number of judgments not drawn up.

It is necessary for the evaluation commission to request a reasoned opinion from the judges of the higher court for which the candidate has applied, obtained by the president of the division of the higher court, who records the result in a report, which is indicated as an advisory opinion. It goes without saying that the advisory opinion will also only raise suspicions as to its relevance and how a candidate ends up receiving the unfavourable score. Moreover, the president of the division will only be able to ask for and collect the opinions of some of the judges in the division, which means that it is possible to manipulate the results (in the case where only judges who have a negative opinion of certain judges in the lower courts are questioned, this will result in a report that is unfavourable to them; on the other hand, if it is

³ Art. 36, paras. (2) and (3) of the Regulation.

⁴ Art. 36, para. (5) of the Regulation.

desired to favour certain candidates, the views of the judges who have a favourable opinion of those candidates, including their sense of humour, will be the predominant ones).⁵

None of the regulated criteria constitutes an objective and predictable criterion⁶ that would lead to the guarantee of a promotion based on meritocracy and respect for the independence of judges and the dignity of their office. The evaluation of judicial decisions cannot constitute a basis for promotion to a higher court, but only a tool for improving the quality of justice as a system.

Formally, the President of the Court of Appeals is part of a commission for the evaluation for promotion, but also of the commission for the evaluation of all judges of the Court of Appeals, thus accumulating a great deal of decision-making power, both in terms of how the judges of the Court of Appeals are evaluated and in terms of designating the judges who will actually be promoted to the Court of Appeals. In the case of Bosnia and Herzegovina, the Venice Commission stated that "[...] one provision seems problematic as it defines the President of the Court as a central figure in the process of evaluating the judges. This may not only lead to a conflict of interest, but also limits the individual independence of judges."⁷

The immediate effect will be the possible favouring of some candidate judges over others, based on discretionary and subjective criteria, which it departs from the principle of meritocratic promotion in the judiciary. The concrete result as concerns the composition of the judiciary will be the development of a typology of judge who can promote, obedient in behaviour, provisions that can negatively and seriously affect the individual independence of judges.

In fact, in recent years, the prior delegation to the higher court of judges who have obtained the appropriate hierarchical rank, on the spot, under the legislation amended in 2018, has become a practice, configuring a kind of probationary period so that judges can be effectively promoted afterwards, which is specific to the probationary period, not to judges with extensive experience. It has created a kind of system of dependent judges within an independent judiciary. Delegations are also ordered by the presidents of the courts of appeals, and most of the judges who are actually promoted are chosen from among the delegated persons, at least this can be inferred in the practice in some courts of appeals.

⁵ The Romanian press reports that "the selection procedure is strikingly similar to the old techniques for selecting the people to join the Romanian Communist Party, the favourable characterisations from as many people as possible being an essential condition for joining the ranks of the single party". An example of such a characterisation is quoted *in extenso*: "the judge is an open, sociable, communicative, organised and hard-working person", "he is not rigid, does not show excessive formalism" and "he works very well with the members of the panels, being a consummate professional and deliberations run smoothly. He is a committed colleague in the team and has a good sense of humour". See <https://presshub.ro/caracterizari-ca-pe-vremea-pcr-pentru-judecatorii-care-doresc-sa-promoveze-in-cariera-191618>.

⁶ See Alioune Badara Fall. 'Les menaces internes à l'indépendance de la justice'. Available at: <http://v1.ahjucaf.org/Les-menaces-internes-a-l.html#nb31>. The author also points out the situation of some promotions in the judiciary based on personal relationships and recommendations.

⁷ European Commission for Democracy Through Law (Venice Commission). 'Opinion on the Draft Law on the Courts of Bosnia and Herzegovina', CDL-AD(2013)015, para. 66, available at: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2013\)015-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)015-e).

This is how the legislative changes in the field of promotion of judges can give rise to a body of magistrates directly dependent on the presidents of the 15 courts of appeals in Romania.

3. Organisation and functioning of Judicial Inspection

The Judicial Inspectorate is a body with legal character within the Superior Council of the Magistracy, whose accountability and transparency are expressly provided for as an aim of the first benchmark of the Cooperation and Verification Mechanism developed by the European Commission. The Judicial Inspectorate plays an essential role in disciplinary proceedings within the judiciary, directly linked to the objective of strengthening accountability and therefore the efficiency of the judicial system.

The importance of the independence of the Judicial Inspection derives from its endowment with a wide range of jurisdictional powers, with a major impact on the careers of judges and prosecutors, such as: it carries out disciplinary investigations, which is a mandatory preliminary stage of the disciplinary action against the judge or prosecutor, it carries out checks to assess whether the conditions for the exercise of the function were met in bad faith or with gross negligence in the event of a miscarriage of justice, it carries out checks in the event of requests to defend the independence, impartiality and professional reputation of judges and prosecutors, verifies the fulfilment of the condition of good repute required for the exercise of the function of judge or prosecutor, verifies the integrity of the candidates registered in the competition for promotion in the position of judge at the High Court of Cassation and Justice, carries out checks at courts and prosecutor's offices regarding compliance with the provisions of laws and regulations, as well as the manner in which judges and prosecutors holding a managerial position exercise their managerial duties, etc.

In the architecture of judicial inspection activities, the chief inspector (appointed by a commission composed of three judges appointed by the SCM Division for Judges and a prosecutor appointed by the SCM Division for Prosecutors) has key powers, which were strengthened by the 2018 legislative amendments⁸: it appoints judicial inspectors (only from among judges and prosecutors of courts/prosecutor's offices), designates inspectors with executive functions, manages the work of the Judicial Inspectorate and disciplinary proceedings, organises the allocation of cases, determines the specific areas of activity in respect of which control is exercised, is the main issuer of instructions/orders and has the capacity to initiate disciplinary proceedings itself or to endorse/confirm the decision to close the complaint given by an inspector during preliminary checks.

With these changes, the Judicial Inspectorate has practically become a pyramidal public authority, unique in the judicial system, at the disposal of a single person, with wide discretionary power (including for the adoption of the organisational regulatory framework and confirmation/reversal of decisions of judicial inspectors, etc.). In this structure, magistrates (judges and prosecutors) appointed as judicial inspectors by the Chief Inspector are fully subordinated to him, with the risk of their functional independence being substantially affected.

The European Commission's 2021 Rule of Law Report (Chapter on the situation of the rule of law in Romania) noted the start of the disciplinary investigation for the disciplinary offence of exercising one's

⁸ Law no. 234/2018.

functions in bad faith or with gross negligence, if the act does not constitute a criminal offence, against a judge of the Pitești Court of Appeals, following the application in a dispute on 7 June 2021 of the judgment of the Court of Justice of the European Union of 18 May 2021 in 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 et al.*

The Judicial Inspectorate has recently initiated disciplinary proceedings against the judges who were at the origin of the referral to the CJEU, and against those who applied the CJEU judgment, in a show of force that was perceived by all relevant external observers as vindictive, likely to compromise the mandatory application of EU law in Romania. Moreover, these disciplinary investigations were carried out precisely by judicial inspectors appointed either during the interim period of the Chief Inspector or in the framework of contests controlled by the Chief Inspector.

In principle, a disciplinary procedure is incompatible with the rules of the European Union law, if it affects the essence of the procedure governed by Article 267 TFEU and, with it, the very foundation of the Union itself, having a dissuasive effect on any Romanian magistrate called upon to apply the binding rules of the European Union law, including the case law of the Court of Justice of the European Union, under Article 148 of the Romanian Constitution.

A body charged with initiating disciplinary proceedings, such as the Judicial Inspectorate, should at least demonstrate a degree of operational and investigative independence. Each judicial inspector must be independent in issuing decisions, cases should be randomly allocated, and access to the positions of judicial inspector (prosecutor or judge) should operate on the basis of an examination held based on objective and meritocratic criteria. This is the only way to remove suspicions about the 'fabrication of cases' for certain magistrates considered inconvenient by interest groups that are subordinated to parts of the media or want to control the judicial system.

The 2022 European Commission Rule of Law Report (Country Chapter on the rule of law situation in Romania) noted that "the concentration of power in the hands of the Chief Inspector and his deputy, as well as the limits to the oversight by the SCM, remain an issue for the independence of justice".⁹

A request for preliminary ruling concerning the organisation and functioning of Judicial Inspection is on the dockets of the Court of Justice of the European Union.¹⁰

4. Appointment as President of the Superior Council of Magistracy of an interim member, maintained in office exclusively by the will of his colleagues

Under Decree no. 1/03.01.2022 of the President of Romania, published in the Official Gazette no. 3/03.01.2022, it was ordered the retirement from office of Judge MG, elected member of the Superior Council of Magistracy of the High Court of Cassation and Justice.

⁹ See European Commission. '2022 Rule of law report – Communication and country chapters'. Available at: https://ec.europa.eu/info/publications/2022-rule-law-report-communication-and-country-chapters_en.

¹⁰ Case C-817/21, *Judicial Inspection*.

On January 11, 2022, the Plenary of the SCM was convened to establish the vacancy of one seat of elected member of the Superior Council of Magistracy, representing the judges of the High Court of Cassation and Justice.

Under Decision of the Senate Plenary no. 1/2022 on the validation of an interim member of the Superior Council of Magistracy, published in the Official Gazette No. 50/17.01.2022, Judge MB was appointed interim member of the Superior Council of Magistracy.

On February 7, 2022, several members of the SCM submitted Petition no. 3918 requesting the immediate convening of the SCM Plenary in order to initiate elections for the remainder of the term of office until the expiry of the 6-year term for filling the vacancy of the office of judge of the High Court of Cassation and Justice.

Under the Plenary Decision of February 11, 2022, it was decided not to hold elections for the vacant seat of member of the Superior Council of Magistracy, representative of the High Court of Cassation and Justice (item 13 on the covered agenda).

On February 25, 2022, several SCM members reiterated this request, submitting Petition no. 5584. The petition was not included on the agenda of the next Plenary meeting on February 28, 2022, and at that meeting, the supplementing of the agenda with this item was rejected.¹¹

Article 44, paragraph 1 of Law no. 317/2004 confers the status of court upon the Superior Council of Magistracy, in the sense that it performs, through its divisions, the role of court in the field of disciplinary liability of judges and prosecutors, for the acts provided for in Law no. 303/2004, republished, as amended and supplemented.

According to Article 57 of Law no. 317/2004 on the Superior Council of Magistracy, "(1) In the event of termination of membership of the Superior Council of Magistracy before the expiry of the term of office, new elections shall be held for the remaining vacancy, in accordance with the procedure laid down by law. (2) Until the election of a new member, the interim office shall be held by the judge or prosecutor who obtained the next highest number of votes in the elections held in accordance with Article 8, paragraph (3) or, as the case may be, Article 19. (3) In the case referred to in paragraph (1), the person elected to fill the vacancy shall serve as a member of the Superior Council of Magistracy for the remainder of the term of office until the expiry of the 6-year term".

The majority decided in the Plenary Session of February 11, 2022 that it did not intend to organise elections for the vacant seat of the member of the Superior Council of Magistracy representing the High Court of Cassation and Justice. By rejecting the request to hold elections at the meeting of February 11, 2022, and by refusing to discuss the new request on the same subject at the meeting of February 28, 2022, with the verbal reasoning at the meeting that this subject had already been decided by the Plenary of the

¹¹ See Juridice.ro. 'Șapte membri aleși ai CSM solicită organizarea alegerilor pentru locul vacant de membru al Consiliului Superior al Magistraturii, reprezentant al Înaltei Curți de Casație și Justiție'. 3 March 2022. Available at: <https://www.juridice.ro/772967/sapte-membri-alesi-ai-csm-solicita-organizarea-alegerilor-pentru-locul-vacant-de-membru-al-consiliului-superior-al-magistraturii-reprezentant-al-inaltei-curti-de-casatie-si-justitie.html>.

SCM, the express refusal of the Superior Council of Magistracy to apply the mandatory legal provision of Art. 57 of Law no. 317/2004 to hold elections for the remainder of the term of office until the expiry of the 6-year term in order to fill the vacancy for the High Court of Cassation and Justice is obvious.

As the text of the law is imperative as regards the organisation of new elections for the vacant seat, and the interim appointment of the judge who obtained the next highest number of votes in the 2016 elections is strictly linked to the election of the new member, the two procedures - organisation of new elections and validation of the interim member - had to be simultaneously carried out.

With this decision, an interim member of the Judges' Section has acquired, not by application of the law, but by the will of the majority of the members of the Superior Council of Magistracy, the status of full member of the SCM.

However, the presence *sine die* of an interim member of the SCM, including in the composition of the disciplinary panel of the Disciplinary Division for Judges, *in which he/she participates only as a result of the will of his/her colleagues not to hold elections for the office which the interim member holds*, is likely to raise serious doubts as to his/her independence. The presence of a judge in a panel (with which the disciplinary panel of the SCM is assimilated) cannot be conditional, dependent on the will of the other members, who are refusing to hold elections for the vacant office, but it should be unconditional.

5. Conclusions

The Consultative Council of European Judges, in its Opinion no. 17 (2014) on the evaluation of the work of judges, quality of justice and respect for the independence of the judiciary, stated (paragraph 6) that: "the fundamental rule for any individual evaluation of judges must be that it maintains total respect for judicial independence. When an individual evaluation has consequences for a judge's promotion, salary and pension or may even lead to his or her removal from office, there is a risk that the evaluated judge will not decide cases according to his or her objective interpretation of the facts and the law, but in a way that may be thought to please the evaluators. Therefore, any evaluation of judges by members of the legislative or executive arms of the state is especially problematic. However, the risk to judicial independence is not completely avoided even if the evaluation is undertaken by other judges. Judicial independence depends not only on freedom from undue influence from external sources, but also requires freedom from undue influence internally, which might in some situations come from the attitude of other judges, including presidents of courts."

There are a huge variety of highly problematic things that judges, especially senior judges, can do to other judges. In detail, see, for example, David Kosař,¹² who suggests that certain forms of judicial self-government create "a system of dependent judges within an independent judiciary", with undue influence being exercised by judicial officials, such as presidents of courts or officials of judicial self-government bodies, *within the judiciary*.¹³

¹² David Kosař. *Perils of Judicial Self-Government in Transitional Societies* (2016), at p. 407.

¹³ See Opinion of Advocate General Michal Bobek of 4 March 2021, Joined Cases C-357/19 and C-547/19, *Public Ministry - Prosecutor's Office of the High Court of Cassation and Justice - National Anticorruption Directorate*, para. 152.

The European Court of Human Rights itself recognises the condition of judges' internal independence and the dangers of judges being influenced by their colleagues and court presidents.¹⁴

Self-governance of the judiciary can lead to the misuse of disciplinary procedures and other accountability mechanisms or to the distortion of the merit-based selection system for judges. It would be wrong to remain in the categories of previous decades, when threats to the independence of judges were considered to come only from the other branches of government.

There is no particular reason (at least in some societies) for judges to behave differently from politicians when using these prerogatives.¹⁵ Rather, judicial independence should be understood as "a consequence of the self-restraint of powerful actors" in the judiciary.¹⁶

The judge who decides a case must be appointed on the basis of objective criteria laid down by law and not on the basis of the discretionary choices of any person inside or outside the judiciary. "Court presidents are the privileged channel for the executive branch to exert pressure on the entire judiciary".¹⁷ This is why the hierarchical structure with regard to judges was unanimously criticised as incompatible with their independence.

¹⁴ See ECtHR judgment of 15 July 2010, *Gazeta Ukraina-Tsentr v. Ukraine*, no. 16695/04, paras. 33–34; ECtHR, judgment of 10 October 2000, *Daktaras v. Lithuania*, no. 42095/98, paras. 35–38; ECtHR judgment of 3 May 2007, *Bochan v. Ukraine*, no. 7577/02, para. 74; ECtHR judgment of 9 October 2008, *Moiseyev v. Russia*, no. 62936/00, paras. 182–184; ECtHR judgment of 5 October 2010, *DMD GROUP, a.s. v. Slovakia*, no. 19334/03, paras. 65–71; ECtHR judgment of 3 May 2011, *Sutyagin v. Russia*, no. 30024/02, para. 190; ECtHR judgment of 12 January 2016, *Miracle Europe Kft. v. Hungary*, no. 57774/13, paras. 53–63.

¹⁵ See Chris Hanretty. 'The Appointment of Judges by Ministers: Political Preference in England, 1880-2005'. 3 JOURNAL OF LAW AND COURTS 305 (2015).

¹⁶ See Samuel Spáč. 'By the judges, for the judges: The study of judicial selection in Slovakia'. (Comenius University, PhD Thesis 2017); John Ferejohn. 'Independent Judges, Dependent Judiciary: Explaining Judicial Independence'. 72 SOUTHERN CALIFORNIA LAW REVIEW 353 (1999), at p. 375; John Ferejohn and Larry Kramer. 'Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint'. 77 NEW YORK UNIVERSITY LAW REVIEW 962 (2002).

¹⁷ See Guido Neppi-Modona. 'The various aspects of external and internal independence of the judiciary'. Available at: [https://www.venice.coe.int/webforms/documents/?pdf=CDL\(2012\)035-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL(2012)035-e).