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From the Judiciary in Romania to the EPPO in Brussels – The Tactical Field of the Romanian Secret Service

How the Romanian National Anti-corruption Directorate DNA and the Romanian Intelligence Service SRI manipulated the judiciary in order to obtain desired sentences and the implications of this collaboration for Romania and the European Union

by Oliver Pahnecke[1]

Abstract

This article contains an overview of how the Romanian internal secret service SRI infiltrated the judiciary and how its co-operation with the DNA lead to an infringement of due process in numerous corruption related cases. This teamwork could also have an impact on the judiciary at the European Union (EU) level, since one of the candidates for the position of first General Prosecutor of the EU at the European Public Prosecutor's Office (EPPO) is former DNA head Laura Codruţa Kövesi. The article uses publicly available reports of the Council of Europe, the EU and the OSCE, as well as newspaper articles, reports of magistrates' associations and material of the Romanian Constitutional Court to analyse the legal situation and propose policy changes for Romania, the EU and its own selection process for the EPPO.

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List of Abbreviations

AMR – Association of Romanian Magistrates
APR – Association of Romanian Prosecutors
CCR – Constitutional Court of Romania
CSAT – Romanian Supreme Council of National Defence
CSM – Romanian Supreme Magistracy Council
CVM – Cooperation and Verification Mechanism
DNA – Romanian National Anti-corruption Directorate
ECHR – European Convention on Human Rights
ECtHR – European Court of Human Rights
EPPO – European Public Prosecutor's Office
EU – European Union
GRECO – Group of States against Corruption
ICCJ – High Court of Cassation and Justice
ICCPR – International Covenant on Civil and Political Rights
KGB – (here) State Security Committee of the Republic of Belarus
MEDEL – European Judges for Democracy and Liberty
NURJ – National Union of the Romanian Judges
OSCE – Organization for Security and Co-operation in Europe
SIE – Romanian Intelligence Service (external)
SRI – Romanian Intelligence Service (internal)
TEU - Treaty on European Union
UDMR – Democratic Union of Hungarians in Romania

I. The Romanian Intelligence Service SRI in Romania's Prosecution and Courts, in particular its Cooperation with the Prosecutors at the National Anti-corruption Directorate, DNA

Laura Codruţa Kövesi is bringing in the scalps. This is how the Guardian praised the woman leading Romania's war on corruption at the helm of the National Anticorruption Directorate (DNA) in November 2015. "This year we have investigated 12 members of parliament, two of them being former ministers," says Kövesi, who was appointed head of DNA in 2013. "We have investigated two sitting ministers, one of whom went from his ministerial chair directly to pre-trial detention."[2] In 2014, the agency successfully prosecuted 24 mayors, five MPs, two ex-ministers, former prime minister Victor Ponta[3] and more than 1,000 other individuals including judges and prosecutors, with a conviction rate above 90%.[4]

This conviction rate looks impressive. However, it becomes less so after a comparison with the conviction rates in other states. Based on the OSCE trial monitoring report on Belarus,[5] the DNA conviction rate was closer to the 91-94% conviction rate of Belarus. In Belarus, the secret service KGB plays an important role in the judiciary, unlike in Germany which has a conviction rate of 81%. This does not seem to be the only similarity. The chain of events over the past years shows that Romania's internal secret service (SRI) is active in the country's judiciary, even if the Commission of the EU is steadfast in its will to ignore this: ever since Romania's accession to the EU in 2007, the Commission publishes progress reports for the Cooperation and Verification Mechanism (CVM). The intent behind this mechanism is to help in and control the improvement of the judicial reforms and the fight against corruption. However, it does not mention the SRI's activity in the judiciary, despite the former president of the Romanian Constitutional Court Augustin Zegrean publicly declaring that the Constitutional Court's judges were threatened by SRI. In fact, one of his colleagues had even reported to the EU Commission's officers responsible for the CVM during their country visit that he was "afraid to be a judge at this court".[6]

After 11 progress reports, the Commission finally mentioned very briefly in its report published on 13 November 2018 that "[O]ne of such broader factors has been publicly-debated claims that cooperation agreements between the judicial institutions, notably the prosecution, and the Romanian Intelligence Services were the source of systemic abuse, in particular in corruption cases."[7] The technical report of 2017 claims that "[T]he prosecution and conviction of many prominent politicians in Romania is a sign that the underlying trend of judicial independence is positive" without

2 Gillet, Kit, *Bringing in the scalps: the woman leading Romania's war on corruption*, the Guardian, London, 4 Nov 2015

3 Victor Ponta was subsequently acquitted of corruption charges dating back to 2007-2008 before his political career by the High Court in 2018, see: Gidei, Mihaela, *Înalta Curte de Casaţie şi Justiţie a decis, joi, în primă instanţă, achitarea lui Victor Ponta şi a lui Dan Şova în dosarul Turceni-Rovinari. Decizia nu este definitivă şi poate fi atacată de DNA,* Mediafax, Bucharest, 10 May 2018

4 Gillet, Kit, *Bringing in the scalps: the woman leading Romania's war on corruption*, the Guardian, London, 4 Nov 2015

5 OSCE Office for Democratic Institutions and Human Rights, *Report - Trial Monitoring in Belarus March – July 2011*, Warsaw 10 November 2011, Annex II Comparative Conviction Rates p. 100

6 Gidei, Mihaela, *Augustin Zegrean, amintiri de pe vremea când Toni Greblă a fost dus la DNA: L-am chemat pe Iohannis în CCR şi ne-am exprimat teama*, Mediafax, Bucharest, 10 May 2018, referring to incidents from 2015, see also Bogdan, Gabriela, *Former CCR judge Toni Grebla, acquitted by the Supreme Court in the case related to the ostrich farm. Grebla: Judges are proving that they judge by evidence, not by targets established by SRI and DNA*, Nine O' Clock, Bucharest, Romania, 14 May 2018

7 European Commission, *Report from the Commission to the European Parliament and the Council - On Progress in Romania under the Cooperation and Verification Mechanism*, Strasbourg, 13 November 2018, p. 2

mentioning that this could also be a sign of an abuse of power and therefore should be treated with caution.[8] Additionally, it only contains one section on the SRI's activity within the judiciary.[9] In the more detailed 2018 technical report, the two-page chapter *Cooperation between the intelligence services and the judicial institutions*[10] was included. That chapter mainly reflects the positions of the Supreme Council of National Defence (CSAT), DNA and the Supreme Magistracy Council (CSM).[11] Consequently, it ignores the statements of the Constitutional Court judges and the former Romanian president, as well as the arguments of the three associations of magistrates and prosecutors. This is despite the fact that all of their concerns have been consistently proven well-founded over the past years. When it comes to concerns of infiltration, the report states that "[T]he law clearly forbids a situation where intelligence service agents would be embedded in the justice system, as incompatible with the statute of magistrates" and that the institutions concerned denied that there were any agents active in the judiciary.[12]

Yet, public statements of important stakeholders, in particular of the SRI itself, suggest otherwise. Rumours about an infiltration of the judiciary have been circulating since the 1990s until 2015 when SRI's legal director, general Dumbrava, called the SRI the antibody for the elimination of corruption in an interview. Dumbrava added that the SRI would not "withdraw from the tactical field once the indictment was presented to the court" and that the SRI maintains its "interest until the final resolution of every case is reached."[13] That same year, Traian Basescu, Romania's former president, who had declared corruption a matter of national security 2005 in his function as co-ordinator of Romania's secret services SRI and SIE Romanian Foreign Intelligence Service (SIE) in the Supreme Council of National Defence (CSAT)[14], confirmed the collaboration of DNA and SRI and accused the DNA prosecutors of abusing preventive arrests "(…) in order to force confessions (...)".[15] From 2016 onwards, Basescu demanded rigorous oversight for both bodies[16] and criticised their procedures as a violation of human rights as there are "many who have been paraded in handcuffs for the glory of Ms Kövesi".[17]

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8 European Commission, *Romania: Technical Report Accompanying the document "Report from the Commission to the European Parliament and the Council On Progress in Romania under the Cooperation and Verification Mechanism"*, Brussels, 25.1.2017 p. 4

9 id. p. 23

10 European Commission, *Technical Report Accompanying the Document "Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism"*, Strasbourg, 13 November 2018, p. 7-9

11 CSAT co-ordinates the national defence and therefore the activity of SRI, while DNA and CSM signed cooperation protocols with SRI

12 European Commission, *Technical Report Accompanying the Document "Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism"*, Strasbourg, 13 November 2018, p. 10

13 Matei, Alina, *Dumitru Dumbravă: SRI este unul dintre anticorpii bine dezvoltaţi şi echipaţi pentru însănătoşirea societăţii şi eliminarea corupţiei*, Bucharest, Romania, 30. April 2015

14 Supreme Council of National Defence (CSAT) Decision no. 17/2005 on combating corruption, fraud and money laundering (not public). This secret decision made corruption a threat to national security, mentioned in: National Union of Romanian Judges, *Report on the unlawful involvement of the Romanian secret intelligence agencies, through secret protocols, in the Romanian judiciary system*, MEDEL homepage, 23 May 2018; Basescu also ignored the 5:1 vote of the Supreme Council of the Magistracy against another term of Kövesi's as the Romanian Prosecutor General, see D.G., *Aviz negativ de la CSM pentru reinvestirea Codrutei Kovesi in functia de procuror general*, HotNews.ro, Bucharest, Romania, 24 September 2009

15 Bogdan, Gabriela, *Basescu vehemently attacks Coldea, Kövesi, Stanciu: They are the artisans of scattered justice*, Nine O' Clock, Bucharest, Romania, 7 April 2015

16 Bogdan, Gabriela, *Basescu continues to train his guns on SRI and DNA: SRI has to be vigorously placed under oversight, bill on magistrates' responsibility needed for the DNA*, Nine O'Clock, Bucharest, Romania, 2 August 2016

17 Bogdan, Gabriela, *Ex-president Basescu convinced ECHR will condemn Romania for DNA's actions*, Nine O' Clock, 24 April, 2017

The CSAT is an administrative body operating under the authority of the President, entrusted with the organisation of the national defence, military and security activities of Romania. To date, it remains unclear how the decision of the CSAT to declare corruption a matter of national security could be used to overturn the relevant laws of the legislator. This decision of the CSAT prompted the abovementioned activities of the SRI, likewise an executive organ, in the judiciary. These events not only constitute a breach of the separation of power, but also expose a military unit working undercover in a civilian justice system. It is important to note that the SRI never received any legal mandate to get involved in criminal investigations with prosecutors.

In fact, this typical feature of Securitate was explicitly excluded in the law to prevent similar abuse after the fall of communism in Romania.[18] This was circumvented, as the SRI's 2013 activity report demonstrates. It states that legal experts of the SRI were members of joint operational teams within local and central law enforcement bodies in 463 cases (compared to 314 cases in 2012). In the meetings of the Joint Operational Teams, the legal experts of the SRI played an important role in the assessment of the operational situation and the measures proposed for the documentation of criminal activity, many of which are used as evidence in criminal trials. Also, in 2014, the SRI reported similarly on its activity for law enforcement institutions.[19] SRI activities were arranged based on secret protocols with the General Prosecutor's Office and the DNA, but also with the Superior Council of the Magistracy, the High Court of Cassation and Justice and the Judicial Inspection.[20] As a response to these discoveries, the National Union of the Romanian Judges (NURJ), the Association of Romanian Magistrates (AMR) and the Association of Romanian Prosecutors (APR) demanded clarification of the SRI's involvement in the judiciary from all competent Romanian institutions. This included the Superior Council of the Magistracy, the President, CSAT, the General Prosecutor Office, the DNA, the Romanian Intelligence Services and the Parliamentarian Oversight Committee on SRI.

In February 2016, the NURJ met with CSAT. After this meeting, CSAT stated in a letter that the 1991 National Security Law was outdated which necessitated it to "supplement" the law with secret decisions. One such decision was to make corruption a threat to national security, effectively extending the SRI's activities to the judiciary. In the letter, the CSAT also mentioned that the secret orders were the starting point for the Cooperation protocols between the SRI and the General Prosecutor's Office, which led to the creation of the joint teams of SRI officers and prosecutors.[21]

Since the SRI, the External Intelligence Service (SIE) and the Secret Service of the Ministry of the Interior refused to publish any of the classified Cooperation protocols, the NURJ sued for their de-classification and publication to evaluate the extent to which the independence of the judiciary might be impaired.[22] The NURJ and the AMR contacted the EU Commission and the Helsinki Committee regarding this matter. The Commission did not assist with the issue, but the Helsinki Committee held a hearing at the U.S. Senate. While the former U.S. ambassador Marc Gitenstein[23] expressed content with the developments in Romania,[24] one of the witnesses, David Clark, "expressed concern regarding several areas of Romania's anti-corruption measures, which he said had been tainted by the politicization of justice, collusion between prosecutors and the executive branch, intelligence agency

18 National Union of Romanian Judges, *Report on the unlawful involvement of the Romanian secret intelligence agencies, through secret protocols, in the Romanian judiciary system*, MEDEL homepage, 23 May 2018, p. 5 Nr. 3
19 id. p. 5-6 Nr. 3.d. and e.
20 id. p. 6 Nr. 3.e.
21 id. p. 8
22 id. p. 9
23 Served as U.S. Ambassador to Romania from 2009 through 2012.
24 Commission on Security & Cooperation in Europe: U.S. Helsinki Commission, *"The Romanian Anti-Corruption Process: Successes and Excesses"*, transcript of the hearing at the U.S. Senate, Washington, D.C., 14 June 2017 p. 4

influence over the process, lack of judicial independence and other abuses of the process." He doubted the accuracy of the EU's CVM reports due to the EU's "epic capacity for wishful thinking," by pointing out how slow the EU has been to respond to the serious deterioration of democratic standards in Hungary and Poland.[25] A second witness, Phil Stephenson, described his personal experience with the Romanian judicial system and his ongoing investigation by the Directorate for Investigating Organized Crime and Terrorism (DIICOT). He said that "the fight against corruption itself has been corrupted." He appreciated the attention that the Commission was bringing to the issue of corruption in Romania and expressed hope that further attention will address deficiencies in the anti-corruption process.[26]

The extent to which the fight against corruption in Romania is itself corrupted, is also reflected by the number of DNA cases that ended with acquittals in the past year despite the highly praised initial conviction rate. Until Spring 2019, at least 82 former DNA cases have ended with acquittals27. Among the acquitted were former Prime Minister Victor Ponta, Senate President Calin Popescu Tariceanu, Constitutional Court judge Toni Grebla, High Court of Cassation and Justice judges Gabriela Birsan and Iuliana Pusoiu, National Liberal Party leader Ludovic Orban and many other judges, prosecutors, police officers, teachers, managers and others. Likewise, the DNA had to drop numerous corruption charges before the courts ruled.28 These issues are not likely to be resolved anytime soon, as can be seen in the case of Prosecutor General Augustin Lazar. Lazar was accused in April 2019 of having been a Securitate operative allegedly deciding on the pardon of political dissidents in a prison of the Ceaușescu era29. – There are numerous cases that are being re-opened as a response to the lack of due process in the past years.

The organisation "European Judges for Democracy and Liberty" (MEDEL) with 22-member organizations in 13 European countries and observer status with the Council of Europe, also supported the efforts of the Romanian judiciary and published several statements. It called the unlawful interference of the Romanian secret services in the judiciary a threat to democracy and expressed serious doubts about the respect for basic human rights and the guarantee of a fair and just trial.[30]

On 9 July 2019, the Council of Europe's Group of States against Corruption (GRECO) published its Interim Compliance Report on Romania's corruption prevention in parliament and the judiciary. GRECO not only confirms the existence of the classified protocols, but also finds the independence of the prosecution as well as the admissibility of evidence in numerous anti-corruption cases questionable. The report states that this undermines the credibility of previously anti-corruption efforts that were highly-praised. This means, from the viewpoint of GRECO, Ms. Kövesi's work as chief prosecutor of the DNA and her co-operation with the SRI is discredited.[31]

25 id. p. 14
26 id. p. 9
27 Figures from a non-exhaustive unofficial list until spring 2019 compiled by the National Union of Romanian Judges
28 id.
29 Bogdan, Gabriela, *PG Augustin Lazar rejects allegations that he ordered disciplinary action against political detainee in mid 80s*, Nine O'Clock, Bucharest, Romania, April 5, 2019
30 National Union of Romanian Judges, *Report on the unlawful involvement of the Romanian secret intelligence agencies, through secret protocols, in the Romanian judiciary system*, MEDEL homepage, 23 May 2018, p. 9
31 GRECO, Group of States against Corruption, Interim Compliance Report Romania, *Corruption prevention in respect of members of parliament, judges and prosecutors*, Fourth Evaluation Round, Council of Europe, Strasbourg, 9 July 2019, p. 17 fn 18

I.1. SRI involvement and SRI's first director, Florian Coldea

Ghiţa-Gate was the next phase of large disclosures in the winter of 2016-2017. Sebastian Ghiţa, a former parliamentarian, SRI collaborator and businessman, had fled Romania. He aired a series of seven tapes with a detailed description of the Cooperation of the SRI and DNA on his private TV station *Romania TV*. Ghiţa presented evidence of his close friendship with General Florian Coldea, first deputy director of the SRI, such as the fact that he spent several vacations, for example on the Seychelles and in Tuscany, with Coldea and his family. This was later confirmed by the SRI's internal control committee.[32] Since Ghita was part of the parliamentarian SRI oversight committee from 2012 to 2016,[33] holidays with a SRI official would constitute a conflict of interest. He stated that he had met with General Coldea and Laura Codruţa Kövesi, the head of DNA, at the SRI premises at least twice a week for discussions between 2010 and 2014 as well as at private parties.

Additionally, Ghiţa reported how case files for owners of media outlets and other convicts were manipulated, how people were appointed to positions important for Coldea and Kövesi and how decisions on infrastructure projects were influenced. On 5 January 2017, Ghita stated that prime minister Victor Ponta was blackmailed by Coldea to appoint Kövesi to the DNA leadership. He even went so far as to claim Coldea and Kövesi had incriminating files on current Romanian president, Klaus Iohannis.[34] Coldea was suspended from the SRI shortly after this information was made public. He was found innocent in an internal investigation and reinstated, but, referring to military honour, Coldea asked the president to discharge him so as to not damage the institution's image. On the evening of 17 January 2017, president Iohannis announced that he had signed two decrees regarding Coldea and declaring his military discharge and release from office.[35]

On this occasion, the DNA denied that its Chief Prosecutor attended video conferences organized by the SRI. The DNA confirmed that there is not and never has been any collaboration protocol between the SRI and DNA or a secret protocol between Coldea and Kövesi, nor have there been mixed teams of SRI officers and prosecutors or meetings between prosecutors and intelligence officers in safe houses.[36]

However, the Chairman of Parliament's SRI Oversight Committee Adrian Tutuianu confirmed the existence of such a protocol about two months later: "In relation to the protocols concluded between the Prosecutor's Offices and the SRI, I mention that there is a protocol concluded on 4.02.2009 between the SRI and the Prosecutor's Office attached to the High Court of Cassation and Justice (ICCJ). (...)."[37]

In 2018, former SRI colonel Daniel Dragomir disclosed further details on the cooperation of the SRI and DNA which worked to the detriment or benefit of defendants in certain cases by either using the media or by manipulating the judicial process:

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32 Bogdan, Gabriela, *Tutuianu: SRI internal control committee's report confirms Ghita, Coldea travel together to Seychelles, Italy*, Nine O' Clock, Bucharest, Romania, 26 January 2017

33 id.

34 Bogdan, Gabriela, *A relationship that started at SRI and ended at Cheia: The content of the seven tapes with Sebastian Ghita that led to Coldea's suspension*, Nine O' Clock, Bucharest, Romania, 16 January, 2017

35 Bogdan, Gabriela, *SRI finalises internal inquiry in Coldea case, general found innocent and reinstated. Invoking military dignity and honour, SRI First Deputy Director asks to be discharged*, Nine O' Clock, Bucharest, Romania, 17 January 2017

36 Bogdan, Gabriela, *DNA: Kövesi didn't attend video-conferences organized by SRI; there are no SRI-DNA collaboration protocols*, Nine O'Clock, Bucharest, Romania, 27 January 2017

37 Bogdan, Gabriela, *Chair of SRI Oversight Committee Tutuianu: SRI Director terminates all protocols that don't correspond anymore*, Nine O' Clock, Bucharest, Romania, 1 March 2017

> Specifically, he referred to the involvement of the Romanian Intelligence Service in the act of justice, supervising the criminal cases until the desired sentence is obtained and choosing the court panels to this end. Dragomir said that these actions are supported in Media, the "targets" being "publicly sentenced" before receiving a final decision issued by the court. The brain of the SRI operations was also indicated as being Florian Coldea, while Laura Codruta Kövesi is the brain in judiciary, two heads which Dragomir accused of turning the institutions in their own servants due to personal interests. (…) "The SRI officers were making the indictments, and the brave DNA prosecutors were taking them, countersigning them and sending them to the court, hoping that the much esteemed tactical field will continue to take care of them in order to provide them with the necessary paths to ensure the conviction (…)There were personal relationships between judges and officers who were involved in the tactical field, relationships that have been developed over the time, for instance General Dumbrava was supporting judges to be placed on the positions. The second case, based on blackmail, such as the SIPA archive, and the third was the officers under cover from the judiciary."[38]

Despite that, Coldea maintains that the Cooperation between the SRI and DNA was conducted only within the legal limits, and indictments were not written by SRI officers.[39] However, Dragomir's deposition appears more credible. His testimony in front of the SRI oversight committee related to the DNA access to databases has been proven accurate and is congruent with the testimony of other witnesses.[40] For example, former Justice Ministry Secretary of State, Ovidiu Putura, has confirmed the so-called "Cover" method to the SRI Oversight Committee. This strategy was used to rig the allocation of court cases to certain "desired" panels of judges. Normally, the case allocation is supposed to be random to guarantee the court of law is being designated by chance to hear a case without undue influence. However, Putura explained to the SRI oversight committee in detail how court clerks can manipulate the process precisely.[41]

Another strategy was to avoid assigning cases to at least one DNA prosecutor who was not willing to follow the recommendations of the SRI to conduct searches that would violate the criminal code. The colleague that the case was re-assigned to then ordered the search as suggested.[42]

A further important manipulation took place at the High Court of Cassation and Justice in Bucharest. Most high-profile corruption cases are heard there, in front of a panel with five judges. Although the law requires the determination of the judges on these panels by lot, the chairs of the two panels were persistently held by either the president or her representative. With decision Nr. 685 of 7 November 2018, the Constitutional Court declared this practice unconstitutional and a direct violation of Article 6 (1) of the European Convention on Human Rights (ECHR), which demands "an independent and

38 Bogdan, Gabriela, *Hearing of the former SRI First Deputy Director, Florian Coldea, at the SRI Committee, was postponed by a week. Manda: Coldea announced he has a cold*, Nine O' Clock, Bucharest, Romania, 6 March 2018

39 id.

40 Bogdan, Gabriela, *Following the accusations made by the former SRI Officer Daniel Dragomir, DNA confirms: We have legal access to 21 databases, including the Cadastre Agency*, Nine O' Clock, Bucharest, Romania, 5 March 2018

41 Bogdan, Gabriela, *Before SRI Cttee, Putura talks about "Cover" method used to allocate cases to certain panels of judges. Manda: He presented a list of High Court judges who are close to the establishment*, Nine O' Clock, Bucharest, Romania, 26 October 2017

42 Bogdan, Gabriela, *Manda: A former DNA prosecutor told us how SRI was suggesting that searches should be made. About a new hearing for Maior: The question is who will pay the travelling costs*, Nine O' Clock, Bucharest, Romania, 9 May 2018

impartial tribunal established by law".[43] As the Romanian Constitutional Court points out: "Taken into consideration that the court's objective impartiality is also determined by its composition, the manner of appointing one of the members of the 5-judge panel of the High Court of Cassation and Justice is sufficient to raise legitimate and objectively justified fears of justice."[44]

Additionally, the Constitutional Court held that the High Court of Cassation and Justice had misinterpreted the law regarding the appointment of the members of the panels and expressly refused to follow its content.[45] Judge Stanciu sticks out in this context in particular: as the former president of the High Court, she was not only one of the two judges who always sat on a panel, but she also sat later on the panel of the Constitutional Court that was hearing her own case about the composition of High Court panels being rigged and refused to abstain from voting due a conflict of interest.[46] This fact was public knowledge before the EU Commission published its report on 13 November 2018.[47]

I.2. Involvement and dismissal of DNA chief prosecutor Laura Codruţa Kövesi

On Friday, 30 March 2018, the SRI published the 2009 eighteen-page protocol between the SRI and DNA which, according to Kövesi, did not exist. The document outlined a joint strategy as well as the creation of joint operational teams and was signed by Tiberiu Nitu, First Deputy Prosecutor General at the time, and Florian Coldea, First Deputy Director of the SRI. The protocol was approved by the heads of the two institutions: Laura Codruta Kövesi and George Maior, Eduard Hellvig's predecessor as the civil head of the SRI. One chapter is dedicated to the technical support consisting of signal transmission, which includes the management and maintenance of the equipment that transmitted the signal from the Service's wiretap centres to the Directorate. The audio and video surveillance activity "(…) will be carried out by the Service's specialised unit (...) under the coordination of the case prosecutor, on the basis of a "joint action plan" drafted by the designated representatives of the two sides (...)," according to this document. It also stipulates that the prosecutors are to report within 60 days to the SRI regarding how the information was used.[48] This proves joint teams exist or existed, contravening the law and in combination with judges reporting on instances where the SRI manipulated wiretap transcripts and other evidence.[49] Consequently, this could lead to courts outside of Romania raising doubts as to the rule of law in Romania, which may create difficulties in the Cooperation between the Romanian judiciary and courts in other jurisdictions.

After the 2009 protocol between DNA and the SRI had been published, the Supreme Magistracy Council (CSM) informed the public that the CSM, the Judicial Inspection and the ICCJ had also

43 Article 47 (2) sentence 1 of the Charter of Fundamental Rights of the European Union and Article 14 (1) sentence 1 of the U.N. International Covenant on Civil and Political Rights contain almost verbatim the same obligation for Romania.

44 Curtea Constituţională a României – Constitutional Court of Romania, *Parliament v. High Court of Cassation and Justice, Decision Nr. 685*, 7 November 2018, p. 2 Nr. 12

45 id. p. 25 Nr. 155 - 156

46 id. p. 45

47 Jucan, Floriana, *Livia Stanciu a refuzat să se retragă de la vot miercuri*, Q Magazine 5 November 2018; The 13 November 2018 Technical Cooperation and Verification Mechanism Report covers the illegal composition of court panels in high-level corruption cases at the High Court of Cassation and Justice. Yet, it does not state clearly that the Constitutional Court ruled that the practice of the High Court was unconstitutional as it violated the fundamental right to a court of law. Instead the report only states on page 6, footnote 22 that the Constitutional Court had admitted a constitutional conflict.

48 Bogdan, Gabriela, *Laura Codruta Kövesi verified by Judicial Inspection. DNA Chief, accused of lying about protocol with SRI*, Nine O' Clock, Bucharest, Romania, 3 April 2018

49 Pahnecke, Oliver, *Securitate 2.0?*, Heise Verlag, Hannover, Germany, 24 July 2016

concluded protocols of cooperation with the SRI.[50] There should be 65 protocols in total regulating the Cooperation of the SRI with other Romanian state bodies.[51] In the meantime, the Judicial Inspection started a disciplinary action against Kövesi due to her alleged mismanagement of cases and instances where she ignored orders from the Attorney General.52

Democratic Union of Hungarians in Romania (UDMR) president Kelemen Hunor claimed that the Cooperation lead to even more problematic actions: "(...) that UDMR had information, but not evidence, that such protocols exist, considering that in several trials it was felt that these protocols mean not only classified evidence but the fact that the accused person or their lawyer was not allowed to know what was in the dossier, only the prosecutor and the judge knew that." If this were true, an efficient defence was not possible in some cases and there was subsequently no equality of arms.53

Former President Basescu revealed a document that not only confirms a Cooperation plan between the SRI and DNA, but also seems to support Kelemen's claim. In the plenary session of the senate, Basescu read out parts of the document: "The end of the document says that according 'to the provisions of article 8 and 57 of the cooperation protocol concluded between the Prosecutor's Office attached to ICCJ and SRI, in order to fulfil their duties, we ask you that the data presented will be intended to inform the case prosecutor according to the principle of the necessity to know without being included in the case file'. This top secret document shows that the protocol between the Prosecutor's Office attached to the High Court and SRI was fully operational, an action plan was set up, and the information sent to DNA wasn't intended to be presented to the lawyer and to the defendants."[54]

Kövesi, now forced to admit a DNA-SRI protocol existed, claims that the Cooperation was based on law: "The notion of mixed team does not exist in this protocol, nor is there the notion of collaboration, but of cooperation. (…) Of course, it [the protocol] was necessary. In 2009 there were prosecutor's offices that did not have a voice recorder, there were no wiretapping teams within prosecutor's offices. The need for such a protocol and for harmonising the procedures was felt. It's not the prosecutor's fault that at that moment the wiretaps were made exclusively by the SRI, as established by the CSAT. At that moment, solutions had to be found in order for us to fulfil our obligations. This protocol did not give added prerogatives to these two institutions but sought to create unitary practices," the DNA Chief Prosecutor said. She stated that all activities of SRI officers were limited to legal technical assistance: "The SRI officers were not administering evidence, were not hearing witnesses, were not carrying out any kind of activities within the criminal dossier, they simply had specific, technical activities stipulated by law. When the prosecutor was asking for surveillance to catch someone red-handed, this joint team was formed – the prosecutor could discuss, have a dialogue with the officers carrying out the surveillance. (…) This activity couldn't be done by the prosecutor alone, so this protocol established the limits and the prerogatives of each member."[55]

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50 Bogdan, Gabriela, *Scandal in the CSM plenary meeting. Codrut Olaru: Supreme Magistracy Council, Judicial Inspection and ICCJ concluded protocols of cooperation with the SRI*, Nine O' Clock, Bucharest, Romania, 5 April 2018

51 Bogdan, Gabriela, *JusMin Toader: I will request Public Ministry to declassify protocols concluded with SRI*, Nine O' Clock, Bucharest, Romania, 18 March 2018

52 Bogdan, Gabriela, *Judicial Inspection starts disciplinary action against DNA Chief. Kövesi designated her aide to carry out audits at two territorial branches*, Nine O' Clock, Bucharest, Romania, 11 April 2018

53 Bogdan, Gabriela, *Scandal in the CSM plenary meeting. Codrut Olaru: Supreme Magistracy Council, Judicial Inspection and ICCJ concluded protocols of cooperation with the SRI*, Nine O' Clock, Bucharest, Romania, 5 April 2018

54 Bogdan, Gabriela, *Basescu reveals a secret document of SRI related to "Gala Bute": "It shows how they were reaching politicians"*, Nine O' Clock, Bucharest, Romania, 17 May 2018

55 Bogdan, Gabriela, *The SRI-PICCJ protocol raises vehement reactions in the public space. Polemics between former and incumbent DNA Chief Prosecutor. UNJR and AMR ask the General Prosecutor's Office and SRI to publish all*

The same article reports that Basescu was forced during his presidency to mediate a dispute between Daniel Morar, then chief prosecutor of the DNA, and the SRI, because of the way the secret service operated. "Unfortunately, if during Morar's stint the DNA worked while observing the Criminal Code, during Kövesi's stint the institution was placed under the SRI's control", so Basescu.[56]

Justice Minister Tudorel Toader listed 20 reasons to remove DNA Chief Prosecutor Kövesi from office. Among others, they contained her refusal to be heard in Parliament, forgeries in dossiers, the lack of an appropriate reaction in the case of the alleged abuses committed at DNA Ploiesti, and the harming of Romania's image by misinforming the European bodies.[57] The proposal to remove Kövesi from her position led to a struggle between the Minister of Justice and President Iohannis, who claimed the reasons for dismissal were not convincing, especially since the Supreme Council of the Magistracy had evaluated Toader's reasoning negatively.[58]

The dispute was resolved by the Romanian Constitutional Court (CCR) which ruled in favour of the Minister of Justice and ordered President Iohannis to remove DNA chief prosecutor Kövesi from her position. In its ruling, the Constitutional Court points out that, since President Iohannis had no objection regarding the regularity of the dismissal procedure, the procedure met the necessary criteria. However, the President assumed prerogatives he does not have. The Minister of Justice has the prerogative to exercise control over the prosecutors and, within strict limits imposed by law, can demand the dismissal of the prosecutor from a management position. The President's prerogative in this context is limited to a control regarding the regularity of the procedure, not its content, and so the President blocked the Justice Minister from exercising his authority over the prosecutors.[59] Therefore, the CCR ordered the dismissal in the course of the resolution of a constitutional conflict, not because Kövesi might have violated the law.

After General Coldea and DNA-head Kövesi had to leave their positions, two further steps were made to clarify what had happened in the judiciary during the past years.

On 15 November 2018, the Romanian Parliament passed the Declassification Act which declassified the Decision no.17/2005 of the CSAT on the fight against corruption, fraud and money laundering, together with all the documents containing classified information relied upon or concluded according with or based on this decision. Also, this act requires the declassification of all the cooperation plans made by the DNA and the SRI concluded between the Prosecutor's Office attached to the High Court of Cassation and Justice and the Romanian Intelligence Service to accomplish their duties in the national security field. Finally, it demanded the declassification of all the protocols and/or collaboration and cooperation agreements concluded with the other relevant organs of the Romanian state. People affected by the consequences of these documents have the right to legal recourse with the competent courts to establish any violation of their fundamental rights. The law stipulates in particular that the cases in which final decisions were delivered and evidence was administered by

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the protocols, and the CSAT to make public all the issued decisions, Nine O' Clock, Bucharest, Romania, 4 April 2018

56 id.

57 Bogdan, Gabriela, *President Iohannis: Won't comply with JusMin's request to dismiss DNA Chief Prosecutor. Justice Minister announces he will notify CCR about Iohannis's refusal to dismiss Kövesi*, Nine O' Clock, Bucharest, Romania, 17 April 2018

58 id.

59 Bogdan, Gabriela, *Kövesi's dismissal from office. CCR publishes reasoning of decision that obligates Iohannis to dismiss DNA Chief Prosecutor. The document has 133 pages. CCR: President blocked the minister's competences without having this prerogative. Reactions to Constitutional Court's reasoning on anti-graft chief prosecutor's removal from office*, Nine O' Clock, Bucharest, Romania, 8 June 2018

special technical means during the existence of the protocols and Cooperation agreements are subject to revision.

On 16 January 2019, the Romanian Constitutional Court decided that the protocols with the SRI were unconstitutional due to their violation of the separation of powers: "The High Court of Cassation and Justice and the other courts, as well as the Public Ministry – the Prosecutor's Office attached to the High Court of Cassation and Justice and the subordinate units – will verify in pending cases the extent to which a violation of the provisions occurred in terms of substantive competence and by the quality of the person of the criminal prosecution body and will order the appropriate measures," the Constitutional Court specified. Due to its time frame of about a decade, this case has had a massive impact on the human rights of defendants. Furthermore, by illegally conferring competences to a secret service it has eroded the authority of the judiciary and caused distrust in public institutions.[60]

Limiting the review only to pending cases as the Constitutional Court of Romania suggests would probably exclude all defendants that had the coincidental misfortune of being convicted earlier than others.61 It's restriction seems to violate Romanian and international legal standards: Article 453 of the new Romanian Criminal Procedure Code states that a revision of the case may be required when new facts are established that could lead to a nullity of the judgement, such as fake documents or if the court's decision was based on false statements of the prosecutor or an expert. According to Article 426, annulment can be sought when the panel of judges hearing the case had been illegally composed.

These articles reflect the fair trial standards of the International Covenant on Civil and Political Rights (ICCPR) which Romania is a member of. Article 14 section 6 adds that "[W]hen a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him." This UN treaty suggests revision by court or pardoning by the president in the case of a miscarriage of justice, and stipulates that there is no limitation, also not in time, unless the defendant is responsible for the non-disclosure of the unknown fact.

Summing up, the protocols, in particular the SRI-DNA protocol signed by Kövesi, Maior, Nitu and Coldea, caused three problems:

The first problem is the expansion of the SRI's competence to other areas, such as criminal investigations. That means an administrative act violated the law the parliament had passed. The same act also violated the separation of powers. The second concern is that the SRI was authorized to gather evidence in criminal cases, essentially granting it powers that Securitate had during the Ceaușescu dictatorship. The third issue is the change of the competence in the criminal investigation. As the investigation plan can only be amended by both heads of SRI and DNA, and the prosecutor was not free to develop the case according to criminal law, the SRI decided de-facto on the criminal investigation.

60 Bogdan, Gabriela, *Reactions after secret protocols between the Public Ministry and SRI ruled unconstitutional. JusMin Toader: Not surprised. PG Lazar: Optimistic current prosecution documents will be deemed legal. UNJR's Girbovan: CCR finds one of most serious conflicts between state powers*, NINE O'CLOCK, Bucharest, Romania, 17 January 2019

61 With similar limitations: Curtea Constituţională a României – Constitutional Court of Romania, *Parliament v. High Court of Cassation and Justice, Decision Nr. 685*, 7 November 2018

An additional problem that is most likely not directly linked to the protocols is the rigging of the case assignment at courts. The cases should be either randomly distributed by chance, or by a mechanism set in place that cannot be altered, for example a distribution based on the alphabet. For case assignment, the OSCE recommends: "Administrative decisions which may affect substantive adjudication should not be within the exclusive competence of court chairpersons. One example is case assignment, which should be either random or on the basis of predetermined, clear and objective criteria determined by a board of judges of the court. Once adopted, a distribution mechanism may not be interfered with."[62]

I.3. Summary

The magazine "Romania Insider" published the following comparison between Russia and Romania on 24 January 2019:

> The European Court of Human Rights (EC[t]HR) had a total of 56,350 pending cases at the end of 2018, of which 8,503 (15.1% of the total) were complaints against the Romanian state. Romania thus ranked second for the total number of ongoing cases at EC[t]HR after Russia, which had a share of 20.9% of the total pending cases, according to the EC[t]HR annual report.[63]

One could equally argue that Russia's population is 7,35 times larger than Romania's, whereas it is accountable for only 5% more of the cases.[64] Both statements are misleading as the absolute and relative numbers do not correlate with the gravity of the situation in the country. Instead, it is necessary to look into the violations by article and by state[65] which shows that Romania has problems with "inhuman and degrading treatment", "lack of effective investigation", "right to a fair trial", "length of proceedings" and "right to respect for private and family life", as well as to "protection of property". This is a reflection of the issues discussed in this article and expressed by the Romanian public. Although it is a positive sign that Romania does not lead the statistics in respects to torture, slavery or right to life, but it can certainly do better.

Even though statistics can be misleading, the mere fact that Romania occupies a top position in the statistics of the European Court of Human Rights – along with some other members of the EU– demonstrates that the EU Commission must improve its policy as a first step to facilitate the necessary corrections in Romania. The seemingly accurate SRI reports to parliament, the ethical guide for SRI staff and the fact that SRI was the first institution to declassify some of the protocols could be an indication that SRI under its current director, Hellvig, is willing to put an end to this practice. If possible, the EU Commission should capitalize on this opportunity in the years to come.

Despite the current government's commitment to remove SRI from the judiciary and keep up the fight against corruption without forcing through policies by way of emergency ordinances, as recently

62 OSCE Office for Democratic Institutions and Human Rights, *Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia*, Kyiv, Ukraine, 23-25 June 2010, p. 5 Nr. 12

63 Romania Insider, *Romania ranks second by the number of pending cases at European Court of Human Rights, Romania Insider*, Bucharest, Romania, 24 Jan 2019

64 European Court of Human Rights, *Pending Applications Allocated To A Judicial Formation*, European Court of Human Rights Statistics, Strasbourg, France, 31 December 2018

65 European Court of Human Rights, *Violations by Article and by State*, European Court of Human Rights Statistics, Strasbourg, France 2018

promised,[66] these problems will not be resolved overnight. It is paramount that the EU Commission admits the current problems to ensure the success of this judiciary reform. The fight against corruption cannot be won by supporting one side and eliminating the other, because then Romania would still have one corrupt network that is likely to become even stronger. Likewise, the removal of Kövesi and Coldea has not lead automatically to an improvement of the rule of law. In January 2019, for example, recordings surfaced in which prosecutors of the DNA office in Oradea discussed how to intimidate judges.[67]

If the collusion of secret service and prosecution is not stopped, it is almost certain that executive structures will develop that are open to abuse for future governments. Declassification and independence of the judiciary are the only alternative. This approach might not lead to spectacular arrests and could lead to the occasional acquittal due to a lack of evidence. However, the possibility of acquitting a defendant is essential when upholding the core principle that everyone charged with a criminal offence shall be presumed innocent until proven guilty, as determined by Article 6 paragraph 2 of the ECHR. This safeguard is paramount for a democratic society based on the rule of law. If a trial ends with a pre-determined verdict, someone has made this decision outside of the law.

According to Dana Girbovan, judge at the Court of Appeal in Cluj-Napoca and president of the NURJ, this happened in several instances where independent experts could prove recordings submitted for evidence by the SRI had been tampered with. For example, parts of the recording had been deleted or pieces from different conversations had been cut together to incriminate the defendant. In other instances, the SRI transcripts did not match the recordings, as certain words had been changed in the transcript. In one case, the judge asked the prosecutor to play the CD with the recording to verify the accuracy of the transcript. To the court's surprise, the CD contained folk music instead of the expected conversation.[68]

Romanian law requires a prosecutor to collect evidence for both prosecution and defence in a criminal investigation so as to find the truth. In order to achieve that goal, the prosecutor has to be independent. However, his requirement is clearly not fulfilled by a secret service agent under military orders. It is hard to talk about equality of arms and a fair trial when the SRI has full control over the servers recording the conversations and so is able to manipulate or hide exculpatory evidence. Collecting intelligence is also fundamentally different from collecting evidence in a criminal case, which must meet specific criteria in order to be admissible in courts. Collecting intelligence, albeit necessary, is done in secrecy, sometimes at the brink of legality. Collecting evidence, on the contrary, must be done according to the rules and procedures of a criminal investigation. Justice must be carried out in the name of law, not some secret orders.[69]

As the President of the NURJ Dana Girbovan says:

“The CSAT decisions and the secret protocols, which have affected the administration of justice, are bombs at the foundation of the rule of law. There is a simple and clear principle underlying the rule of law and democracy: justice is carried out in the name of the law. Not in the name of the CSAT’s secret decisions, not in the name of the secret protocols, but in the name of the law.”

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66 Bogdan, Gabriela, *EC’s Juncker and Timmermans hail the European approach of PM Dancila and Romania’s Gov’t support for the European project. Dancila about meetings in Brussels: We want to punctually resume discussions on the CVM*, Nine O'Clock, Bucharest, Romania, June 5, 2019

67 Romania Insider, *Romania’s anticorruption directorate launches probes into new internal scandal, Romania Insider, Bucharest*, Romania, 7 Jan 2019

68 Pahnecke, Oliver, *Securitate 2.0?*, Heise Verlag, Hannover, Germany, 24 July 2016

69 id.

Put simply, the laws are made by Parliament which is the supreme representative body of the Romanian people. The President then promulgates these laws and they take effect after they are published in the Official Gazette. "This is the fundamental principle of the rule of law functioning everywhere in the democratic world: you cannot observe a law that is non-public, all the more you cannot be held liable under a law that is non-public. If we accept the violation of this fundamental rule, we accept that, in the name of various desiderata, slogans or ideologies that appear noble at the moment, we can make deviations, detours or we can bracket democracy and the rule of law. The effect is the undermining of democracy, compromising of the good functioning of the state and the trust between the citizen and the state."[70]

II. Recommendations

As this is an evolving situation, it is impossible to determine which allegations of corruption will be proven in court and what sections of the protocols in question violate the human rights of these defendants. This is especially true because these protocols have an impact on a variety of laws and vice versa. However, based on the available information, it makes sense for Romania and the EU to overhaul several policies.

II.1. Recommendations for Romania

Romanian parliament, judiciary and government could consider and implement the following points:

1. Granting fair trials

International obligations related to fair trial standards were not observed in the fight against corruption. A cooperation with the OSCE Office for Democratic Institutions and Human Rights could be helpful. In particular, the Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia contain guidelines for Judicial Administration, Selection and Accountability to ensure the necessary independence of the judiciary.[71] Romania also committed itself to the right to a fair trial in the Vienna principles 1989, the Copenhagen 1990 document, as well as in the Ljubljana 2005 and Helsinki 2008 decisions.[72] Romanian Courts are bound by the Romanian Criminal Procedure Code and the International Covenant on Civil and Political Rights, both of which demand a legal remedy in cases of a miscarriage of justice. A review of all corruption-related criminal cases, either pending or with ongoing impact on the defendant, such as a prison sentence, should be treated accordingly.

2. Declassification and investigation of intelligence activity

Besides the declassification of protocols and Cooperation agreements between the SRI, the prosecution and relevant bodies, also the minutes of those CSAT meetings should be made public that are connected to establishing corruption as a threat to national security and those that are related to

70 Bogdan, Gabriela, *The Protocols' "saga": While Judge Girbovan (UNJR) claims that CSAT decisions, secret protocols are bombs at foundation of rule of law, Florian Coldea warns that SRI is today in impossibility to work on a protocol basis in terms of national security crimes*, Nine O' Clock, Bucharest, Romania, 5 April 2018

71 OSCE Office for Democratic Institutions and Human Rights, *Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia*, Kyiv, Ukraine, 23-25 June 2010

72 OSCE, *Human Dimension Commitments*, Volume 1 Thematic Compilation 3rd Edition, Warsaw 2013, pp. 114-115

fighting corruption are especially important. Based on the current law 303 Art. 7, all justice-related decisions must be published. Therefore, publishing relevant CSAT minutes would be a necessary second step to understand past developments.

Additionally, it could eventually make sense to investigate whether there is similar involvement of other intelligence services, such as the Romanian SIE, etc.

3. Securing the independence of the magistracy

Publishing the CSAT's procedure regarding the confirmation of the annual affidavit of judges, prosecutors and other staff in the judiciary that they are not collaborators or agents of any intelligence services would help measure the effectiveness of this procedure in identifying threats to judicial independence. Once its ability to safeguard the independence of the judiciary is verified, this screening could be conducted publicly.

Making it illegal for all members of the judiciary, not only judges and prosecutors, to become collaborators, informants or agents of domestic and foreign secret services should also help. This measure would prevent a circumvention of the prohibition of national secret service activities in the judiciary by exchanging information from one intelligence organisation to the other across borders. It would also be necessary to make it illegal for secret service members, foreign or domestic, to solicit collaboration of any form from members of the judiciary.

The same must be valid for Romanian magistrates, staff at European and International Courts, and other law enforcement agencies outside Romania. For other nationals working in the EU courts and the Council of Europe, this should apply just the same.

As the guardian of EU treaties, the EU Commission must respond when a member state's secret service is undermining the independence of the judiciary because that is outside the scope of secret services' role in responding to national security threats. In the case of Romania, the EU Commission first must stop basing its analysis for the CVM on decision no.17/2005 of the Supreme Council of National Defence. This decision made corruption a matter of national security which violated the prerogative of the parliament to legislate and the separation of powers. If this is not addressed, then the EU perpetuates this violation of core principles on which the EU is founded. It may also encourage other Member States to declare other areas as matters of national security which the EU would not be able to supervise. Where national security threatens the independence of the judiciary, it has ceased to be an issue outside of the scope of the EU Commission. Representatives of all judicial bodies as well as all associations of magistrates have to participate in official meetings with the EU commission to guarantee the EU Commission receives all information necessary for a complete evaluation.

4. Independent interceptions by law enforcement and judicial oversight

The prosecution has to have its own wiretapping equipment and the use of this equipment has to be subject to judicial oversight. The current government seems to prefer one wiretapping body for all intelligence services and criminal investigations, which saves money. However, economic concerns should not be prioritised over the independence of the judiciary. Dependent on the parliament's decision, increasing the prosecutors' independence to that of judges could help reduce political interference with the prosecution.

5. Correcting economic incentives for the intelligence community

Finally, prohibit economic activities of secret services, unless they are needed for intelligence operations and take place under the supervision of the relevant parliamentarian oversight committees. In cases where economic activities are necessary, profits should benefit the state budget and not the operatives of an intelligence service. Furthermore, the responsible units of the tax authorities should be obliged to report to the same parliamentarian oversight committee.

II.2. Recommendations for the European Union

1. Safeguarding the independence of the magistracy in Member States and re-starting the EPPO selection process based on EU and international standards

As a first step, the EU Commission, the EU Parliament, the Council and its Member States should condemn the infiltration of any judiciary by any secret service. This constitutes a breach of the separation of powers and, even more importantly, it infringes the right to a fair trial and threatens human rights and democracy. This practice is not in accordance with the foundations of the EU. Intelligence gathering is fundamentally different from collecting evidence in a criminal trial and so a trial cannot be based on the work of a secret service and secret protocols.

Since the EPPO is a current affair, the prohibition of secret services in the judiciary means that all candidates for the new EPPO have to be prudently screened. Only then can citizens of the EU be certain that a person filling this office is not or has not been an agent of any European or foreign intelligence service. It also ensures that the candidate does not collaborate or has not collaborated in any way with intelligence services. These steps demonstrate the candidates' integrity and ensure that the candidate does not pose a risk to the independence of the judiciary.

The EPPO selection committee chair Dr. Haberl-Schwarz has ignored a request to publish any form of ranking of all eligible candidates[73], nor its evaluation criteria. This committee has not publicly explained why the three shortlisted candidates are to be preferred in that given order, or why the shortlist had to be narrowed down to three when there is no legal requirement for that. According to the operating rules of the selection panel, the "deliberations of the selection panel shall be confidential and shall take place in camera",[74] but "[b]ased on its findings during the review and hearing, the selection panel shall draw up a shortlist of three to five candidates to be submitted to the European Parliament and the Council. It shall provide reasons for selecting the candidates on the shortlist. (…) The selection panel shall rank the candidates according to their qualifications and experience. The ranking shall indicate the panel's order of preference and shall not be binding on the European Parliament and the Council."[75] The operating rules stipulate "deliberations in camera", but as soon as the list has reached the EU Parliament the results – which are the outcome of the deliberations – must be published to ensure transparency.

The former OLAF head and current Italian customs chief allegedly applied for the EPPO unsuccessfully[76] despite possessing the necessary qualifications and practical experiences. Thus, the

73 Pahnecke Oliver, *Greift der rumänische Geheimdienst nach der Europäischen Staatsanwaltschaft?*, Telepolis – Heise Verlag, Hannover, Germany 17 February 2019

74 Council Implementing Decision *on the operating rules of the selection panel provided for in Article 14(3) of Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ("the EPPO")*, Brussels, 25 May 2018 Annex nr IV

75 id. Annex nr. VII. 1.

76 Kassandra, *Why is Romania still an EU member state?*, New Europe, Brussels, 18 February 2019

selection procedure for the EPPO is not fully transparent. Moreover, the collaboration between Kövesi and the SRI has not been taken into consideration by the selection committee or the EU Parliament when they made Kövesi their number one candidate. This contradicts Article 14 2. (b) of "Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office" which demands that the EU Parliament and the Council should appoint the European Chief Prosecutor from among candidates "whose independence is beyond doubt". Recital (83) states that "[t]his Regulation requires the EPPO to respect, in particular, the right to a fair trial, the rights of the defence and the presumption of innocence, as enshrined in Articles 47 and 48 of the Charter."

According to the EU vacancy notice for the EU General Prosecutor[77], the candidates had to "demonstrate their understanding of and commitment to the independence and guardianship of fundamental rights", to "have high ethical standards and personal integrity" and to be independent of any institution, member state or the EU itself.

To ignore this regulation and the vacancy note collides with the legal standards set by the European Court of Human Rights in the case *Guðmundur Andri Ástráðsson v. Iceland*.[78] In this case, the Court found a violation of the right to a fair trial in criminal proceedings. Of particular relevance is that the Court cited a violation of the right to a tribunal established by law because the Icelandic institutions had picked judges for a newly created court in a manner that violated Icelandic law. This case relates to a national court but is transferrable to choosing the first prosecutor of the EU. If the selection process is not transparent and objective, there is a clear danger that other candidates will file a complaint which, in the light of the Icelandic case, could be successful.

The selection panel decided on a shortlist of three candidates instead of five, which means that they did not find any of the other candidates suitable for this position. GRECO criticises the use of classified protocols; the admissibility of evidence in numerous anti-corruption cases that were originally praised very highly; and the cooperation between DNA and the SRI which was designed by Coldea and Kövesi. Kövesi being named as the selection panel's number 1 candidate despite this history calls into question the selection process as a whole and the reasoning behind disqualifying candidates that were not shortlisted.

It could be argued that the EU was a supra national body on which the ECHR was not binding, yet, but it is already binding on all EU member states and so are decisions of the European Court of Human Rights. Consequently, the council cannot vote for Kövesi because such a vote would violate EU law, just as Iceland had violated its own law.

Furthermore, the EU requirement that the "selected candidate should hold, or be in the position to obtain, a valid security clearance certificate at the level of EU Secret from his/her national security authority"[79] is also contrary to the OSCE/ODIHR "Opinion for the appointment of judges for the Supreme Court of Georgia". This legal opinion was written by former European Court of Human Rights (ECtHR) judge András Sajó, former Vice-President of the International Commission of Jurists Michèle Rivet and President of the European Association of Judges, and First Vice-President of the

77 European Commission, European Public Prosecutor's Office (EPPO), Publication of a vacancy for the European Chief Prosecutor — Luxembourg , Temporary Agent AD 15 (2018/C 418 A/01), published in the Official Journal of the European Union on 19.11.2018

78 *Guðmundur Andri Ástráðsson v. Iceland*, Application no. 26374/18, Judgement 12 March 2019

79 European Commission, European Public Prosecutor's Office (EPPO), Publication of a vacancy for the European Chief Prosecutor — Luxembourg , Temporary Agent AD 15 (2018/C 418 A/01), published in the Official Journal of the European Union on 19.11.2018

International Association of Judges José Igreja Matos. They clearly state that background checks have to be based on the rule of law and should rely on a standard criminal record from the police instead of security services[80]. This is a precautionary measure to keep security services from influencing the selection of magistrates and reflects OSCE/ODIHR Kyiv recommendation Nr. 22.[81] In light of this and after the cooperation with the SRI, the value of the SRI's security clearance for Kövesi is questionable.

For the sake of credibility and the rule of law in the EU, it makes sense to re-start this procedure with a transparent selection based on improved operating rules for the selection panel. This would include a disclosure of the evaluation criteria, a public ranking according to the grades of all candidates and a wider selection of candidates to choose from. Monitoring the process could be helpful, as evidenced by the example of Serbia. Ongoing legal reforms driven by preparations for the accession to the EU resulted in the current Serbian legal framework that governs the process of electing members of the state prosecuters council and the high judicial council of Serbia in a transparent manner through monitoring.[82]

2. Correcting economic incentives for the intelligence community

EU Member States should also consider prohibiting economic activities of secret services, unless they are needed for intelligence operations and take place under the supervision of the relevant parliamentarian oversight committees. In cases where economic activities are necessary, profits should benefit the state budget and not the operatives of an intelligence service. Furthermore, the responsible units of the tax authorities should be obliged to report to the same parliamentarian oversight committee.

3. Maintaining and expanding the CVM

While it is understandable that Romania would like to have the CVM lifted as Tariceanu suggested in his meeting with Timmermans, this mechanism is far from being obsolete.[83] Even for non-high profile cases, there is a lot of work left to be done concerning fair trial standards and police work.[84] Tariceanu himself said that amendments in the judicial domain, such as the modifications of the Criminal Codes, will have to be implemented according to the decisions of the Constitutional Court of Romania, the European directives on the presumption of innocence and the right to a fair trial, and the Venice Commission's recommendations.[85] Therefore, the CVM is just as important now as it used to be.

Expand the CVM by adding a section on the involvement of Intelligence Services.[86]

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80 OSCE/ODIHR, *Opinion on Draft Amendments Relating to the Appointment of Supreme Court Judges of Georgia*, Opinion-Nr.: JUD-GEO/346/2019 [AlC], Warsaw, 17 April 2019 p. 23 Nr.72

81 OSCE/ODIHR, *Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia*, Kyiv, 23-25 June 2010 p. 6 Nr. 22

82 OSCE Mission to Serbia, Office for Democratic Institutions and Human Rights, *Report on Monitoring of Peer Elections for the High Judicial Council and State Prosecutors' Council of the Republic of Serbia*, Belgrade/Warsaw 2016 p. 21 Nr. 6, Nr. 7

83 Bogdan, Gabriela, *In Brussels, Tariceanu talks with EC First Vice President Frans Timmermans about CVM and SRI's protocols with judicial system institutions*, Nine O' Clock, Bucharest, Romania, 29 June 2018

84 Mihala, Lorelei, *Truth and Justice: Romania's Wrongly Accused*, Balkan Insight and Balkan Investigative Reporting Network, Bucharest, Romania and Sarajevo, Bosnia and Herzegovina, 18 December 2018

85 Bogdan, Gabriela, *In Brussels, Tariceanu talks with EC First Vice President Frans Timmermans about CVM and SRI's protocols with judicial system institutions*, Nine O' Clock, Bucharest, Romania, 29 June 2018

86 See also recommendation Nr. 4

4. Improving the CVM by intensifying the rapport between the Romanian magistracy, the Romanian government and the EU Commission

In a fourth step, it is recommended that the EU Commission give appropriate weight to the concerns of the magistracy. The NURJ informed the experts of the European Commission on several occasions during CVM meetings about the lack of independence in the Romanian judiciary due to the secret service. Not only was this problem not mentioned in any way by the Commission, but the NURJ was also not invited to continue participating in meetings with EU experts for the 2018 report.[87] If the Commission ignores the representatives of professional bodies that are affected, it is essentially acting like a judge who is ignoring the arguments of either the prosecution or defence, which is clearly problematic.

The 2018 CVM progress report[88] of the European Commission draws mainly on the findings of the Venice Commission's 2018 reports.[89] It rightfully criticises the reforms of the judiciary and the criminal codes and is the first EU progress report raising concerns regarding the SRI activities within the judiciary. It is incomprehensible that the CVM's progress reports between 2007 and 2017 do not contain any reference to the infiltration of the judiciary by the SRI or their Cooperation with the DNA considering MEDEL[90] has published statements of concern since 2015 and critical articles have been published in Romanian and European newspapers for years.

In January and February of 2016, the NURJ together with the Association of the Romanian Magistrates addressed EU Commission President Juncker with a letter of concern. They received a polite and non-committal letter of then Secretary General of the Commission, Alexander Italianer, regarding this matter. Now, since both 2018 Venice Commission's opinions contain information to that effect across several sections[91], the Commission finally included a comment related to the Romanian Intelligence Service's activity in the judiciary in its CVM progress report. It states that "[T]he operation of the intelligence services is not a matter for the EU and falls outside the CVM benchmarks."[92]

87 National Union of Romanian Judges, Report on the unlawful involvement of the Romanian secret intelligence agencies, through secret protocols, in the Romanian judiciary system, MEDEL homepage, 23 May 2018, p. 10

88 European Commission, *Report from the Commission to the European Parliament and the Council - On Progress in Romania under the Cooperation and Verification Mechanism, Strasbourg*, 13 November 2018

89 Venice Commission, *Opinion No. 924 / 2018 on Amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organization, and Law No. 317/2004 on the Superior Council for Magistracy*, Strasbourg, 20 October 2018
and
Venice Commission, *Opinion No. 930 / 2018 on Romania, Amendments to the Criminal Code and the Criminal Procedure Code*, Strasbourg, 20 October 2018

90 Magistrats Européens pour la Démocratie et les Libertés

91 Venice Commission, *Opinion No. 924 / 2018 on Amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organization, and Law No. 317/2004 on the Superior Council for Magistracy*, Strasbourg, 20 October 2018, para. 91 - 107
and
Venice Commission, *Opinion No. 930 / 2018 on Romania, Amendments to the Criminal Code and the Criminal Procedure Code*, Strasbourg, 20 October 2018, para. 17
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92 European Commission, *Report from the Commission to the European Parliament and the Council - On Progress in Romania under the Cooperation and Verification Mechanism*, Strasbourg, 13 November 2018, p. 3

Indeed, matters of national security and the national secret services are not part of the Commission's decision 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.[93] However, where the Venice Commission is unable to evaluate such activities and the content of secret protocols in its report[94], indeed, it becomes a necessity to deal with this activity at the EU level. Fighting corruption is clearly defined by the EU Commission as a CVM benchmark and should be achieved according to the rule of law. It could be argued that EU intervention is justified in this case, since the Romanian intelligence services were involved in manipulating the judicial process to guarantee a particular outcome in high-profile corruption cases.

Therefore, it would be desirable if the European Commission would analyse the role of the Romanian intelligence services as a tool and participant in undermining the judicial process in Romania. As section (7) of the Commission Decision establishing the CVM for Romania stipulates, the Commission may apply safeguard measures based on Articles 37 and 38 of the Act of Accession. This includes the suspension of Member States' obligation to recognise and execute Romanian judgments and judicial decisions, such as European arrest warrants (EAWs), under the conditions laid down in Community law should Romania fail to address the benchmarks adequately. The decision does not contain a time frame for this suspension, but such a suspension would be a serious impediment for Romania in every respect.

In recent years, the discussion about the loss of mutual trust and the end of mutual recognition of judicial acts has been centred on Poland and Hungary. These member states enacted reforms of the national judiciary that are seen as a threat for the independence of the judiciary. As Bárd and van Ballegooij suggest,[95] a lack of judicial independence should be treated as a rule of law problem which could lead to the executing judicial authorities freezing their judicial cooperation with the judiciary of other Member States should doubts arise in respect to the rule of law in the issuing Member State.[96] As such, even without the EU Commission's decision to suspend the Member States' obligation to co-operate, it is possible for the judiciary of individual Member States to halt a judicial procedure in connection to Romania. The European Court of Human Rights as well as the Court of Justice of the EU issued decisions on several relevant cases.[97] In *Aranyosi and Căldăraru*, the Court of Justice of the EU ruled that "(…) the execution of a European arrest warrant must be deferred if there is a real risk of inhuman or degrading treatment because of the conditions of detention of the person concerned in the Member State where the warrant was issued."[98]

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93 European Commission, *Decision 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 (notified under document number C(2006) 6569) (2006/928/EC)*, Official Journal of the European Union, 14 December 2006

94 Venice Commission, *Opinion No. 924 / 2018 on Amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organization, and Law No. 317/2004 on the Superior Council for Magistracy*, Strasbourg, 20 October 2018, para. 98 reads: "It is not the mandate of the Venice Commission within the framework of this opinion to take a view on the above processes and concerns, nor to assess the legal and practical implications of the above-mentioned protocols."

95 Bárd, Petra and van Ballegooij, Wouter, *Judicial independence as a precondition for mutual trust? The CJEU in Minister for Justice and Equality v. LM*, New Journal of European Criminal Law, XX(X) 2018, pp. 1-13

96 id. p. 1

97 For example ECtHR Cases Nr. 22015/10 Voicu v. Romania, Requête no 13054/12 Bujorean c. Roumanie and Case Nr. 79857/12 Mihai Laurentiu Marin v. Romania, all 10 June 2014 and related to the detention conditions in Romania; Court of Justice of the European Union joined Cases C-404/15 and C-659/15 PPU Pál Aranyosi and Robert Căldăraru, 5 April 2016, deferral of the EAW in case detention conditions amount to inhuman or degrading treatment

98 Press release No 36/16 of the Court of Justice of European Union

In *Minister for Justice and Equality v. LM*[99], Polish courts had issued three EAWs against a defendant to start criminal procedures in a case about trafficking narcotics. Upon arrest in Ireland, the defendant claimed an extradition to Poland would threaten his right to a fair trial, according to Article 6 of the ECHR, in particular due to the reforms of the judiciary in the Republic of Poland. The Grand Chamber of the Court of Justice treated the case as a possible violation of the right to a fair trial, meaning the courts are to be impartial and independent. The Court of Justice ruled that even if an Art. 7 Treaty on European Union (TEU) procedure is not concluded yet, the courts have the responsibility to examine whether an EAW is appropriate in light of possible infringements of fair trial standards and other fundamental rights. First, the courts are required to evaluate the independence and impartiality of the judiciary in the requesting Member State. In a second step, the courts determine if the right to a fair trial could possibly be violated in the specific case of the defendant.[100]

According to the Court of Justice of the European Union "the executing judicial authority must request from the issuing judicial authority any supplementary information that it considers necessary for assessing whether there is such a risk. (…) If, after examining all those matters, the executing judicial authority considers that there is a real risk that the individual concerned will suffer in the issuing Member State a breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial, it must refrain from giving effect to the European arrest warrant relating to him."[101]

Applied to Romania, the information made publicly available by the two professional bodies of judges - the NURJ and the Association of the Romanian Magistrates - as well as the decisions of the Romanian Constitutional Court, already suggest that such a violation seems likely in certain cases. This is further supported by the reports of the Venice Commission and GRECO. What is more, the CVM has been in force since Romania's accession to the EU in 2007. As sections (6) and (7) of the Commission's decision on establishing the CVM indicate, there were issues in the accountability and efficiency of the judicial system and the law enforcement bodies that warranted the establishment of a CVM. If Romania should fail to address the benchmarks in areas of judicial reform and the fight against corruption adequately, the Commission may apply safeguard measures based on Articles 37 and 38 of the Act of Accession, including the suspension of Member States' obligation to recognise and execute Romanian judgments and judicial decisions, such as European arrest warrants.[102] That the CVM could not be abolished, yet, shows Romania failed to reach the benchmarks and the application of said safeguard measures is possible.

These safeguard measures that can be triggered based on section (7) of the Commission's decision on the CVM suggest that this is a similar sanction as the infringement procedure according to Art. 7 TEU as it would lead to the same result: the suspension of judicial Cooperation. Romania has similar problems with judiciary reforms as Poland, but Romania also has issues with the SRI being active in the judicial process, as evidenced by the declassified protocols. Thus, it is likely that future Romanian cases will be examined by courts of other states according to the test established by the Court of Justice of the EU in the case *Minister for Justice and Equality v LM* as the ongoing CVM suggests

99 Court of Justice of the European Union Case Nr. C-216/18 PPU Minister for Justice and Equality v LM, Opinion of Advocate General Tanchev published 28 June 2018

100 Court of Justice of the European Union, *Press Release No. 113/18, Judgment in Case C-216/18 PPU Minister for Justice and Equality v LM (Deficiencies in the system of justice)*, Luxembourg, 25 July 2018, p. 2

101 id. p. 3

102 European Commission, *Decision 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 (notified under document number C(2006) 6569) (2006/928/EC)*, Official Journal of the European Union, 14 December 2006

that tribunals in Romania could violate Art. 47 section two and the first sentence of the European Charter of Fundamental Rights.[103]

III. Conclusion

The problems arising from the activities of the Romanian secret service in the judiciary seriously threaten the right to a fair trial and the judicial reforms are slow. So the situation in Romania arguably has a higher level of urgency than Poland and Hungary. The 2019 GRECO report is the latest official assessment of Romania's progress in efforts to reform its judiciary and combat corruption. It criticised the existence of the classified protocols between the DNA and the SRI and states, they "(…) raised questions as to the independence of the prosecution and the admissibility of evidence obtained in numerous anti-corruption cases, thus undermining the credibility of previously highly-praised anti-corruption efforts."[104] Later, "(...) GRECO concludes that Romania has now implemented satisfactorily or dealt in a satisfactory manner with four out of the thirteen recommendations contained in the Fourth Round Evaluation Report."[105] According to the 2018 report, "the very low level of compliance with the recommendations was "globally unsatisfactory"".[106]

As long as the independence of the magistracy is not guaranteed and the cases affected by the DNA-SRI collaboration are not tried by an independent tribunal, Romania does not fulfil its domestic and international obligations. The EU Commission's current stance in limiting itself in discussions with the Romanian government to the CVM is therefore insufficient. In order to improve this situation, the Commission should discuss the application of safeguard measures based on Articles 37 and 38 of Romania's Act of Accession, including the suspension of Member States' obligation to recognise and execute Romanian judicial decisions to prevent possible violations of the fundamental rights of individuals.

In a more general approach, it is recommended that the EU should explore the application of an Article 7 TEU procedure to evaluate if there is a violation of the values listed in Article 2 TEU.[107] If a violation was found, there would be the potential that Romania's voting rights in the EU Council could be suspended. This was already discussed in the context of the emergency ordinances[108] which not only lead to protests from the side of EU representatives, but also to massive and unprecedented protests in the judiciary through measures such as reducing working hours.[109] By May 2019, Prime

103 Art. 47 section two sentence one of the European Charter of Fundamental Rights reads: "Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law."

104 GRECO, Group of States against Corruption, *Interim Compliance Report Romania, Corruption prevention in respect of members of parliament, judges and prosecutors*, Fourth Evaluation Round, Council of Europe, Strasbourg, 9 July 2019 p. 17 fn 18

105 id. p. 17 Nr. 79

106 GRECO, Group of States against Corruption, *Interim Compliance Report Romania, Corruption prevention in respect of members of parliament, judges and prosecutors*, Fourth Evaluation Round, Council of Europe, Strasbourg, 18 January 2018 p. 19 Nr. 90

107 Article 2 TEU reads: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

108 Bogdan, Gabriela, *European Commissioner Jourova on activation of Art. 7 for Romania: It depends on what happens in the following days*, Nine O'Clock, 5 April 2019

109 Bogdan, Gabriela, *PM Dancila: Not giving up on OUG 7/2019; some issues bring dissatisfaction, substantiated, they could be changed. Dragnea: Premier slated to meet magistrates' associations. DIICOT suspends its activity 4*

Minister Viorica Dancila had abandoned the idea of using emergency ordinances because it was clear that triggering Article 7 would have harmed Romania.[110]

The example with Article 7 in the context of Romania shows that an attentive EU Commission as well as a persistent dialogue with a government that puts the interest of the Member State it represents first can yield the necessary result. What is right for Romania is also right for the EU and future candidates for accession: the goal of fighting corruption must be accomplished according to the rule of law. This might not lead to spectacular arrests and stars among the prosecutors, but this protects the foundational principles of the EU from damage in the long run.

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