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**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND
THE COUNCIL**

On Progress in Romania under the Co-operation and Verification Mechanism

{COM(2014) 37 final}

Benchmarks to be addressed by Romania pursuant to Commission Decision of 13/XII/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:¹

Benchmark 1: Ensure a more transparent and efficient judicial process notably by enhancing the capacity and accountability of the Superior Council of Magistracy. Report and monitor the impact of the new civil and penal procedures codes

Benchmark 2: Establish, as foreseen, an integrity agency with responsibilities for verifying assets, incompatibilities and potential conflicts of interest, and for issuing mandatory decisions on the basis of which dissuasive sanctions can be taken

Benchmark 3: Building on progress already made, continue to conduct professional, non-partisan investigations into allegations of high- level corruption

Benchmark 4: Take further measures to prevent and fight against corruption, in particular within the local government

¹ Previous CVM reports can be consulted at: http://ec.europa.eu/dgs/secretariat_general/cvm/index_en.htm

List of acronyms

ANI: National Integrity Agency

ARO: Asset Recovery Office

CCR: Constitutional Court

CVM: Cooperation and Verification Mechanism

DIICOT: Directorate for Investigating Organised Crime and Terrorism

DNA: National Anti-Corruption Directorate

ECRIS: information system of the RO justice system (for internal use)

HCCJ: High Court of Cassation and Justice

MoJ: Ministry of Justice

NAC: National Audio-visual Council

NAS: National Anti-corruption Strategy

NIC: National Integrity Council

NIM: National Institute of Magistracy

SCM: Superior Council of Magistracy

WIC: Wealth Investigation Commissions

INTRODUCTION

This technical report sets out the information and the data which the Commission has used as the basis for its analysis. This information has been collected from a variety of sources: a combination of on-the-spot dialogue with key interlocutors, an ongoing presence in the Commission's representation, and the knowledge and experience of experts from other Member States. It has also had the benefit of working closely with successive Romanian governments, which have provided detailed and focused responses to a series of questionnaires, as well as with a variety of key judicial and governmental bodies.

1. THE JUDICIAL PROCESS

Reform of the judicial system is one of the two overarching themes monitored under the Co-operation and Verification Mechanism in Romania. At the point of accession it was concluded that shortcomings remained in the functioning of the Romanian judicial system which required further reforms. These reforms focused on the need to strengthen the efficiency and consistency of the judicial process, as well as the transparency and accountability of the judiciary.

In more detailed terms this pointed to adopting new Codes, implementing measures to ensure the consistency of jurisprudence², strengthening human resources management within the judiciary, restructuring the Public Ministry, and enhancing the capacity and accountability of the Superior Council of the Magistracy and of the transparency, accountability and integrity of the judiciary as a whole.

1.1. Judicial independence

1.1.1. Legal framework and guarantees

The Constitution of Romania establishes the principle of the separation and balance of powers, and the independence of the judges.³ The Constitutional Court of Romania is the guarantor of the supremacy of the Constitution and is independent from any other authority. It was instrumental in July 2012 in restoring the balance of powers.⁴ It has also been important as an authority to which the Superior Council of Magistracy (SCM) or the High Court of Cassation and Justice (HCCJ) can refer key issues surrounding respect for court decisions.⁵

The Constitution of Romania further establishes that the Superior Council is the guarantor of the independence of justice. In practice whenever a judge, prosecutor or judicial institution considers its independence is threatened, it can appeal to the SCM. The SCM examines the

² This concept is to be understood as the consistent interpretation and application of the law and practice within the judiciary, referring to the civil law tradition.

³ Constitution of Romania article 124.

⁴ COM(2012) 410 final; COM(2013) 47 final.

⁵ For example, on 31 October, the president of the SCM seized the Constitutional Court on a dispute of constitutional nature regarding the non-enforcement of a final decision of the High Court of Cassation and Justice on the incompatibility of a senator. This is the second legal conflict initiated by the SCM, after the notification of the Constitutional Court in late 2012 on a similar case, where the Court has held that there was a legal dispute between the Judiciary and the Legislative following the refusal of the Senate to enforce a similar decision.

allegations, on the basis of a report by the Judicial Inspection. If the SCM considers the allegations are founded, it issues a statement in defence of the magistrate or the institution, published on its website. These statements are usually not relayed further by the press. The SCM has put increasing emphasis on this function. In 2013, the Judicial Inspection registered 17 notifications referring to the need to defend the independence, impartiality and professional reputation of magistrates or the independence of the judiciary.⁶

Judges and prosecutors who were victims of criticism by politicians or politically motivated media attacks have welcomed the support of the SCM; although neither the SCM nor the Ministry of Justice provides financial support for magistrates to bring their case to court.⁷ The SCM also considers that its actions in defence of the independence of justice have helped this issue to be taken more seriously by citizens and politicians. The new Criminal Code planned to enter into force in February 2014 has a provision criminalising attempts in certain circumstances to pressure the judiciary.⁸

In addition, the SCM also examines possible threats to the independence of justice within new laws or legislative proposals, as a logical consequence of its role under the Constitution. Similarly, the SCM has sought to have its role recognised in the process of revision of the Constitution on topics related to the judiciary.

The process of reform of the Constitution handled by the Parliament started in the spring of 2013 and entered a more public phase in summer 2013. The process was dominated by work in Parliament, with limited opportunities for NGOs and the public to be involved in the debate in terms of seeing how the variety of ideas put forward might be translated into Constitutional provisions. At the end of May, the Romanian Parliament Constitutional review Commission finalised a first draft, which was shared with the Council of Europe Venice Commission and the European Commission in June. The intention of the Parliament at that time was to adopt the new Constitution and hold a referendum in the autumn 2013. (Once the Parliament adopts the new bill, revision shall be final after approval by a referendum held within 30 days).

In parallel the law on referendum was modified in order to allow for a lower level of participation and approval. However the Constitutional Court ruled that the new referendum law could enter into force only one year after its final signature.⁹

As a result, the whole revision process was put on hold, including discussions with the Venice Commission on a new draft. The process since then has been characterised by a lack of clarity about the likely next steps, and whether the delay will allow a wider public debate to take

⁶ 6 solicitations were registered by the Inspection's Directorate for Judges and 11 solicitations by the Inspection's Directorate for prosecutors. The SCM Plenum has admitted 4 of the 6 solicitations registered by the Judicial Inspection's Directorate for Judges (1 solicitation has been rejected and the one is pending before the Inspection) and 4 of the 11 solicitations registered by the Judicial Inspection's Directorate for Prosecutors (3 solicitations have been rejected and 3 are pending).

⁷ For example in France, on the basis of a law from 1958, between 2000 and 2013, there were 74 requests for protection by magistrates for which the Ministry of Justice paid lawyers costs allowing them bringing their case to court.

⁸ Art 276 "The act of a person who, during the judicial proceedings, makes false public statements that a judge or criminal prosecution bodies would have committed a crime or a serious disciplinary misconduct related to the investigation of that case, aiming at influencing or intimidating, is punished with imprisonment from 3 months to 1 year or fine."

⁹ Law no. 341 of 16 December 2013 modifying Law no. 3/2000 on the organisation of a referendum, reducing the threshold to 30%.

place. It appears that the process in Parliament is likely to restart in the coming weeks. There remains a commitment to consult with the Venice Commission in particular, and the Romanian government has on a number of occasions underlined its intention to ensure that any revisions are in full respect of the values upon which the EU is founded, including in particular the respect for the rule of law and the separation of powers.

In June 2013, at a relatively late stage in the process, the SCM was invited to debates of the Joint Commission of the Senate and the Chamber of Deputies on the revision of the Constitution. The SCM took the opportunity to express concerns relating to certain new articles in the draft amendment of the Constitution relating to the judiciary. It is not clear whether these comments will be taken on board in future drafts. The draft made available to the Commission in June 2013 raised a number of issues, notably in this area.¹⁰,¹¹,¹² The Commission mentioned on several occasions to the Romanian authorities that the process of constitutional reform should be transparent and should be made in full respect of the values upon which the EU is founded, including in particular the respect for the rule of law and the separation of powers. It should also be subject to a broad consultation of stakeholders as well as of the Venice Commission. The Romanian authorities made clear their intention to keep the European Commission informed.

1.1.2. Political and media pressure on the judiciary

Criticism by politicians and politically motivated media attacks on individual judges, prosecutors and members of their families, and on judicial and prosecutorial institutions, have been a particular concern and have been raised by both by the Commission and the Council.¹³ The number and strength of such attacks seems to have decreased since July 2012, but examples continue. This includes cases where judicial institutions and magistrates have been criticised directly in the wake of judicial decisions about important political personalities. This contrasts with practice in other Member States, where in line with the principle of separation of powers and judicial independence, explicit or implicit rules or conventions limit the extent to which politicians comment on judicial decisions.¹⁴

In respect of 2013, the Constitutional Court also reported that attacks against the court and its members, although less vociferous than in summer 2012, remained an issue.

¹⁰ Amended article 52(3) will make the state liable for loss caused by judicial error if liability is imposed by law and if, for example, power has been exercised in bad faith or serious or gross negligence is involved. The amended section goes on to confer on the state a right of redress against the magistrate. Such a provision could risk an infringement of judicial independence: see the United Kingdom submissions in Case C-224/01, Köbler v Austria.

¹¹ Amended article 64(4) would give the Parliament power to compel the attendance of judges before Parliamentary committees, for example, to assist them in their formulation of legislation. Such a provision could risk opening the door to political pressure in breach of the independence of the judiciary.

¹² Amended article 113(2) would increase to 4 out of 21 the proportion of the SCM members appointed by the political branch of the state (Parliament).

¹³ COM(2013) 47 final, page 4; Council Conclusions on the CVM, 11 March 2013.

¹⁴ For example, there is a Resolution of the United Kingdom House of Commons of 15 November 2001 restricting Members of Parliament from commenting on proceedings in court unless a ministerial decision is in question, or in the opinion of the Speaker a case concerns issues of national importance. There is also the convention in the House of Commons that MPs should not criticise judges in debate or in motions and questions. There is also a debate in the UK about including specific provisions on this issue in the Ministerial Code, to preclude comments on the results of particular cases or specific sentences handed down by a court, while retaining Ministerial freedom to comment on the effectiveness of the law, or about policies on punishment in general.

The National Audiovisual Council (NAC) has received complaints about broadcasting outlets relating to the justice system and has adopted sanctions in some cases.¹⁵ The SCM referred four cases to the National Audiovisual Council.

In autumn 2013, the Ministry of Justice organised a first meeting with investigative journalists in order to provide better information on the justice system, education on the independence of the judiciary and to establish a dialogue and better cooperation between the journalists and courts. The objective was to develop better mutual understanding and respect.

Political pressure in appointment decisions is dealt with in section 1.5 below.

1.2. Reform of the legal framework and the new Codes

The new Civil Code entered into force on 1 October 2011. The new Code of Civil Procedures entered into force on 15 February 2013, with some provisions to become operational on 1st of January 2016.¹⁶ The new Criminal Code and the new Code of Criminal Procedures are planned to enter into force in February 2014. The July 2012 CVM report underlines that, when completed, this should represent a substantial modernisation of the Romanian legal system.¹⁷ Much of the emphasis has been on implementation. The leadership of the judiciary, as well as the Ministry of Justice, has recognised the importance of the efforts needed and courts have been encouraged to report on possible difficulties. The SCM, HCCJ and the General Prosecutor also see the implementation of the new codes as one of their priorities.

The SCM coordinates an inter-institutional working group whose aim is to prepare the system and civil society for enforcing the new provisions of the four new codes. The Minister of Justice secured additional budget and posts for supporting the implementation of the new codes, in line with the Memorandum adopted by the Government in 2012 (for 2013 – 2015: 414 judges and 604 auxiliary personnel).

Preparations for the entry into force of the Code of Civil Procedures were uneven. Much attention was given to the possible need for extra judges and clerks, but the impact was not assessed before finalising the legislation and the opportunities for key outside stakeholders to identify important questions were few. Learning from this experience, preparations for the entry into force of the new Criminal Codes within the judiciary are more intense and specific issues are the subject of pre-emptive action.¹⁸

1.2.1. Civil Procedure Code

The principles which underlie the new Code of Civil Procedure are to ensure simplification and speed of civil procedures and to improve service and process.

Since July 2012, there has been a substantial training effort for magistrates and clerks on the new civil codes, with more than 150 training activities and about 5000 participants. The training is organised mainly by the National Institute of Magistracy and the National School

¹⁵ In 2013, the NAC adopted 11 sanctioning decisions out of which 7 sanctions with a fine and 4 public summons to broadcasters in cases related to the justice system and the police. <http://www.cna.ro/-Decizii-de-sanc-ionare-.html>

¹⁶ Articles XII, XIII, XVIII, XIX, of Law no.2 of 1st of February 2013.

¹⁷ COM(2012) 410 final, p.4.

¹⁸ For example, working with prisons and probation services to identify serving prisoners whose sentences will expire when the Criminal Code brings in shorter sentences.

of Clerks, under the oversight of the SCM.^{19, 20} The training activities included conferences, decentralised seminars, and train-the-trainer sessions. Material from the trainings is also available on-line for e-learning. The initial training for magistrates and clerks has also been adapted to include training on the new codes.

The new Civil Procedure Code applies to all new cases introduced after its entry into force on 15 February 2013. As a result all courts dealing with civil and administrative cases are in a transition phase applying both old and new codes of civil procedure, depending on the case.

Contacts with the SCM and judges in different jurisdictions and different court levels have suggested that delays in the judicial proceedings have increased since the introduction of the civil codes – though many still feel this is a transitional effect only. Judges and court managements seemed to be confronted with a series of difficulties, organisational and legal. Not everyone was able to attend the training, and it was not always accompanied by clear guidance on implementation. Possibly as a consequence, there are reports that procedures are not being consistently applied,²¹ and that public administration has not been well prepared for the changes. However, it is also the case that both the SCM and the Minister of Justice report that new efforts have been made in the course of autumn 2013 to correct the situation in terms of resources and interpretation of the law. The HCCJ has also made specific efforts to define harmonised practices in civil courts and systematisation of civil trials.

1.2.2. Criminal Code and Criminal Procedure Code

The introduction of the new Code of Criminal Procedure will be a major undertaking: all provisions are directly applicable, and the code introduces two new institutions, the “rights and freedom judge” and the “preliminary chamber” judge. The rights and freedom judge is to hear applications in relation to requests, complaints, searches, preventive measures, provisional security measures and the behaviour of the prosecutor. The preliminary chamber judge is to verify the legality of evidence gathered and the procedural acts undertaken in the course of the prosecution. These new institutions are designed to reduce the types of disputes which defendants in Romania have raised in the course of a criminal prosecution, leading to the disruption and postponement of trials already begun. The idea is that by having such disputes resolved beforehand, the trial will proceed more smoothly.

The new criminal codes will also influence the fight against corruption. In addition to the two new institutions described above, which should reduce the levels of appeals, there are other relevant changes:

- Length of proceedings: there will be fewer possibilities for second appeals, so final decisions could be reached quicker.

¹⁹ The professional training on the new codes has been carried out mainly within a project coordinated by the Superior Council of Magistracy, with external funding under the Swiss Financial Mechanism and implemented with the National Institute of Magistracy (NIM) which has organised training sessions (with the participation of over 2300 magistrates out of the total almost 7000) and several other activities with the same purpose (e.g. conferences recorded and broadcast online, accessed by over 46.000 unique visitors).

²⁰ At the end of 2013, the Swiss – Romanian Project was extended for 12 more months and the number of activities has been extended by adding 14 more face to face seminars to the 250 already approved seminars.

²¹ For example, from the Romanian Bar Association.

- Prescriptions and sentences: In general criminal sentences are more favourable to the convicted in the new Criminal Code. When there are shorter sentences, Romanian practice also means that the cases have a shorter prescription period. As a result, there are ongoing prosecutions or trials that may face prescription much earlier than originally planned. The Prosecution services, the HCCJ, the SCM and the judicial inspection are monitoring such cases and encouraging judges and prosecutors to accelerate them. By end of November 2013, DNA had identified 10 files which might be affected by this issue, and DIICOT had identified 7. The HCCJ has also advanced the hearings of some high-level corruption cases in order to ensure that a final decision can be reached before the prescription deadline.
- Jurisdiction and level of courts: The Tribunalele will have jurisdiction in first instance for some conflict of interest cases. This will need to be monitored to ensure that this does not dissipate the fledgling expertise in this area built in the Courts of Appeal and the attached prosecutors. It would also be a new logistical call on ANI to have to defend its cases before all these jurisdictions.
- Investigation techniques: The Codes define new special investigation techniques. DNA is drafting practice guides for its prosecutors. There are however concerns from DNA and DIICOT regarding new restrictions concerning special investigation techniques, in particular for investigating Ministers²².

The application of the new codes will probably face a series of problems in law and in practice. Most actors expect delays in the proceedings in the first phases of the implementation. This will need to be monitored to ensure the problems can be resolved quickly.

Most actors consider that preparatory efforts undertaken so far are more substantial than for the code of civil procedure:

- Centralised and decentralised training. The SCM encourages courts throughout the country to ensure that every judge and prosecutors has gone through at least one training. At the level of the HCCJ and the courts of appeal, specific seminars have been organised;
- Organisational preparations by the criminal sections at all levels of courts for implementing the two new institutions, as well as by the Prosecution;
- Filling vacancies, including the new provision made for judges and court clerks;
- Adaptations to the justice electronic management system, ECRIS.

Judges and prosecutors throughout the country were invited to discuss issues with regard to the new codes, in order to anticipate potential problems. Several legal problems were already discovered and these may lead to amendments of the codes or of the law for the application of

²² In a joint letter, DIICOT and DNA have requested the General Prosecutor to notify the Ministry of Justice with a view to amending some provisions of the New Criminal code and the new Criminal Procedure Code. They raised concerns with regard to the provisions requiring for the interceptions to be authorised only after the stage when criminal charges are pressed against the defendant and not in pre-investigation phase or undercover investigation. Other issues raised include access to financial information, judicial expertise and the need for some transition provisions.

the Criminal Procedure Code still to be adopted before the entry into force²³. The latter also creates insecurity for the judicial system as the codes are not fully stabilised.

In December the Romanian Parliament voted a series of controversial amendments to the Criminal Code, which were ruled unconstitutional by the Constitutional Court. This issue is dealt with in section 3.

1.3. Consistency of Jurisprudence and predictability of the judicial process

Inconsistency and a lack of predictability in the jurisprudence of the courts or in the interpretation of the laws remains a major concern for the business community and for wider society. This problem of inconsistent interpretation and application of the law applies both to judges and prosecutors, with a responsibility also on the public administration. The introduction of the Codes is an opportunity to address this and an important incentive for progressing on the problem of inconsistent interpretation and application of the law. The role of the HCCJ is crucial in this process and it has taken it up as one of its major priorities. The General Prosecution has also initiated in 2013 several strands of work with the goal of ensuring the consistency of practice and interpretation of the law in the prosecution services throughout the country.

1.3.1. New procedural codes and role of the HCCJ

The new Procedure Codes refocus second appeals on their primary cassation purpose and reinforce the role of the High Court in ensuring the consistency of jurisprudence. To complement the appeal in the interest of the law, which can be used to resolve the interpretation of the law when facing inconsistent judgements, the new procedural codes also introduce a new, proactive mechanism for improving the consistency of jurisprudence. This preliminary ruling procedure allows for a court ruling in final instance to address questions to the High Court for an interpretative ruling that is binding both for the court in question and for future cases.

So far as appeals in the interest of the law are concerned, these have been steady and for the time being remain the main mechanism for ensuring the consistency of case law. In 2011 there were 33; in 2012, 19; and in 2013, 21. The procedure is well-established and appeals are solved within a legal deadline of three months. The HCCJ publishes the cases on its website and in the Official Journal (OJ).

The preliminary ruling procedure is set out under Articles 519-521 of the Code of Civil Procedure. The Procedure parallels the reference procedure in the Court of Justice of the European Union. The HCCJ has published guidelines, a model document for courts to use and a model judgement concerning preliminary ruling requests. Decisions are binding to all courts when published in the OJ.

The HCCJ has sought to encourage use of the new procedure, organising for example a video conference in early March 2013 with all Courts of Appeal. So far the procedure has given rise to only three requests under the Code of Civil Procedure. One case, a reference from the Court of Appeal at Brasov, was settled in 2013. As this mechanism is used by courts acting as last instance, preliminary rulings can only be requested in relation to the new Code of Civil

²³ Draft Emergency ordinance on the implementation of the Criminal Code and the Code of Criminal Procedures.

Procedure, which came into force in February 2013. The HCCJ expects a rapid acceleration of references for rulings when the new Code of Criminal Procedure comes into force.

1.3.2. Management solutions and processes

Legislative reforms alone will not solve inconsistent jurisprudence. The management of the judiciary reported that tackling this problem is a priority for them, and they are taking a number of practical steps to promote a consistent jurisprudence amongst the magistracy, including meetings, training seminars and improvements in the publication of motivated court judgments. However, these efforts are made in the face of reluctance in some quarters to follow the jurisprudence or guidance of superior courts. One example to illustrate this problem is the sentencing in corruption cases. Although sentencing guidelines exist, it seems clear that many courts do not follow them (see below). It does not appear that a clear, consistent and transparent process exists for the court management to identify cases of failure to be consistent with established practice and ask the judge concerned to explain why they decided to diverge from such norms in a particular case.

A consistent jurisprudence in criminal cases is also dependent on the consistent practice in the Prosecution, and the management of the Prosecution has a role in providing general instructions and guidelines to the prosecutors on the way to fulfil their action. As an example, prosecutors can be requested to prosecute systematically certain crimes which have important public consequences and be advised to request systematically a certain sentence for these crimes.²⁴

Decisions “in principle”

A third institutional method of ensuring the consistency of jurisprudence is as a result of courts discussing issues and reaching a consensus. This takes place both within and between courts. In the High Court there are working groups in each section to identify problems where a uniform approach would be desirable. The sections vote if necessary and the two-thirds majority view is then sent to the Courts of Appeal. They have no binding force in law but the rulings, which are sent out together with the relevant legislation, should have a highly persuasive force. The criminal sections of the HCCJ issue some six to seven recommendations a month as to how differences in the jurisprudence should be resolved.²⁵

Similarly, at Court of Appeal level, meetings of the sections of the court attempt to resolve differences in interpretation, by majority vote if necessary. This type of informal attempt to resolve differences in the jurisprudence is seen as a useful complement which could be extended more broadly. Another idea put forward has been informal email networks, whereby judges can exchange views as to the existence and resolution of problems in the jurisprudence.

Analyses and guides by the General Prosecution

At the Prosecution, consistent practice has become a priority. The Public Ministry has seized the HCCJ on several occasions for appeals in the interest of the law. It also regularly analyses divergent cases and informs all prosecution offices at appeal courts of the results of the

²⁴ For example in France this is done via “Circulaires” issued by the Ministry of Justice having authority on the Public Ministry.

²⁵ The President of the fiscal and administrative section of the High Court reported that rulings are sent to the Courts of Appeal around twice a month, and each opinion may cover more than one issue.

analysis. A series of closed decisions were analysed and re-opened including in the areas of conflict of interest and copyright. The Research Bureau drafted about 100 study notes on consistency in criminal law and criminal proceedings.

For the implementation of the new Criminal Codes, following an analysis initiated in summer 2013, the General Prosecution will draft a guide to encourage consistent practice.

Judicial inspection

In 2013, the judicial inspection increased its thematic controls in view of detecting divergent practices between individuals or courts nationwide. Examples of recent thematic controls are: systems for allocation of cases; systematic monitoring of cases for public procurement, corruption and fraud; delegated judges to penitentiaries; and listening devices of prosecutors. Recommendations for improvements and guidelines for consistent practice are then considered by the SCM.

Training

Unification of jurisprudence is also part of the specialised training programmes for magistrates. In 2013, it continued to be a priority for the continuous training programme. In addition to the training seminars, the NIM also organised on-line broadcasting of 5 of its most relevant training seminars on inconsistent jurisprudence, available for all judges and prosecutors linked to the appeal courts.

Access to court decisions throughout the country

The July 2012 report pointed to continued problems in the access for judges to the court decisions of all other courts of the country.²⁶ The intra-judicial information system ECRIS did not allow automatic access, making it harder to combat a lack of consistency in the interpretation of the law. In November 2013, the SCM decided to grant access to ECRIS to all judges and court clerks.²⁷

All decisions of the HCCJ are now available on-line on its website in the form of summaries of the relevant decisions and integral text of the decisions rendered by the HCCJ. In 2013, the HCCJ published:

- 281 relevant decisions, described as a mechanism of unification of jurisprudence, with in total 4090 relevant decisions published.
- 17 344 integral decisions, with in total 92 766 integral texts of the decisions published.

Progress is less clear in efforts to publish all judicial decisions in a form available to both outside professionals and the public at large. The publication of jurisprudence accessible to all seems necessary for ensuring a transparent and accountable judicial system, thereby increasing trust, consistency and predictability of outcome. The current Jurindex system is obsolete. A new system to be set up through the Foundation Romanian Legal Information System – RoLI – involving the Bar Association, the SCM, the NIM and Notaries, is planned but is not available yet. The target date is unclear, while there are doubts expressed by the

²⁶ COM(2012) 410 final, p. 7.

²⁷ On 19 November, the Plenum of the SCM decided to grant access to the ECRIS system to all judges and court clerks. The ECRIS system enables each judge to access all the decisions of the courts and to upload and to publish decisions online.

judiciary on the usefulness of publishing all decisions, notably for financial reasons. Best practice involving the publication of all jurisprudence can be found in many EU countries.

Legal culture in following case-law

Efforts to address the issue of consistency need to take account of the obstacle presented by legal culture. This may be a particular problem in cases starting at the level of the Judecatoria, where final appeal would come in one of Romania's 15 Courts of Appeal. The concept is well established in judicial administration literature, underlining how “local legal culture” can hinder consistency and can only be addressed by strong leadership and training. Experts consulted by the Commission noted a view prevalent in many Romanian Courts that it is for the individual judge to interpret the Codes without reference to the jurisprudence, contrary to what is seen as standard practice in EU Member States, not limited to common law systems.²⁸ The SCM does have the power to launch disciplinary action in serious cases.²⁹

1.3.3. Quality and stability of legal framework

An additional source of difficulties in the consistent application of the law relates to the quality and the stability of the legal framework. Parliamentary procedure often gives no space for proper assessment, consultation and preparation, even when urgency is not clear. Recent examples are several amendments to the Public Procurement laws in the same year (some of them being retracted a few months later), and substantial changes in the Criminal Codes adopted overnight in December 2013, two months before their entry into force.

In addition, the Government adopts many laws through Emergency Ordinances (a consistent trend of some 100 instruments per year, according to the Constitutional Court), thereby bypassing the normal parliamentary process.³⁰ Recent examples are the new Insolvency Code and the law on decentralisation.³¹ In October 2013, the Constitutional Court ruled that the adoption of a government emergency ordinance for the new Insolvency Code was unconstitutional, thereby annulling the law shortly after its adoption, and in general, there may be a trend towards a more demanding interpretation of the Emergency Ordinance conditions on the need to establish real urgency.

The Ombudsman (People's Advocate) has the power to challenge abusive use of emergency ordinances. A new Ombudsman was appointed in January 2013, who has recently resigned. In May 2013, he reported that this Constitutional role represents only a very small part of its activities (1 to 3 times a year maximum).

²⁸ *An Introduction to Comparative Law*, Professors Zweigert and Kötz (Oxford, 3rd ed, 1998, page 262): “It is true that there is never any legal rule which compels a judge [in civil law countries] to follow the decisions of a higher court, but the reality is different. In practice a judgment of the Court of Cassation or of the Bundesgerichtshof in Germany today can count on being followed by lower courts just as much as a judgment of an Appeal Court in England or in the United States. This is true not only when the judgment of the superior court follows a line of similar decisions; in practice even an isolated decision of the Bundesgerichtshof in Germany enjoys the greatest respect, and it is very rare and not at all typical for a judge openly to deviate from such a decision. In France the situation is much the same.”

²⁹ HCCJ rulings in the interest of the law and preliminary rulings are binding to all courts after publication in the OJ. Dissenting decisions would constitute a disciplinary offence.

³⁰ As reported in the CVM Progress Report of January 2013 COM(2013) 47 final, the Venice Commission of the Council of Europe considered that the excessive use of government emergency ordinances should be addressed.

³¹ In January 2014, the CCR ruled that the decentralisation law is unconstitutional (on substance).

1.4. Structural reform of the judicial system

1.4.1. Strategy for justice

A first draft of a Strategy for the Development of the Judiciary (2014-2018) was prepared by the Ministry of Justice in September 2013. The draft strategy seeks to incorporate the recommendations of the CVM, the World Bank's Judicial Functional Review³² and its Court Optimisation Study.³³ It was drafted in close cooperation with the SCM and based on a consultation process within the judiciary, with other legal professions and Civil Society (NGOs) also involved.

The draft strategy aims at strengthening the current reforms and the judicial institutions and at increasing public trust in the judiciary; it seeks to improve the effectiveness of the courts and the functioning and professionalism of all judicial professions active in the justice chain. It is also used as a basis for discussion in the preparations of the programmes of the new EU funds programming period. The Ministry of Justice is following up with an action plan detailing the high level objectives included in the strategy, in view of having both documents approved by the Government by the beginning of February.

The overall goals presented in the draft strategy – greater efficiency, institutional strengthening, integrity, quality, transparency and access to justice – would be consistent with the work done in other Member States and at European level, such as with the performance framework developed by CEPEJ of the Council of Europe and at the international level with the World Bank's work as summarised in its *New Directions in Justice Reform 2012*.³⁴ The fundamental aims of increasing trust in the judicial system, respecting judicial independence and promoting mutual respect between the judiciary, executive and parliament are important points emphasised in previous CVM reports.

In order to improve delivery and implementation, the draft strategy proposes to set up a system of integrated management at the level of the judiciary with a joint monitoring board consisting of the Ministry of Justice, the SCM, the HCCJ, the Public Ministry and the DNA as part of the aim of achieving greater efficiency. An important element for any future reform of the judicial system would be to increase the capacity of the judicial management for better-informed decision making, based on reliable data collection on the functioning of the judicial system, research and long term planning. Other Member States have also used practices, such as court users' surveys and staff surveys, to collect information about weaknesses in their judicial systems.

It has further been suggested by experts consulted by the Commission that the implementation of reforms of the judicial system could be piloted or tested in a few courts before being applied nationwide, as this may enable a better analysis of the impact on the functioning of the courts and the work of the magistrates. This method has already been applied for introducing case-management, as part of the project directed by the East-West Management

³² The Judicial Functional review has not been published yet. It is currently under translation in Romanian.

³³ "Determining and implementing the optimal volume of work of judges and court clerks and ensuring the quality of the courts' activity", East-West Management Institute, March 2013.

³⁴ http://www.coe.int/t/dghl/cooperation/cepej/evaluation/default_en.asp; The World Bank: *New Directions in Justice Reform* (2012) (<http://documents.worldbank.org/curated/en/2012/05/16706679/world-bank-new-directions-justice-reform-companion-piece-updated-strategy-implementation-plan-strengthening-governance-tackling-corruption>).

Institute³⁵. In any event, experience points to the importance of a consistent and sustained implementation for the successful implementation of a wide-ranging and detailed strategy.

1.4.2. Management of workload and efficiency of justice

Excessive workload is reported as a major issue for judges and prosecutors at all levels of courts, and in various jurisdictions. The problem is particularly acute in Bucharest. In some cases, the problems of delays are reported to have been exacerbated by the changeover to the new Civil Code and new Civil Procedure Code, in particular for professional litigation as the Civil Code assimilated the old Commercial Code. High workload also leaves little time for judges, prosecutors and court clerks to study the new codes and keep ahead with the development of jurisprudence, thereby increasing the risks of inconsistent decisions and practice.

The sources of the excessive workload are multiple. One problem cited by all interlocutors is the shortage and insufficient training of court clerks, and insufficient expertise in prosecution. There are also material resources shortages, regarding rooms, scanners, and computers. There are also structural organisational problems in case management and effective performance monitoring, as highlighted by the East-West Management Institute study.³⁶

Another important source of the heavy caseload is the high number of similar or repetitive cases by individuals or companies against the State. In other Member States, one accepted practice is to group such similar cases, choose a few test cases on which a decision would be taken and then apply the decision to all similar cases. In Romania, judges reported that there exists no legal procedure to group the cases³⁷. It also appears that public authorities require separate judgements to fulfil requirements such as audit clearance for payment.

Solutions to diminish the number of cases treated by the courts such as mediation have been introduced recently. Where mediation is allowed, a judge can invite parties to participate in an information session explaining the procedure, and can recommend to parties at any stage that this might be an amicable way to settle a dispute. However in practice mediation is only rarely used. First there seems to be problems with the status and quality of mediators and second it appears that mediation can be more expensive than going to court.

Other initiatives have taken cases out of the judicial system altogether. The new code allows for divorce cases or certain family matters to be dealt with by notaries. And solutions have been pursued to shift away certain cases from the courts to the administration.³⁸ Finally, the work to develop the role of court clerks and to fill vacancies would allow some tasks to be delegated by judges to clerks.³⁹

³⁵ See footnote 33.

³⁶ See footnote 33.

³⁷ As an exceptional measure, following an avalanche of similar cases on reimbursement of pollution taxes, the Government issued a decision that one final court decision would apply to all cases.

³⁸ Such as handling issues related to the first registration of a car administratively, without the need to go to court

³⁹ This legislation was voted by the Chamber of Deputies in March 2012 but is still under consideration by the Senate.

The Ministry of Justice, the SCM and the General Prosecution have also looked at the long-standing issue⁴⁰ of rebalancing the available resources by redesigning the judicial map. The analysis proposed closing 30 courts and corresponding prosecutor's offices and redesigning the circumscription of 25 other courts and prosecution offices. This change would however require legislative amendment, and despite the backing of the Ministry, it seems that the support of Parliament remains uncertain.

Specialisation can also help to address particular blockages in the system. In Bucharest, a Commercial Tribunal will be set up. The law was adopted by the Parliament late in 2013, and the Tribunal is expected to start functioning in March 2014. It will deal with all professional litigation. The aim is to support the business environment in Romania, as a large majority of commercial litigations are dealt with in Bucharest. It will be a specialised court on commercial matters, including insolvency, aimed at ensuring better quality and speed. It might inspire other suggestions, such as a court specialised in litigation with the administration, including public procurement.

The SCM monitors the activity of the courts and prosecutors' offices by approving their activity reports and through the Judicial Inspection. In the last year, the judicial inspection focused a number of actions on the monitoring of timeliness of certain type of proceedings, monitoring old cases still pending in courts, monitoring timeliness in drafting court decisions and verifying managerial measures in this regard.

1.4.3. Management of Resources

Material and financial resources

There is a commitment from the government to provide additional resources to the judicial system in order to ease the implementation of the reforms. The MoJ annual budget in 2013 increased with regard to 2012,⁴¹ with additional amounts allocated for the implementation of the new Civil Procedure Code. The funds have helped to improve services, processing of acts, renting of premises and IT equipment. Further court buildings in Tulcea and Pitesti were built/restored and all Romanian courts were equipped with audio court recording systems, also with the help of the World Bank.

The Judicial Inspection should soon be relocated in more appropriate premises. The HCCJ will have new headquarters in the Parliament Palace from 2014, allowing to free space for the council rooms for the Judges involved in the new rights and liberties procedure.

The National Institute of the Magistracy (NIM) will also benefit from external funds in the period 2014-2016. Appropriate funding of NIM will be necessary for the years to come as the training on the new laws and codes need to continue, as well as the quality and quantity of initial and continuous training, allowing for more specialisation. Lawyers and businesses report that still many judges are not sufficiently qualified to deal with complex (commercial) cases.

At a time of severe constraints on public finances, it remains however difficult to fund the judicial system, in particular in terms of modernisation of the IT systems of all institutions at all levels, and their adaptations to the new codes. Examples like a reliable national system for

⁴⁰ COM(2012) 410 final; COM(2013) 47 final.

⁴¹ After the budgetary rectification of October 2013, the 2013 budget was 13% higher than for 2012.

the collection of data on the functioning of the courts and prosecution services, and a public system for access to jurisprudence would also require additional resources. The Strategy for Justice 2014-2018 will bring together these requirements for additional resources, though some projects will be eligible for EU structural funds.

The government also steered a reform of the system of court fees to raise fees for the first time in several years and to increase the share directed at the court system, rather than local authorities.⁴²

Human resources: Entry into profession, Promotions and Appointments, HCCJ competitions

In line with the Government memorandum of 2012, new posts of judges/prosecutors and auxiliary personnel will be allocated in 2013, 2014 and 2015. The SCM and the NIM organised several competitions to fill the new positions and for promotions to higher courts. The SCM reports that by the end of August 2013, all positions corresponding to 2013 were already allocated.

The new posts were filled by graduates from the National Institute for the Magistracy (NIM), but also by direct admission in magistracy for persons with at least 5 years of specialised experience in law. The NIM reports that there were many candidates for the competitions, and therefore a high quality of the candidates could be ensured.

A number of judges and prosecutors also obtained “on-the-spot” promotion (obtaining only a higher professional degree without being promoted to another court). Experts consulted by the Commission expressed concern that this solution takes away the opportunity of mobility for magistrates.

Subsequent analyses will be carried out on the need of personnel based on ex-post impact of the introduction of the new codes and the absorption capacity of the judicial system.

A new law was agreed in Parliament concerning the selection of judges at the HCCJ to address the problems which had held up new appointments. This aimed at the right balance between the need for rigour in the appointments and the need to address shortages in the HCCJ, and will also allow the current size of the panels at the HCCJ to be maintained.⁴³

1.4.4. Transparency, accountability and integrity of the judiciary

The SCM is working closely with the Judicial Inspection on issues of integrity within the judiciary. The SCM examines files brought forward by the Inspection and imposes warnings and sanctions. This is a continuous process. During 2013, the Judicial Inspection carried out 73 disciplinary investigations against magistrates, and 25 disciplinary actions (18 for judges and 7 for prosecutors) have been initiated. In the same period, the SCM has rendered 25 decisions on disciplinary matters (18 against judges and 7 against prosecutors), with 9 cases admitted and 16 cases rejected.⁴⁴ Sanctions ranged from a warning, diminishing of revenue

⁴² As of 1 January 2014, the revenues from stamp duties to be transferred to the state budget will be 45%, compared to 30%, as in the old regulation, the remaining 55% being allocated to the local authorities.

⁴³ The CVM report of January 2013, COM (2013) 47, final had underlined the importance of maintaining quality in promotions to the HCCJ, and considered that the current size of the panels struck the right balance.

⁴⁴ Out of the 25 decisions rendered in 2013, 8 of them had been registered in 2012: 6 at the Section for Judges and 2 at the Section for Prosecutors.

for a given period, the suspension from office for 6 months, or disciplinary transfers, to exclusion from the magistracy. Sanctions can be appealed before the HCCJ and the majority of these cases are still pending. Statistics suggest that decisions are confirmed by court but for half of the cases sanctions are reduced.⁴⁵ ⁴⁶ In addition to this, the SCM has decided to suspend from office 9 judges and 12 prosecutors as a result of the initiation of criminal action against them for corruption or fraud. The Plenum also rejected the request of retirement of a prosecutor and engaged a procedure for dismissal following his final criminal conviction. During the same period, the sections of the SCM also endorsed the custodial detention, preventive arrest and search of a judge and for a prosecutor.

The SCM cites the integrity of the judiciary as a priority. Both the SCM and the Judicial Inspection hope that the sanctioning will act as a deterrent for other judges and will thereby have some positive effect on the integrity and accountability of the judiciary.

In August 2013, the Government proposed legislation to Parliament which would amend the law on the status of judges and prosecutors relating to the possibility to lose the right to the service pension in case of definitive conviction.⁴⁷

1.5. Appointments in the Judicial System

Appointments in the judicial system are one of the clearest ways for judicial and prosecutorial independence to be demonstrated. The CVM process has underlined the importance of clear, objective and considered procedures to govern such appointments;⁴⁸ non-politically motivated appointments of people with a high level of professionalism and integrity are central to public trust in the judicial system.

Since July 2012, several high-level appointments have taken place. The nomination of the HCCJ President and the vice-president for the civil sections in September 2013 was a transparent process in line with the established rules. The timetable had been accelerated in order to avoid interim nomination. Although there was no competition, with only one applicant for the post of President, this can be attributed to the fact that the incumbent President had applied and was seen as a highly-respected figure. Later in autumn 2013, following a similar procedure, a new vice-president for the Criminal section was appointed.

The nomination of the General Prosecutor and of the leadership of the National Anti-Corruption Directorate (DNA) and the Directorate for Investigating Organised Crime and Terrorism (DIICOT) was a protracted process. It was launched in September 2012 with a short deadline and signals that it was not a fully open process, notably through public

⁴⁵ 100% of SCM decisions of the Section for Prosecutors since September 2012 have been appealed. The Court has admitted the appeal for two of the decisions rendered by the Section for Prosecutors and has reduced the sanctions in both of these cases (for one of the decisions the sanction was warning and the court has rejected the disciplinary action; for the other decision the initial sanction was exclusion from magistracy and the court admitting the appeal has rendered the sanction consisting in disciplinary transfer), representing 25% of the appealed decisions, 50% are still pending and 25% of the decisions of the SCM have been confirmed.

⁴⁶ 45% of SCM decisions of the Section for Judges since September 2012 have been appealed. The Court has also admitted the appeal for two of the decisions rendered by the Section for Judges and has reduced the sanctions in both of these cases (in both of the decisions the initial sanction was exclusion from magistracy and the court has modified the sanctions into disciplinary transfer), representing 20% of the appealed decisions, while 40% are still pending and 40% of the appealed decisions have been confirmed.

⁴⁷ See section 3.6.3 below.

⁴⁸ COM(2012) 410 final; COM(2013) 47 final.

statements by political figures on potential candidates. The Commission joined others in making clear that it did not consider the procedure used at that time to be in line with CVM recommendations which had specifically underlined the importance of this procedure.⁴⁹

The procedure was subject to changes which gave more time and which opened up the process to more scrutiny, but it proved difficult to re-establish its credibility. The SCM was unable to recommend the candidates after a public hearing and no appointments were made. The institutions therefore continued to function with ad interim leadership.

In April 2013, a new list of the appointees was announced and forwarded to the SCM. This included some figures with established track records in the field of anti-corruption, but was essentially a political choice, rather than the result of a procedure designed to allow scrutiny of the candidates' qualities and a real competition. It led to concerns expressed by a number of voices both within the magistracy and in civil society. The Commission reiterated its position on the procedure, noting that the approach taken put the onus of those appointed to show their commitment to pursue the work of these institutions in tackling corruption.

Another difficult issue arose with the appointments of head and deputy heads of section in the DNA in October 2013. Again, delegations to ad interim positions were abruptly terminated, and nominations were made by the Minister of Justice which had not fully followed the procedure of consulting the head of DNA. The timing also created concerns that a link was being made with DNA decisions on cases relating to political figures.⁵⁰ Following criticism in public debate and by the SCM, a second, more consensual process took place which resulted in a different set of permanent appointments.

As for more junior ranks of the magistracy, the appointment of judges and prosecutors takes place via open competitions, with transparent rules and processes. In 2013, several competitions for judges, prosecutors and auxiliary personnel were organised by the SCM to fill in existing and new vacancies. The main criticism that was reported was that competition exams, for promotion to higher courts and direct entry, can be too theoretical.

1.6. Superior Council of the Magistracy and the Judicial Inspection

1.6.1. SCM – representational role

The Superior Council of the Magistracy (SCM) plays a central role in the Romanian judicial landscape. It brings together both judges and prosecutors, though its work in 2013 has been marked by disagreements between the two chapters. For the first time, a prosecutor was chosen as President of the SCM, which led to attempts to rescind the mandate of two judges from the SCM. This was eventually rejected by the Constitutional Court, but it made it more difficult for the SCM to act as the voice of the magistracy as a whole.

This is particularly important because the SCM is by law the main defender of the independence of justice, both defending individual magistrates (see above) and challenging in the Constitutional Court cases where judicial decisions are not respected. In late 2012 and in October 2013, the SCM notified the Constitutional Court of legal disputes between the

⁴⁹ See COM(2013) 47, p 5.

⁵⁰ Specifically the finalisation by the Head of Section at interim of an indictment for electoral fraud.

legislative and judiciary powers, with refusal of the Senate to enforce final decisions of the HCCJ on the incompatibility of a Member of Parliament.

The SCM also represents the position of the judiciary with regard to reform processes that affect the justice system. It will examine new draft laws and it regularly issues positions on on-going reforms. It has contributed to the finalisation of the Criminal Code and Code of Criminal Procedures and to the drafting of the Strategy for Justice. On 10 December 2013, the SCM issued an Institutional position on the amendments of the Criminal Code adopted by the Parliament the same day and on the draft bill for amnesty and pardon of certain crimes.⁵¹

The SCM is also the central interface for the justice system towards Romanian citizens and users of the justice system. It would be in line with the judicial strategy to see the SCM taking a more proactive role in increasing trust in the justice system. From the information received, it is unclear whether the SCM receives many complaints and how these are dealt with. There is no established practice of conducting regular user surveys.⁵²

1.6.2. SCM – managerial role

The SCM is the central management entity for ensuring the independence, the quality and the efficiency of the judicial process, defining reforms and setting up processes and guidelines for their implementation, for allocating human and financial resources⁵³, for nominations, training and disciplinary procedures. The SCM supervises the NIM and Judicial Inspection, though these bodies have their own authority and responsibilities.

The SCM's current top priorities relate to the implementation of the new codes, the reform of the judicial map and the definition of the new 2014-2018 strategy. An inter-institutional working group for the implementing the provisions of the new codes, chaired by the SCM, is monitoring implementation and proposing measures such as supplementing staff, updating information systems, re-publishing codes, and preparing for implementation of the provisions on a more favourable law. In the first phases of the implementation of the new Code of Civil Procedures, the SCM has been criticised by some judges for not having been sufficiently proactive in addressing the problems and using its management authority to find appropriate and unified solutions nationwide, leaving to court leadership or individual judges responsibility for managing the problems faced with the new codes. By end of 2013, the SCM and other judicial management institutions were showing signs of a more proactive approach, inquiring into problems, existing and anticipated, and starting to take corrective measures.

⁵¹ On 15 November 2012, the SCM issued a negative opinion on the legislative proposal for the amnesty of certain crimes and pardon of certain penalties.

⁵² A consultant has been identified to carry out a survey on actual experiences, attitudes and perceptions towards the reform process.

⁵³ In terms of human resources, the SCM took steps to ensure the implementation of the stages provided in the Memorandum adopted by the Government in 2012, in order to supplement the schemes of magistrates, but, more important, of auxiliary personnel in courts and prosecutors' offices. Likewise, the SCM has organised the competitions of admission, promotion in profession and on leadership positions, in order to have the schemes of personnel adjusted for the needs of the new codes.

The SCM also initiates disciplinary proceedings against magistrates, with penalties ranging from warnings through reductions in salary to suspension.⁵⁴ The SCM has a policy of suspending magistrates from office when criminal proceedings against magistrates have been started and it has enforced this policy effectively for the last couple of years.⁵⁵

1.6.3. Judicial Inspection

The Judicial Inspection plays an essential role in the transformation of the Romanian Judiciary. It contributes at ensuring the integrity of judges and prosecutors and the quality and consistency of the judicial work and decisions. Its resources are limited, which has also constrained the opportunities to replicate successful experiments like a twinning with the Spanish authorities in 2009-10.

The main task of the judicial inspection is still disciplinary investigation. In 2013, investigations were pursued against judges and prosecutors regarding misconduct or negligence, including *ex-officio* investigations. The Inspection believes that it has proven professionalism in its work, balance and proportionality in its responses and sanctions, within the limits of the resources at its disposal. The sanctions proposed by the inspectorate are examined by the SCM and further confirmed after voting. Sanctions can be appealed before the HCCJ.

The Judicial Inspection is also called upon to examine cases of attacks against the judiciary. The Inspection verifies allegations, and if founded, transmits the file to the SCM.

In 2013, the Judicial Inspection increased its thematic controls. In addition to action to support consistency of practice and jurisprudence (see above), objectives include detecting management weaknesses and structural failings. Examples of recent thematic controls are: systems for random allocation of cases; systematic monitoring of cases for public procurement, corruption and fraud; delegated judges to penitentiaries; listening devices of prosecutors. The result is recommendations for improvements and guidelines for consistent practice, which are then adopted and promulgated by the Superior Council of Magistracy. Following one of the thematic controls, the SCM decided to amend the internal regulation of Courts in order to improve the system of random distribution of cases⁵⁶. The Inspection would like to increase this prevention and consistency role.

⁵⁴ The SCM sections applied sanctions that ranged from a warning of a judge (for having a behaviour that affected the honour, the professional probity or the prestige of justice), the diminishing with 20% of the revenue for 6 months (a judge who has repeatedly delayed his works), diminishing with 15% of the revenue for 3 months (a judge breaching the duty to abstain or repeated delays in elaborating the works from imputable reasons) and the exclusion from magistracy of three judges and two prosecutors (cases which included interfering with the activity of other magistrate, affecting the prestige of justice, and the use of function for private interests). See also section 1.4.4

⁵⁵ For example, during August-October, the Sections have decided to suspend from office two judges and, respectively, a prosecutor accused for corruption, and on 8 October, the Plenum has rejected the request of retirement of a prosecutor and notified the President of Romania in order to dismiss him, following his final criminal conviction. During the same period, the sections of the SCM also endorsed the custodial detention, preventive arrest and search of a judge and for four prosecutors. In November, 2 other prosecutors have been suspended and one prosecutor under criminal investigation for abuse in service resigned.

⁵⁶ In September, the Section for judges has analysed the report of the Judicial Inspection on the random distribution of cases at the Bucharest Tribunal and order some administrative measures and procedures in order

2. INTEGRITY FRAMEWORK AND THE NATIONAL INTEGRITY AGENCY

During the reporting period, the National Integrity Agency (ANI) has not faced further constitutional challenges, which had proved to be the biggest risk for ANI in the past. However, ANI remains subject to pressure. This can be connected to the substantial number of cases initiated by ANI in terms of conflicts of interest and incompatibility issues. This has led to public criticism of ANI's decisions, even when upheld in the courts, and attempts to dilute the integrity framework through legislative amendment.⁵⁷

2.1. ANI and the National Integrity Council

2.1.1. Institutional capacity

ANI has seen an increase in the number of integrity inspectors and support staff, as well as new conditions which mean ANI inspectors are comparable with prosecutors. 37 integrity inspectors are working for ANI and deal with around 150 cases per year each. The average duration of the procedure is of 1 to 3 months for incompatibilities and conflict of interest and about a year for wealth assessment.

In 2012 ANI's budget was significantly increased and ANI has also received extra funding for specific projects.⁵⁸

A protocol has been signed with the General Prosecutor and the working relations with prosecutorial bodies have improved. These institutions now channel to ANI possible conflicts of interest. An interesting development is that the General Prosecution has agreed to discuss with ANI cases which local prosecutors decided not to pursue, even though ANI cannot formally appeal negative decisions of a prosecutor (confirmed by HCCJ decision). This "extra judicial" solution is a sign of the willingness of the two institutions to cooperate.

80% of ANI's activities are based on external notifications, compared to 20% ex-officio, a reversal of the previous trend. This reflects the fact that ANI now has over a dozen protocols of cooperation with judicial and administrative authorities. However, in general the number of notifications from different government bodies varies substantially, with some yet to bring any notifications.

The process of passing through the Wealth Investigation Commissions is showing signs that all parties have now become more accustomed to the procedure.⁵⁹ A decision of the HCCJ is still pending on whether decisions by the Commission not to pass a case to court can be appealed by ANI.

to prevent a possible intervention in the software of random distribution of cases and further improvement of these software.

⁵⁷ For example, 13 MPs from all major political parties introduced early December 2013 a draft law aiming to avoid ANI's analysis by stipulating that all incompatibilities and conflicts of interest are only the ones specified by the Statute of MPs.

⁵⁸ The core budget is in 2014: 19.444.000 Lei; 2013: 17.942.000 Lei; 2012: 20.610.000 Lei; 2011: 11.024.000 Lei.

⁵⁹ The WIC were established to examine ANI's reports on alleged discrepancies between income and wealth of over 10.000€, considering that the RO constitution contains a presumption of legal ownership of assets. In 2012-2013, WIC issued 12 ruling on ANI's referrals, 8 were admitted (reports well-grounded and based on solid evidence), 3 dismissed and 1 had reached prescription.

2.1.2. *National Integrity Council (NIC)*

The 2012 CVM report concluded that “The NIC has shown that it can act as a key instrument to defend the independence of the Agency, defending ANI's personnel against outside pressure, and could develop still further its role in promoting integrity more generally.”

In 2013, in the face of sometimes strong media and political attacks against ANI (as well as the NIC itself), the Council continued to support ANI and its work, defending ANI in the face of criticism and intervening proactively in Parliament. This has in particular concerned cases where Parliament has appeared to challenge court rulings on ANI decisions.⁶⁰ It also made the case for an increased ANI budget.

2.1.3. *Track record – conflict of interest, unjustified wealth, incompatibility*

In 2013, ANI's track record is as follows:

- 16 cases regarding unjustified wealth;
- 80 cases of administrative conflicts of interests;
- 45 cases of criminal conflicts of interests;
- 324 cases of incompatibility.

This shows a substantial increase in ANI's activity compared to previous years.⁶¹

About half of ANI reports on incompatibility and conflicts of interest are challenged in court, but more than 80% of court decisions confirm the ANI reports.⁶² Overall more than 90% of ANI reports on incompatibility and administrative conflicts of interest are confirmed.

The court proceedings on incompatibility cases can be lengthy. ANI reports that it takes about two years to have a decision on a case on incompatibility in the HCCJ. Furthermore, although improving, the jurisprudence is still uneven, with inconsistent decisions at the level of the Courts of Appeal but also at the level of the HCCJ itself.⁶³ There are also difficulties with the actual implementation of a final decision. Though a final decision on incompatibility would result in the termination of office or position leading to the incompatibility, it still requires a court order to implement the decision, and there have been cases where courts have cancelled the orders of implementation of the final decision. One such case is pending in a Court of Appeal. The implementation of final decisions on incompatibility by Parliament is also a problem (see below). Another outstanding issue is that by the time the sanction is effectively applied, the damage to the public financial interests can rarely be recovered.⁶⁴

⁶⁰ As a recent example, the NIC published a press release on 23 December 2013 condemning amendments to the Criminal Code voted by the Parliament in early December 2013 and urging the Senate and the Chamber of Deputies to apply court rulings from the HCCJ and the Constitutional Court on ANI decisions. <http://www.integritate.eu/2051/section.aspx/3709>.

⁶¹ ANI has found 11 cases of solid indications for committing possible criminal acts (false statements, crimes assimilated to corruption offences etc.).

⁶² Period 2008-2013,

- incompatibilities: 716 cases with 54% of cases challenged in court; 316 final decisions with 179 unchallenged and 137 final decisions by court (85% confirmed and 15% lost);

- administrative conflicts of interest: 147 cases with 45% of cases challenged in court; 38 final decisions with 21 unchallenged and 17 final decisions by court (82% confirmed and 18% lost).

⁶³ NIC and ANI report inconsistent decision for a similar case on incompatibility in November 2013.

⁶⁴ See section 2.1.5.

Regarding cases of unjustified wealth, since 2010 ANI notified 47 cases to the Wealth Investigation Commissions (WIC) (15 in 2013). The WICs dismissed 15 of ANI's referrals,⁶⁵ 18 cases were brought to court, with so far 5 final decisions (4 confirming the report of ANI). The time to reach final decisions is long. The average timeframe of pending cases before the WIC is about three to six months, while ANI's cases referred to court by the WIC take about two to three years to be resolved.

Throughout the period 2008-2013, 138 cases were referred to the Prosecution for possible criminal conflicts of interests. More than half of the cases concern public elected officials. The effective criminal investigation of the files remains low: 7% of files have been sent to court and for an additional 7% the criminal pursuit has been started; for 36% no criminal pursuit is started whereas 50% of files are pending before the Prosecution. Statistics are improving in 2013, with 18.5% of cases sent to court and another 10% for which criminal pursuit has been started. None of the cases sent to court has reached a final decision.

In addition to cases handling, ANI has been developing its prevention activities, targeted at both individuals and legal persons, in order to clarify formalities to complete and submit assets and interests disclosures and the legal regime of incompatibilities and conflicts of interests.

ANI's strategy for fighting and preventing unjustified wealth, conflicts of interest and incompatibility has also been updated and was republished in September 2013.⁶⁶

2.1.4. New responsibilities for ex ante checks

ANI and the National Authority for Regulating and Monitoring Public Procurement signed in February 2013 a Memorandum of Understanding. This opened the door to a new role for ANI in the ex-ante verification of conflict of interest in the awarding process of public procurement contracts. This will require amending ANI's legal framework and implementing an integrated informatics system to prevent and detect possible conflict of interests. The intention is that using a standard format, all procurement authorities will notify the individuals concerned in procurement decisions to ANI, which will cross check the information with data on interests. The contracting authority would then be notified in advance of a possible problem, and ultimately (in case remedial action was not taken) a case could be notified to the prosecution for investigation. In the first instance, this procedure will be limited to contracts relating to public procurement supported by EU funds.⁶⁷

This project is designed to help avoid conflicts of interest taking place in the first place, and would thereby reduce the risk of corruption and subsequent loss of funds, also considering

⁶⁵ ANI challenged these decisions in court.

⁶⁶ http://www.integritate.eu/UserFiles/File/Hotarari_CNI_2013/2013-09-01_StrategiaANI_PtrCombat&PrevAcumulAvNejust&ConflicteInterese&Incomp_2011-2014.pdf

⁶⁷ Concretely, the system would cover a limited number of potential conflicts, i.e. the existence of kinship until the 3rd grade (parents, children, siblings). Public authorities would be obliged by law to enter in a common database all tendering companies. These could be cross-checked against declarations of interest. After a conflict of interest has been detected, ANI would issue a warning to the head of the authority which has launched the public procurement. Though there would be no obligation for this person to stop the procedure, there would be an obligation to respond, and if this did not happen, this would be notified to the prosecution which would be expected to investigate the potential wrongdoing. The draft law to regulate the system would also foresee for civil servants to have 20% responsibility for misused funds – considered as a major disincentive.

that recovery procedures are cumbersome, lengthy and inefficient.⁶⁸ It would be important to respect the right to protection of personal data. It would subsequently be extended to all procurement decisions. Further refinements in the future could for example extend to the issue of "revolving doors" between contracting authorities and private consultancies.⁶⁹

Technical specifications for the acquisition of this informatics system "PREVENT" have been finalised. The public procurement procedure was due to start by the time of drafting of this report, with the implementation in the first half of 2014.

2.1.5. *Legal Framework*

ANI has recently been discussing with the Ministry of Justice a series of legislative changes. Such changes could include:

- Provisions for contracts to be declared null and void as soon as a decision on a conflict of interest becomes final. Currently, as noted above, the legal framework provides for an automaticity of personal sanctions in cases of incompatibility or conflicts of interest (removal of office, ban on running elections...), but the contracts signed in incompatibility or conflict of interest have to be cancelled through a separate court proceeding. If the contract is cancelled, it would still be for the administration that has incurred the loss to recuperate the money, but the awarder (signing in incompatibility) would bear financial responsibility.
- Certain controls for the appointment of officials in cases where there would be a final integrity decision;
- Facilitated access to declarations;
- Codification of the existing legal framework, under ANI's full initiative.

Since summer 2013, there have been steps taken in Parliament to amend the rules on incompatibilities. The first amendments focused on local authorities. The proposal was to enable local authority officers, usually mayors, to hold positions in private bodies such as utility companies which enter into contracts with the local authority. This is currently deemed incompatible by law. The origin of this proposal dates back to a controversy which emerged in July 2013, after ANI found out that several mayors were sitting in the board of (private) public utilities companies. Whilst such a dual role was forbidden by the law on incompatibilities,⁷⁰ the presence of mayors in such companies had been *recommended* by a 2008 Government Decision.⁷¹ The number of cases was first reported in public declarations to be in the hundreds, with consequences for a large number of mayors, but in the event the numbers involved seem smaller, perhaps 70 cases. The Ministry of Justice did not support the initiative to take these cases out of the definition of conflict of interest and it did not secure a majority in Parliament.

A second initiative which would dilute the effectiveness of the integrity framework was part of the amendments to the Criminal Code adopted by Parliament in December 2013, declared

⁶⁸ According to Commission Services, another weak point of the system is that recovery of EU funds in case of fraud is almost never made from the fraudsters, but from the Romanian public budget.

⁶⁹ The ANAF integrity unit could have a special role in this perspective.

⁷⁰ Law No. 161/2003 and Law No 51/2006.

⁷¹ No 855/2008.

unconstitutional by the Constitutional Court in January 2014. These amendments would have modified the definition of conflict of interest, excluding from conflict of interest appointed and elected officials, including parliamentarians and mayors, as well as civil servants. According to the amendments, the scope of the criminal offence of conflict of interests would be limited to the contractual staff of public authorities. Also administrative acts would be exempted from the scope of this provision, which means that conflict of interest relating to decisions of the public administration would have to be addressed without the tool of criminal law, with substantial consequences for the integrity framework in Romania.

2.2. The integrity framework: Parliamentary Statute

Two important issues have been raised in previous CVM reports concerning the approach of Parliament to integrity issues. The first has been the procedures for the lifting of parliamentary immunity with respect to search, arrest and detention. The second has been the automaticity with which Parliament implements final court judgments, notably those which have upheld decisions of the National Integrity Agency.⁷² In this respect, principles of clarity and automaticity have been regarded to be core elements which help to avoid subjectivity in parliamentary actions.

One example in autumn 2012 was the case of a Senator, where the Plenary of the Senate rejected ANI's request to end the mandate of Senator, despite a definitive decision in this respect from the High Court⁷³. This question was taken to the Constitutional Court (CCR) by the SCM, as a legal conflict between the High Court and the Senate. The CCR decided, with unanimity, that a legal conflict of constitutional nature indeed existed between the two institutions, triggered by the Senate's refusal to acknowledge the termination of the senatorial mandate in line with the definitive High Court sentence.⁷⁴ The Senate took note of the CCR decision. The Senator announced his resignation from the Senate. A more recent case is still pending decision in the Senate, following a ruling by the CCR in November 2013 (see below).

2.2.1. New Parliamentary Statute

The Law on the Statute of Deputies and Senators has been subject to important revisions in the course of 2013.⁷⁵

Parliament considered in January 2013 amendments to the statute of the Members of Parliament, changing the procedure for lifting immunities in the cases of the search, arrest or detention of parliamentarians and the prosecution of former Ministers. Proposals of

⁷² COM(2012) 410 final; COM(2013) 47 final.

⁷³ In a preliminary stage, in this respect, the Senate had assumed responsibility for having decided, in the first place, that the Senator in question was not in a situation of incompatibility and underlined that no legal sanction had been asked against him in the definitive decision of the High Court.

⁷⁴ The Constitutional Court (CCR) published the motivation for the case of this Senator – it is argued that voting against ending the mandate, the Senate had breached legal order and rule of law, and the correct functioning of the justice system has been impeded. By rejecting the definitive sentence the Senate had acted as a superior level (from hierarchy point of view) to the High Court, which is against the rule of law. The motivation was published in the OJ.

⁷⁵ The previous CVM reports recommended that Parliament should build on the new rules to adopt clear and objective procedures to suspend parliamentarians subject to negative integrity rulings or corruption convictions and to fix swift deadlines for processing requests from the prosecution to lift immunity of parliamentarians, as well as giving full justification if Parliament does not let normal law enforcement take its course. COM(2012) 410 final; COM(2013) 47 final.

modifications to the Law on the Statute of Deputies and Senators' included: requests for withdrawal of immunity (which must contain a legal basis and concrete reasons), justification of absences, termination of mandate (if there is a definitive incompatibility decision), personnel of parliamentary offices (no relatives), and issues such as political party migration. The proposal was sent for consultations to other political and judicial institutions, including the Presidency.

After being passed through committees and plenary sessions, a first text was adopted by the two Parliament chambers in February 2013. This was subject to challenge in the Constitutional Court, which found several provisions to be unconstitutional.⁷⁶ After two CCR decisions and consecutive re-examination and adoption by the two Chambers in March and April, the Statute was subject to a further challenge before the CCR.

A revised and final version of the Statute was adopted in July 2013.⁷⁷ It includes the following relevant provisions:

- The termination of mandate in case of incompatibility, to come into effect either on decision by the competent chamber, or on a definitive Court decision (article 7);
- Incompatibilities are recognised in the law (article 16);
- Regarding incompatibilities and conflicts of interest, a procedure for consultation and collaboration with ANI is foreseen in the Statute - ANI should be consulted before issuing an opinion, with a 5 day deadline to respond (article 17);
- Article 24 sets deadlines⁷⁸ for processing requests for detention, arrest or search of parliamentarians.

The previous CVM report had also recommended that full justification should be given if Parliament does not let normal law enforcement take its course; no provisions on the requirement to motivate the decisions against lifting immunities were included in the new law.⁷⁹

The Law on the Statute of Deputies and Senators will be complemented by implementing regulations and by a Code of conduct for MPs.

⁷⁶ The project was challenged several times to the Constitutional Court, a first time on 14 February by 25 senators (CCR Decision nr.81 of 27/02/2013) and a second time on 21 March 2013 by 51 deputies (CCR Decision nr. 195 of 03 April 2013). The third and last challenge to the CCR was made by the President of Romania on 26th April 2013 and is concluded by the Courts' Decision of 19 June 2013, published in the Official Journal, (here after: "*Monitorul Oficial*") nr 404 on 04.04.2013. The decision admitted the objection of unconstitutionality. This time, the issues concerned mainly art.24 which stipulated that, in the phase of granting access to a demand of search, arrest or detention, the competent Chamber would have exceeded its Constitutional powers when evaluating such a demand, substituting itself for the judiciary, because it would already be judging the criminal facts attributed to the deputy or senator or member of the Government in cause. When published, although the Court decision stated its definitive and compulsory character, there was a Separate Opinion signed by 4 judges of the Constitutional Court, which underlined that a demand to the Parliament should include a minimum of motivation.

⁷⁷ Law no. 96/2006 (r2), of 21/04/2006 regarding the Statute of Deputies and Senators, republished in *Monitorul Oficial*, Part I no. 459 of 25/07/2013.

⁷⁸ Maximum 5 days (from the deposition of the report) to submit for the approval of the request by the chamber's plenary maximum 3 days from the chamber's decision to be published in the official journal

⁷⁹ And when for example, shortly after the summer, the Senate refused to lift the immunity of a Senator requested by DIICOT, it gave no reasons.

At the time of writing, the implementing regulations were yet to be adopted, so that the changes brought by the Statute are not yet clear. The most clear cut improvement may well be the new deadlines set.

The Code of Conduct⁸⁰ is currently discussed in a special committee in the Chamber of Deputies.⁸¹ The Code will be adopted as annex to Law no.96/2006 containing the Statute of the Deputies and Senators and will bear the same legal effect. The President of the Chamber of Deputies has acknowledged the desirability of consultation with the National Integrity Agency, as well as looking at the practice in the European Parliament.⁸²

The Code includes a number of general principles concerning the conduct of parliamentarians, such as respecting the national interest and enhancing citizens' faith in the legislative process. It also includes provisions requiring the submission of declarations of wealth and interests. The Code of Conduct does not include a requirement for Parliamentarians to respect the independence of justice and refrain from discrediting judicial decision and undermining or putting pressure on magistrates.⁸³ In addition, concern has been expressed that the definition of incompatibilities and conflicts of interest within the Code, instead of a reference to the existing laws, could give rise to confusion with regard to the existing laws that apply to Deputies and Senators.

Collectively, these changes will need to be assessed in relation to their impact on concrete cases, and the number of cases would be likely to be affected by amendments such as those proposed for the Criminal Codes in December 2013.

2.2.2. *Recent cases*

The desirability of more clarity in the procedures has been underlined by the reaction of Parliament to Court cases confirming ANI rulings in a number of key cases.

As mentioned above, ANI has a strong record in seeing its incompatibility cases confirmed in court. Several of these have involved parliamentarians, and others are now before the Courts.⁸⁴ In addition, administrative decisions declaring conflicts of interest, including one deputy, remained definitive. A number of ANI investigations have also led to prosecutions of parliamentarians.

An important recent case concerns an HCCJ decision as regards revocation from function of a Senator, found in incompatibility by ANI. The Senate took no action.⁸⁵ Following an appeal by the Supreme Council of Magistrates, the Constitutional Court (CCR) ruled that the Senate was by law competent and should take a decision on the termination of the Senator's mandate. It is also to be noted that there are more cases of potential incompatibilities in the pipeline, so this case will be a test case for the Senate.

⁸⁰ <http://www.cdep.ro/proiecte/2013/500/60/5/pl879.pdf>

⁸¹ http://www.cdep.ro/pls/proiecte/upl_pck.proiect?cam=2&idp=13809

⁸² The Parliament confirmed that the Statute of deputies and Senators is inspired by the Statute for Members of the European Parliament.

⁸³ Previous CVM reports including recommendations in this direction (COM(2012) 410 final; COM(2013) 47 final).

⁸⁴ 5 Deputies and 1 Senator (according to the progress report, from 1st of January to 15 October 2013).

⁸⁵ Though the grounds for the decision appeared to be that the incident occurred under a previous mandate, It should be noted that in a number of previous cases the Parliament has terminated the mandate of a Member with a final decision on incompatibility relating to a previous mandate (not in Parliament).

In December 2013, ANI highlighted another case of final incompatibility decision by the HCCJ for a Deputy on which the Chamber of Deputies should take a decision.

3. TACKLING HIGH-LEVEL CORRUPTION

Corruption remains a major issue in Romania (see below). High-level corruption plays a particular role both in its own terms, and in terms of perceptions about the determination of the Romanian authorities to tackle the issue. Previous CVM reports have noted that the track record of key anti-corruption institutions had had a positive impact on the consolidation of Romania's anti-corruption effort.⁸⁶

3.1. Track Record in High level cases – High Court of Cassation and Justice

The High Court's track record on tackling high-level corruption cases has been maintained throughout 2013. The leadership of the HCCJ has underlined the importance of the rule of law being seen to apply even in the most sensitive cases, so the straightforward renewal of the High Court's leadership in September 2013 reinforced its ability to continue this approach. The organisation of the nomination procedure by the Ministry of Justice meant that gaps/interim in the leadership could be avoided. This was clearly consistent with the January 2013 CVM Report recommendation that it is essential that this advance in the fight against high level corruption is maintained under new leadership.

The High Court has reported a scale of cases for 2013 which are in a comparable order of magnitude as the 2012 figures. The Penal Chamber settled, at first instance, 10 high-level corruption cases and the Panels of 5 judges settled, as final instance, 15 high-level corruption cases. Defendants included among others a former deputy, a former senator, former ministers, a former prosecutor and a former judge. The start of 2014 also saw further cases concluded, including that of a former prime minister.

The High Court has continued to implement organisational measures to prevent delays in high-level corruption trials.⁸⁷ Importantly, the High Court has also continued to propose solutions to procedural loopholes allowing for procrastination, which had previously been a feature of high level corruption cases. For example, on the basis of the proposal of the High Court, Article 48(1) of the new Code of criminal procedure was amended, providing that the court of first instance maintains its competence *ratione personae*, even when the defendant no longer has a status requiring High Court consideration, once the indictment has been read before the court (the initial stage of the trial in first instance). The High Court is also closely monitoring cases that might reach prescription earlier following the new Criminal Code.

Maintaining five-member panels for final instance, which was in question earlier in the year, has not had any discernible impact on the progress of cases.⁸⁸

Since the end of 2011, the SCM also monitors the timeliness of high-level corruption cases, with a report of the Judicial Inspection twice a year.

⁸⁶ COM(2012) 410 final; COM(2013) 47 final.

⁸⁷ The HCCJ has successfully handled some large cases, including cases with over 100 defendants.

⁸⁸ COM(2013) 47 final, p. 9.

3.2. The National Anti-Corruption Directorate (DNA)

3.2.1. Legal Framework

The responsibilities of DNA were reframed and the investigation of cases regarding the offences of tax evasion, fraud and customs offences causing a prejudice of under €1 million were removed from DNA's jurisdiction. This should allow DNA to focus even more on high and medium level corruption cases.⁸⁹

Another important change for the anti-corruption institutions, DNA included, will be the entry into force of the New Criminal Code and of the New Criminal Procedure Code on 1st February 2014. It should accelerate the resolution of cases and provide procedural improvements (for example on the use of special investigative means). The DNA leadership and staff are actively preparing for the entry into force of the codes and is analysing the provisions in detail.⁹⁰

The DNA is also currently conducting an analysis regarding the high-level corruption cases for which there is a risk of expiry of the prescription period after the entry into force of the new Criminal Code scheduled for February 2014.⁹¹

On 10 December 2013, the Romanian Parliament voted a series of amendments to the Criminal Code with direct consequences on the fight against corruption, both high-level and petty corruption.⁹² This included the removal of the President of Romania, the Members of the Parliament and persons carrying out a liberal profession (such as lawyers, notaries, bailiffs) from the definition of the “public official” in the Criminal Code. This would appear to have the consequence that they would no longer be covered by criminal offences which are defined as committed by “public officials” like, for instance, bribe taking, abuse of office and trading in influence. CVM reports have consistently underlined the importance of ensuring the full coverage of anti-corruption measures.⁹³ The judicial authorities in Romania also noted that the UN Convention on Corruption defines public officials to be covered by corruption rules as any person holding a legislative, executive, administrative or judicial office of a State Party, whether appointed or elected.⁹⁴

Another provision was a modified prescription regime which would have substantially reduced the prescription period. CVM reports have frequently commented on the prescription regime in Romania,⁹⁵ which includes a relatively unusual provision that prescription ends only with a final instance judgment. Other important provisions included redefining conflict

⁸⁹ Government Emergency Ordinance n° 63 of 19/06/2013.

⁹⁰ DNA and DIICOT have identified a few provisions they consider problematic and would like to see amended before the entry into force of the new codes (see footnote 22).

⁹¹ DNA identified 22 cases. DIICOT has performed a similar evaluation and concluded that 7 of its files could be affected.

⁹² Institutional position adopted by the Superior Council of Magistracy in its Plenum session of 10 December 2013; Public Statement Nr. 1145/VIII/3 of the DNA.

⁹³ For example, in July 2012, one of the recommendations was “*adopt clear procedures which require the resignation of Members of Parliament with final decisions on incompatibility and conflict of interest, or with final convictions for high-level corruption*”. COM(2012) 410 final.

⁹⁴ Art. 2: For the purposes of this Convention: (a) “Public official” shall mean: (i) any person holding a legislative, executive, administrative or judicial office of a State Party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person’s seniority.

⁹⁵ COM(2012) 410 final.

of interest in order to remove a wide range of categories of persons from liability for a criminal offence (see above).

On 15 January 2014, following three challenges to the CCR (one from judges at the HCCJ and two from the PDL party), the Constitutional Court declared the amendments to be unconstitutional on the grounds that they violated the constitutional provisions on the respect for the rule of law and the Constitution, on the principle of equality, on the respect of obligations stemming from international treaties, on the obligation to observe the Constitution and laws regarding the clarity and predictability of rules and on access to justice.⁹⁶ At the time of writing the report, the Parliament has not expressed its further intentions.

3.2.2. *Institutional capacity*

DNA considers that it would benefit from setting up a specialised structure within its organisation to conduct financial investigations. This would help to increase the extent of asset recovery originating from corruption offences and to effectively enforce the new provisions on extended confiscation. DNA faces a very high workload for prosecutors dealing with economic crimes (about 120 cases per prosecutor). According to DNA, such a structure would also need its own investigative capacities, notably to avoid leaks. For this purpose, DNA asked the Ministry of Justice in September 2013 to complement its staff with 50 posts of judicial police officers and agents. This request has received a favourable opinion of the Superior Council of Magistracy.

3.2.3. *Track record*

DNA maintained its track record on conducting investigations of high level corruption cases throughout 2013, with a significant increase in the number of indicted defendants and in the number of successful prosecutions. This trend has continued through a period of uncertainty concerning DNA leadership (see above). The willingness of DNA prosecutors to defend their institution can be seen as a positive sign of the organisation's commitment to fulfilling its mandate.

According to DNA, during 2013, DNA registered 270 indictments, indicting 1073 defendants, including: 1 Deputy, Member of the European Parliament; 5 Deputies, including a Vice-Prime Minister; 1 Senator, a senior officer within the Ministry of National Defence; 1 Minister, currently Member of the European Parliament; as well as numerous senior civil servants, policemen and magistrates. 40 of these indictments cover cases of fraud against the EU budget.⁹⁷ In order to recover the prejudice or to ensure the confiscation of the proceeds of crime by the courts, the prosecutors ordered "ensuring measures"⁹⁸ relating to diverse assets amounting for a total of approximately €250 million.

During the same reference period, 244 final conviction decisions were issued against 1051 defendants in the cases put forward by the DNA. Many of them were also high profile defendants, including 1 Senator, 1 Deputy, 2 Ministers as well as numerous senior civil servants, policemen and magistrates. The vast majority of the sentences consisted of imprisonment. However, there were a large number of suspended sentences (see below). This,

⁹⁶ ROMÂNIA CURTEA CONSTITUȚIONALĂ, COMUNICAT DE PRESĂ, 15 January 2014. <http://www.ccr.ro/noutati/COMUNICAT-DE-PRES-75>

⁹⁷ It seems nonetheless that fewer cases are referred from DLAF to DNA.

⁹⁸ This covers seizure measures, temporary forfeiture of money or other assets, measures that will be replaced by the court decisions to confiscate or obligate the defendant to recover the damage caused.

combined with modest results in terms of recovery of the State's financial prejudice in corruption cases as well as limited confiscation⁹⁹ could affect the deterrent effect of DNA's action, despite the very substantial figures of indictments and final convictions.

DNA also reports over the same period of reference 34 final acquittal decisions for 79 defendants, though in the case of 6 defendants the courts ruled the application of an administrative fine. This represents a small reduction in the proportion of cases ending in acquittal.

3.3. Other key institutions

The fight against corruption is not the primary function of the Directorate for Investigating Organised Crime and Terrorism (DIICOT), but its work to tackle serious crimes perpetrated by organised crime groups often includes investigating corruption as an enabler. This can be the case under the general category of "crimes against the security of the state", but also for example large-scale smuggling or trafficking by organised crime groups. DIICOT reported having handled 32 cases of organised crime linked to corruption, resulting in the indictment of 25 civil servants.

Cooperation between DNA and DIICOT is an important feature and possible conflicts of competence are handled pragmatically, with the institution who first received the complaint taking the lead, with a possibility for the General Prosecutor to arbitrate if needed.

3.4. Extended confiscation

The Ministry of Justice reported that the 2012 law on extended confiscation had been used by the prosecution between 1 January and 1 September 2013 in 34 cases to order interim measures, with a view to applying the extended confiscation.¹⁰⁰ The cases concerned for example corruption offences and/or offences assimilated to corruption, fiscal fraud, smuggling and money laundering. For extended confiscation, there need to be reasonable motives to believe that the assets are linked to crime. There has to be at least one open criminal procedure.

The first Court decision involving extended confiscation (since the introduction of the relevant provisions in the Criminal Code in April 2012) was given in March 2013 by the Tribunal of Timiș in a corruption case. The case is currently on appeal at the High Court of Cassation and Justice.

In June 2013, the High Court ruled, by final decision, the extended confiscation of two apartments which were purchased by the defendant, a police officer, convicted for trafficking in influence.

Extended confiscation still remains a relatively rare procedure and the perception is that it will take time for prosecutors and judges to become familiar with its use.¹⁰¹ Input from the High Court and communication of HCCJ decisions, support from the General Prosecutor, and training have all been identified as possible ways to improve the use of the extended confiscation law.

⁹⁹ In the cases with final conviction decisions during the reference period, the courts ruled the confiscation of the total sum of approximately EUR 2,600,000 as well as real estate and vehicles.

¹⁰⁰ Regular prosecutors' offices – 14 cases; DIICOT – 26 cases, DNA – 4 cases.

¹⁰¹ Reportedly, some prosecutors are concerned of liability in case of misapplication of the law.

3.5. Money laundering

According to the National Office on the Prevention of Money Laundering, 70% of money laundering is related to tax evasion and a portion of the remainder is linked to corruption. No specific figures related to money laundering cases related to corruption cases have been provided, but the office has underlined the good cooperation with DNA.

3.6. Court practice

3.6.1. Sanctions

An important issue is the dissuasiveness and the coherence of sanctions. The High Court of Cassation and Justice has continued to elaborate sentencing guidelines, targeting passive bribery, passive trading in influence and active trading in influence. These guidelines were approved by the Penal Chamber of the HCCJ, were sent for consultation to all courts of appeal and, after this consultation, were published on the web-site of the HCCJ.¹⁰²

Most DNA cases end with the conviction of defendants to imprisonment penalties, but a very large proportion ruled with suspension of execution.¹⁰³ From January-October 2013, 179 final conviction decisions were ruled against 857 defendants in the cases conducted by the DNA. 853 of these defendants were convicted to imprisonment penalties. Out of the 853 imprisonment penalties:

- 22,2% (189 penalties) were ruled with execution in detention and
- 77,8% (664 penalties) were ruled with suspension of execution (either - conditioned suspension of execution, or suspension of execution with surveillance)

The proportion of suspended sentences was particularly high at the level of the Courts of Appeal, with 88% (141 penalties) suspended.¹⁰⁴ It was also high at the HCCJ itself, with 75% (512 penalties) suspended.¹⁰⁵

3.6.2. Duration of proceedings

DNA has reported quicker proceedings and mentioned examples of two high level cases against a minister and against a judge where procedures were finalised from indictment in 4-6 months. Out of the 205 cases in which final decisions were ruled January-October 2013, the majority (about 73%) received a solution in less than 4 years (most of these within 2 years), whilst about 11% received a solution in less than 5 years. The rest, representing about 15%, had taken 5-10 years to come to a conclusion.

The long duration of certain cases is explained by DNA by specific circumstances such as the need to hear a very large number of defendants and/or of witnesses or multiple appeals. Past cases allowing successive delays due to an exception of unconstitutionality or the absence of a defence lawyer have now been largely excluded. In the former case, the fact that the exception of unconstitutionality no longer entails a suspension of court proceedings can be linked to a significant reduction in such cases. In the case of absent defence lawyers, a team of ex-officio

¹⁰² Tools aimed at unification of jurisprudence, such as the Appeal in the Interest of the Law, do not cover the level of penalties, but only points of law.

¹⁰³ The plea bargain system can of course influence the nature of the sentence.

¹⁰⁴ This compares to and 33% at tribunal level (though here the number of cases is small).

¹⁰⁵ However, out of the 512 final penalties ruled/maintained by the HCCJ, 308 penalties have been ruled for 308 defendants in one case. If this case is taken out of the statistics, the percentage for the HCCJ would be 47% penalties with execution in detention and 53% penalties with suspension of execution.

lawyers has been put in place at the High Court to replace absent defence lawyers at high level trials.

3.6.3. *Magistrates' special service pensions*

A number of magistrates have been involved in corruption cases, indicted by DNA and convicted by the High Court, though sentencing at the HCCJ in this area has been identified as a possible area requiring more consistency. In the past, a further difficulty was posed by the fact that magistrates convicted of corruption did not see a consequent impact on their preferential special pensions. The Ministry of Justice has proposed a law on the loss of a magistrate's special "service pension" when subject to a definitive conviction for intentional criminal offenses, including corruption. The draft law was endorsed by the SCM and has passed the Chamber of Deputies. At the time of writing, it remains before the Senate.

3.7. Political approach to high-level corruption

3.7.1. *Rules on Ministerial resignations*

The Romanian Constitution contains clear provisions on the liability of Members of the Government. In particular, its Article 109(2) foresees that "*Only the Chamber of Deputies, the Senate and the President of Romania have the right to demand the criminal prosecution of members of the Government for acts committed in the performance of their duties. If criminal prosecution was asked for, the President of Romania may order their suspension from office. Proceedings against a member of the Government shall entail his/her suspension from office. The jurisdiction belongs to the High Court of Cassation and Justice.*"

With regard to members of Parliament, where they are also Ministers, the approval of Parliament is needed in order to start an investigation. Both DNA and DIICOT have pointed to uncertainties and delays in this process.

3.7.2. *Recent practice*

The January 2013 CVM Report recommended that Romania should "*Ensure swift application of the Constitutional rules on suspension of Ministers on indictment*". It appears that cases involving incumbent Ministers have been handled in different ways and that no clear pattern emerges.

In one case, an indictment of a Minister by DIICOT has resulted in resignation. However, procedures engaged for the lifting of the immunity from investigation of the defendant have been rejected by the Parliament, whilst the prosecution considered that there was enough evidence to start a case.¹⁰⁶ In another high-profile case regarding an indictment for electoral fraud, no steps have been taken at the time of the drafting of the present report. In a third case, a first instance sentence by the High Court resulted in immediate resignation.

4. TACKLING CORRUPTION AT ALL LEVELS

Perception surveys consistently highlight corruption as a serious problem in Romania.^{107, 108} Successive CVM reports have pointed to the need for determined and sustained efforts at all levels.¹⁰⁹

¹⁰⁶ COM(2013) 47 final, p7.

¹⁰⁷ http://ec.europa.eu/public_opinion/archives/ebs/ebs_374_en.pdf

¹⁰⁸ <http://cpi.transparency.org/cpi2013/results/>

4.1. The National Anti-corruption Strategy (NAS)

The National Anticorruption Strategy 2012-2015 continues to develop. This includes activities related to monitoring implementation, notably through peer reviews involving NGOs in the last quarter of 2013. Based on an assessment of risks, each institution covered by the NAS must define and enforce disciplinary rules and internal control standards on integrity, ethics and vulnerable positions. From the reviews and monitoring it appears that there is no common approach to risk assessment¹¹⁰ and that there is a range of different rules and standards applied in the different institutions. Uncooperative institutions are not sanctioned as such, though there is a blacklist of those who have not published their reports.

NAS implementation is monitored by thematic evaluations missions, taking place at local and central level. The NAS also has a portal,¹¹¹ which offers the possibility to report data on preventive measures indicators as well as self-assessments of public institutions. The participation of local authorities to the NAS has also progressed, and out of 3177 administrative units, 2532 have now nominated contact persons for the activities related to the implementation of NAS.

4.2. Examples in tackling corruption

4.2.1. Fighting low and medium level corruption

Petty corruption is recognised as a problem in many areas (with all kinds of "informal payments" requested).¹¹² Tackling this involves a combination of prevention and the effective pursuit of cases of corruption, where the fight against petty corruption is one of the stated priorities of the General Prosecutor.

The Public Ministry has reported that the number of resolved cases in 2013 increased by about 9% compared to a similar period of reference in 2012. The number of indictments went up by about 15% and the number of defendants sent before courts increased by about 22%. Nevertheless, experts consulted by the Commission saw the overall numbers as small, notably in comparison to what perception surveys suggest about the prevalence of corruption.

The General Prosecutor has also re-opened decisions not to indict on charges of conflict of interests and eventually quashed a few of those decisions. In the past, the lack of attention given by the prosecution to the fight against conflicts of interests has been highlighted by ANI and others.

The National Anti-Corruption Strategy also has a local component in the form of local "task forces" regrouping all the correspondents from different administrations, ranging for example from the Coastguards and the Police to schools and pension offices. There are platforms to share best practices in terms of risk identification and preventive measures.

Some of the underlying causes linked by experts to low-level corruption, such as low salaries, are difficult to tackle. But some of the Romanian authorities working in this field have identified concrete measures to discourage and dissuade corrupt practices. Examples include:

¹⁰⁹ COM(2012) 410 final; COM(2013) 47 final.

¹¹⁰ The risk assessment tool which has already been introduced by GAD in 2009 could be a good basis according to independent experts consulted by the Commission.

¹¹¹ <http://sna.just.ro/Paginăprincipală.aspx>

¹¹² Though some businesses consulted by the Commission report a slight decrease in requests for bribes, for example during inspections by public bodies.

control of cash before and after shift for the police and the customs, cameras in patrol cars, schedule people randomly for the driving licence examination, video monitoring and rotation of city hall staff receiving cash payments, and a system enabling online tracking of administrative demands to limit physical contacts between the public and officials. The use of technology and increased transparency have been identified as general factors that can assist in tackling corruption.

4.2.2. *Public administration*¹¹³

Further steps were accomplished in order to strengthen the administrative capacity of the National Agency for Fiscal Administration (ANAF) in the fight against corruption and tax evasion, notably by setting up the Fiscal Antifraud General Directorate (FAGD) within ANAF. It will provide specialised technical support to prosecutors in carrying out criminal investigations, in cases concerning economic and financial crimes. To this end, the antifraud inspectors within this department are seconded to prosecution offices.

The general Directorate for Anti-Corruption within the Ministry of the Interior (GAD) has established over the last years a positive track record for fighting corruption within the Ministry. There was a proposal from the government to extend its competence for preventing and countering corruption to other ministries. But it was not accepted by the legislator. The GAD also now operates a call centre which is available to citizen free of charge to report corruption offenses.¹¹⁴

4.2.3. *Projects*

Specific anti-corruption projects, for example in the Ministries of Education, Health, Justice and Regional Development as well as in ANAF have continued. One important element has been the training of civil servants, illustrating an increasing emphasis on prevention in the fight against corruption.

The following projects supported by Romanian NGOs and by EU serve as examples:¹¹⁵

Ministry of Education: For many years fraud had not been considered a priority but the profile has been raised by scandals in higher education, for example with the fraudulently obtained medical degrees (a case which resulted in jail sentences). Cases continue to be identified, both by DNA and by the Ministry of Education, albeit on a small scale statistically. The use of webcams in exam rooms has been promoted and a secure transmission system is used for the dispatching of exam subjects. A strategy on the fight against corruption in education was adopted in September 2013 and financial support granted. The Ministry is considering revising the curricula to include corruption issues and has invited magistrates to talk in schools.

Ministry of Health: the need to fight corruption both in terms of "informal payments" and public procurement is acknowledged and the health sector appears to be one of the most problematic in Romania. A study on corruption in the health services has been performed, with the support of EU funds. It has revealed a "cartelisation" of companies delivering hospital supplies and abusive payments for infrastructure (overcharging or failing to supply goods as contracted). "Informal payments" are widespread, with a few exceptions (emergency

¹¹³ This is not an exhaustive list, but reflects concrete cases presented during CVM expert missions.

¹¹⁴ 40.889 calls were received between 2009 and August 2013.

¹¹⁵ This is not an exhaustive list, but reflects concrete cases presented during CVM expert missions.

services for example). For public procurement, a central procurement agency for health has been set up, which has already allowed for substantial savings (stents, consumables, vaccines, ambulances...).

4.2.4. *Civil society*

Civil society in Romania plays an important role in pushing forward the fight against corruption and changes in practices, both by documenting and highlighting the problems and by providing support and expertise to concrete anti-corruption projects.

4.3. **Public procurement**

4.3.1. *Institutional and legal changes*

Streamlining of legislation and ensuring more stability emerge as key issues from magistrates and business operators involved with public procurement in Romania. Several NGOs, business and independent experts have reported the continuing vulnerability of public procurement procedures to corruption. Whilst this is not a problem unique to Romania, there is also a question of administrative capacity to handle the procedures, in particular at local level, which calls for particular attention. This also illustrates how procedures to ensure upstream prevention of corruption are particularly important in public procurement.

As regards criminal cases concerning public procurement, other than those falling under the competence of the DNA, the General Prosecutor reported that 109 cases were solved during January-October 2013. Five indictments have been issued, resulting in 23 defendants sent to trial. 8 of them were provisionally arrested. Throughout the reporting period, the courts delivered 3 non-definitive conviction decisions by which 6 defendants were convicted, and 1 non-definitive acquittal decision.

An important issue for public procurement will be the strengthening the cooperation between the National Authority for Regulation and Control of Public Procurement (ANRMAP), ANI and other administrative and judicial authorities in preventing/identifying conflict of interest. This is particularly important in the context of the proposed new system for ex ante controls on conflict of interest to be undertaken by ANI (see above).¹¹⁶

The impact of the “decentralisation law” adopted by the Romanian Government in November 2013 on the fight against corruption at local level is unclear. As such, decentralisation can bring positive consequences and is not an issue of direct relevance from a CVM perspective. Nonetheless, according to the ANI 2012 Annual report,¹¹⁷ a substantial number of cases of conflicts of interests and of the cases of incompatibilities evaluated by ANI occurred in local government. This is in line with experience in other Member States, and points to the need to accompany the transfer of responsibilities with dedicated measures to address the risk of corruption.

¹¹⁶ Memoranda were signed between ANRMAP and ANI on 30 January 2013 on the operationalization of an integrated information system for preventing and detecting potential conflicts of interest and on 10 April 2013 on ensuring the prevention and ex-ante detection of conflict of interest in public procurement.

¹¹⁷ http://www.integritate.eu/UserFiles/File/Rapoarte/Raport_ActivitateaANI_Anul2012_CfLegii544_2001.pdf

4.4. Asset recovery

The recovery rate to ensure that decisions of the courts with financial consequences accrue to the public purse remains very low – estimates suggest that the Romanian Asset Recovery Office (ARO) recovers less than 10% of assets notified by Courts.

In criminal cases, the State can recover the damage or part of it only through the confiscation of assets found in the course of the criminal procedure. Most of the financial sanctions imposed by courts are damages, but it seems that the public authorities responsible for recovering these damages only rarely pursue the cases.

For public procurement contracts, in the case of fraud a financial correction will be imposed by the management authority, deciding that the contractor has to pay back. The recovery of these sums is an administrative question, and it seems that the pursuit of these cases and the enforcement of recovery by public authorities and bailiffs are weak. Procedures in such circumstances would normally be expected to be automatic, which points to a need for training and awareness. The Court of Accounts also has a role to play.

In order to improve the performance in the recovery of assets, priority areas have been identified by the Romanian authorities: the development of asset management institutional capacities, the appointment of 280 financial investigators within prosecution offices, enhancing international cooperation via ARO and the enforcement of relevant legislation on extended confiscation and early selling of movable assets. A number of shortcomings regarding the capacity of the Romanian authorities to confiscate and recover the proceeds of crime were also identified in a recent study finalised in July 2013.¹¹⁸ The study also includes a series of recommendations for improvement.

There has been a doubling in the number of requests received by the Romanian ARO in 2013 compared to the same period in 2012 (88 compared to 43). There is also an overall increase starting from the natural and legal persons under investigation to the identified assets. There is also a substantial increase (more than fourfold) in the number of identified vehicles, apartments and bank accounts.

¹¹⁸ Study by the Basel Institute on Governance:

http://www.baselgovernance.org/fileadmin/docs/publications/commissioned_studies/130722_Romania_ARO.pdf