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From: Secretary-General of the European Commission,
signed by Mr Jordi AYET PUIGARNAU, Director

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To: Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of
the European Union

Subject: COMMISSION STAFF WORKING DOCUMENT
ROMANIA : Technical Report
Accompanying the document
REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT
AND THE COUNCIL
on Progress in Romania under the Co-operation and Verification
Mechanism

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COMMISSION STAFF WORKING DOCUMENT

ROMANIA : Technical Report

Accompanying the document

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

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

{COM(2017) 751 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

List of acronyms

ANABI: National Agency for the Management of Seized Assets

ANAF: National Agency for Fiscal Administration

ANI: National Integrity Agency

ANAP: National Agency for Public Procurement

ARO: Asset Recovery Office

CCJE: Council of Europe Consultative Council of European Judges

CCR: Constitutional Court

CVM: Cooperation and Verification Mechanism

DGA: Anti-corruption Directorate General – Ministry of Internal Affairs

DIICOT: Directorate for Investigating Organised Crime and Terrorism

DLAF: Figh Against Fraud Department

DNA: National Anti-Corruption Directorate

ECHR: European Court of Human Rights

ERDF: European Regional Development Funds

ESF: European Social funds

HCCJ: High Court of Cassation and Justice

MoJ: Ministry of Justice

NAS: National Anti-corruption Strategy

NIC: National Integrity Council

NIM: National Institute of Magistracy

SCM: Superior Council of the Magistracy

References to "CVM reports" refer to the Commission Progress Reports and the accompanying Technical Reports.

CVM report 2016: COM(2016) 41 and SWD(2016) 16 – *report of progress in 2015*

CVM report 2017: COM(2017) 44 and SWD(2017) 25 – *report of progress since 2007 and in 2016*

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

1. INTRODUCTION

This technical report sets out the information and the data which the Commission has used as the basis for its analysis under the Cooperation and Verification Mechanism (CVM). This information has been collected from a variety of sources. In the first place, the Commission has had the benefit of working closely with the Romanian government and key judicial and State bodies on CVM issues, which have provided detailed and focused reports, as well as in frequent face-to-face meetings.^{2,3} The Commission services follow developments through a permanent presence in Romania.⁴ Commission contacts with the Romanian administration across the full range of EU policies also help to inform this work. The Commission also meets with non-governmental organisations active in the area of judicial reform and anti-corruption projects, with judges and prosecutors unions. This report remains the responsibility of the Commission services.

The Commission also supports the efforts of Romania in achieving the CVM objectives through funding under the European Structural and Investment Funds and the Internal Security Fund – Police. In the 2014-2020 period, the Administrative Capacity Operational Programme (ESF) will provide funding of about EUR 103 million for judicial reform projects, including 35 million specifically for anti-corruption (in line with the updated anti-corruption Strategy), and EUR 35 million to support reform and improvements in public procurement. ERDF resources of up to EUR 15 million will be invested in capacity building and technical assistance in public procurement, in fraud prevention for Management Authorities and in the Fight Against Fraud Department (DLAF). Financing by EU funds can also be subject to the agreement of strategies and implementation of actions with the Commission (ex-ante conditionalities for using the Funds). Over the years, Romania has also benefited from bilateral support from EU Member States.

The Commission further draws on the various studies and reports that are available from international institutions and other independent observers in the field of judicial reform and the fight against corruption. Since the time when the CVM benchmarks were adopted, there have been major developments in ECHR case-law, international standards and best practices,⁵ and comparative information on national justice systems in the EU,⁶ which also help to give an objective and comparable measure of the development of the Romanian judicial system and the fight against corruption.

The CVM Commission Decision of 2006 defined four benchmarks for Romania. These benchmarks have never been modified. The assessment of the progress in Romania has involved looking at the structural conditions (such as laws, institutions, and resources); at the results and track record; and at sustainability and irreversibility. Each year since the entry into force of the Decision, the Commission has made recommendations with regard to each benchmark to reflect progress and how the progress might be sustained or extended, normally focusing on a time horizon of the coming year.

² In 2017, the Commission services had two fact-finding missions in Romania.

³ In 2017, Commission representatives had meetings with the Ministers of Justice, officials from the Ministry of Justice, the National Agency for Fiscal Administration (ANAF), the Ministry of Regional Development and Public Administration (MRDAP), the High Court of Cassation and Justice (HCCJ), the Superior Council of the Magistracy (SCM), the Prosecutor General, the National Anti-Corruption Directorate (DNA), the Directorate for Investigation of Organised Crime and Terrorism (DIICOT), the National Institute of the Magistracy (NIM), the Judicial Inspection, the National Integrity Agency (ANI), the National Agency for Public Procurement (ANAP), the President and members of the Chamber of Deputies, the Vice-President and members of the Senate, the Constitutional Court.

⁴ The Commission has a CVM resident adviser in Bucharest.

⁵ The most important being the developments in the European Court of Human Rights (ECHR) case-law on fair trial rights, the UN Convention Against Corruption, Venice Commission Reports on European standards as regards the independence of the judicial system, and the European Commission for the Efficiency of Justice (CEPEJ) indicators.

⁶ The EU Justice Scoreboard <http://ec.europa.eu/justice/effective-justice/scoreboard/>

The Commission adopted the last Cooperation and Verification Mechanism report on 25 January 2017, presenting a positive assessment of 10 years' progress in judicial reform and the fight against corruption. This report used a long-term perspective to identify the key remaining steps to reach the goals of the CVM. Most of them focus on the responsibility and accountability required by the Romanian authorities and on the internal safeguards needed to ensure that progress achieved is irreversible. When these steps set out under a benchmark are taken, the respective benchmark will be considered provisionally completed. When this applies to all benchmarks, the CVM will be closed. This process resulted in twelve final recommendations set out in the January 2017 CVM report. Complying with the twelve recommendations can therefore be considered as sufficient to meet the CVM goals – except if developments were to clearly reverse the course of progress underlying the baseline assessment of January 2017.

This technical report will therefore be focused on the progress under each of the key remaining recommendations. Where necessary, the assessment also reports on developments which could put into question the previous positive assessment from the Commission on progress in judicial reform or the fight against corruption.

The Commission's 2014, 2015 and 2016 CVM reports were able to highlight a positive trend and a track record pointing to strong progress and growing irreversibility of the reforms under the CVM. This positive trend was confirmed in 2016 with a continued track record for the judicial institutions in a time of change in leadership and a strong impetus by the government to strengthen corruption prevention. The 10 years' perspective of developments under the CVM shows also that, despite some periods when reform lost momentum and was questioned, Romania has made major progress towards the CVM benchmarks.

At the same time a number of key issues already identified in earlier reports have remained outstanding, and therefore this report cannot conclude that the benchmarks are at this stage satisfactorily fulfilled.

January 2017 CVM report, p. 14

2. PROGRESS ON KEY REMAINING STEPS

On the basis of the key remaining steps identified in the January 2017 CVM report, this section will describe the actions taken by the Romanian authorities to fulfil the recommendations. If necessary, it may also include other developments which could have an incidence on current or past assessments from the Commission on progress in judicial reform or the fight against corruption.

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

Judicial independence

Recommendation 1: Put in place a robust and independent system of appointing top prosecutors, based on clear and transparent criteria, drawing on the support of the Venice Commission.

Overview of progress

Successive CVM reports have highlighted that even if there has been a trend towards more merit-based and transparent appointments, the law on appointments of top prosecutors and its implementation is not sufficiently robust to guarantee against the impact of strong political discretion in the appointments. From past experience, this can result in doubts being cast on the independence of a candidate, create delays in appointments due to political deadlock, or even lead to the appointment of magistrates who may later prove to have integrity issues. The dismissal process mirrors the

appointment process and has created important tensions this year, with calls from political figures for the Minister of Justice to initiate a procedure for dismissing the Chief Prosecutor of the National Anti-Corruption Directorate (DNA) and the Prosecutor General.⁷

At the end of August, the Minister of Justice tabled a proposal for the appointment procedure of top prosecutors as part of a package of amendments to the three Justice laws.⁸ The three Justice laws, dating back to 2004, regulate the status of judges and prosecutors, the organisation and function of the courts and prosecution offices and the Superior Council of the Magistracy.

The process of amending the three Justice laws is ongoing for more than two years. It was initiated by the Superior Council of the Magistracy (SCM) in 2015 to modernise a series of provisions regarding the career of magistrates (terms for promotion to a higher court, retirements, special sickness leaves, entry into profession) and to change the appointment procedure for top prosecutors, in view of depoliticising the selection process. The Ministry of Justice carried out an extensive consultation process in 2016 and finalised new drafts in December 2016 but eventually did not adopt them prior to the parliamentary election.

In January 2017, the new Government decided to re-consult the SCM, as the Council had been newly elected. The SCM launched a new consultation to all courts and prosecution offices and proposed additional changes to the drafts in April 2017. In a press conference on 23 August, the Minister of Justice presented the main lines of the new drafts. The announcement triggered many negative reactions.⁹ The draft includes a series of new provisions which, in that form, had not been part of prior consultations and are not accompanied by an impact assessment. Criticisms centred on the consequences for judicial independence, including in respect of the procedure on the appointments of top prosecutors.

At the end of September, after consultation of all courts and prosecution offices, the SCM gave a negative opinion on the drafts. In its motivation, the SCM criticised many new provisions for their potential adverse effect on judicial independence or on the functioning of the judicial system. The opinion of the SCM was also critical on the proposal of the Minister regarding the appointment procedure for top prosecutors, a view echoed by several judicial institutions. In the SCM's view, the procedure proposed falls short of ensuring the adequate guarantees in terms of transparency, control and checks-and-balances. The first reaction of the Minister of Justice was to state that the opinion from the SCM, which is non-binding, would not affect the draft. Soon a petition was started by one of the judges associations, which to date has secured over 4000 signatories, representing more than half of the total number of magistrates in Romania, requesting the Minister of Justice to respect the SCM opinion and withdraw the draft laws, pointing to a lack of sound impact assessment for the changes proposed.¹⁰ Several civil society organisations have also expressed their support for this petition and requested the Minister to withdraw the laws.¹¹ It is to be noted that the Council of Europe Consultative Council of European Judges (CCJE) recommended in a recent opinion that “*the judiciary should be*

⁷ Following a Constitutional Court Decision (68/2017), which had ruled that there is a legal conflict of a constitutional nature between the Public Ministry – The Prosecutor's Office attached to the High Court of Cassation and Justice – the National Anticorruption Directorate and the Government of Romania, in relation to an investigation within the Ministry of Justice following a complaint on irregularities in the decision making of Government Emergency Ordinance (EOG) 13/2017 in January 2017.

⁸ Law no. 303/2004 on the statute of judges and prosecutors, Law no. 304/2004 regarding the Judiciary and Law no. 317/2004 on the Superior Council of Magistracy

⁹ Including from the President of Romania, the magistracy, the opposition, judges associations and NGOs

¹⁰ On 17 October, more than 4000 magistrates had signed according to <http://www.forumuljudecatorilor.ro/index.php/archives/2813>

¹¹ http://adevarul.ro/news/eveniment/65-organizatii-cer-premierului-ministrului-justitiei-renunte-proiectul-lege-privind-modificarea-legilor-justitiei-1_59e5afbd5ab6550cb8342bdd/index.html
<http://www.nineoclock.ro/romania-100-platform-65-ngos-urge-govt-to-scrap-bill-amending-justice-legislation/>

*consulted and play an active part in the preparation of any legislation concerning their status and the functioning of the judicial system”.*¹²

At the end of October 2017, there was a change in the legislative procedure. On 25 October a Parliamentary Committee took up the drafts of the Justice laws as a parliament own initiative. These new drafts were not discussed with the judiciary, nor adopted by the Government. The Government therefore took no further responsibility for the draft laws.

The Parliament made public the new drafts, further amending the initial proposal from the Minister of Justice. On 9 November, the SCM gave a negative opinion on the drafts. (See also Recommendation 4 and Political Report (COM (2017) 751) on the laws on Justice in general).

The proposals for the appointments of top prosecutors in the drafts prepared by the Minister and in the Parliament drafts have been a key part of the debate on the justice laws. It concerns the amendments to Article 54 of law 303/2004 on the appointment and dismissal procedures for the Prosecutor General, Chief Prosecutor of DNA, Chief Prosecutor of the Directorate for Investigating Organised Crime and Terrorism (DIICOT), of their deputies and of the heads of section in DNA and DIICOT. An assessment should take into account the guidelines of the Venice Commission that any appointment procedure for the Prosecutor General or equivalent post needs a balance "such as to gain the confidence of the public and the respect of the judiciary and the legal profession."¹³ The degree of discretion for the Minister of Justice in the selection procedure and in the revocation procedure is one of the issues in the debate, as well as the role of the President. As in the law in force, the procedural aspects linked to the extent of political influence are (1) the selection process, where the Minister alone undertakes the first selection of candidates (2) the Minister can propose the renewal of an appointment once. The term of appointment, which is relatively short makes the position more vulnerable to external influence. Some of these issues were already identified in previous CVM reports as raising questions with regard to respecting the guidelines of the Venice Commission.¹⁴ Another issue concerns the lack of safeguards involved in the dismissal procedure, which can be initiated by the Minister of Justice. This has particular importance given the prevalence of conflicts between the executive/legislative power and the judiciary.

In its proposal of April 2017, with agreement of the judiciary which had been consulted on the proposal, the SCM had proposed a procedure in which top prosecutors are appointed by the President of Romania at the proposal of the Superior Council of Magistracy.

The 2016 CVM report also recommended that a procedure which involves a political element should not be applied to lower management posts, deputies and heads of section (which would be left to the SCM and leadership of the organisations concerned). This recommendation has not been followed up with the amendments. Further amendments (Article 55 of law 303/2004) propose to replicate the above procedure with strong involvement from the executive for all management posts in the Prosecutor's Office attached to the High Court of Cassation and Justice, DNA and DIICOT. Currently these are appointed by the SCM following a competition organised by the SCM and the National Institute of Magistracy.

The Minister of Justice has justified these amendments in the explanatory memorandum by the "*right and obligation of the Minister of Justice to monitor the way in which the prosecutor's offices are managed: In this way, the special law assigns to the Minister of Justice a role in the procedure for the appointment of the prosecutors with managerial positions, giving substance to the provisions of Article 132 (1) of the Constitution which reads that "prosecutors shall carry out their activity in*

¹² The CCJE has stressed the importance of judges participating in debates concerning national judicial policy. In addition, the judiciary should be consulted and play an active part in the preparation of any legislation concerning their status and the functioning of the judicial system. Consultative Council of European Judges, [Opinion No.18 \(2015\)](#), "The position of the judiciary and its relation with the other powers of state in a modern democracy",

¹³ Venice Commission report. Report on European standards as regards the independence of the judicial system – Part II: The prosecution service, [CDL-AD\(2010\)040](#)

¹⁴ CVM report 2017 and CVM technical report 2017

accordance with the principle of legality, impartiality and hierarchical control, under the authority of the Minister of Justice".¹⁵ In other amendments, Articles 1 and 62 of the same law, the authority of the Minister of Justice is strongly emphasised, also bringing the execution of tasks of the Public Ministry under the authority of the Minister of Justice. The result is a substantial cumulative list of changes which seem to increase the authority of the Minister of Justice on the prosecution services relevant to their operational and managerial independence.

Different models with regard to the appointments to the position of Prosecutor General (or similar top prosecution posts) are recognised by the Venice Commission. Previous CVM reports have put the emphasis on ensuring appropriate safeguards in terms of transparency, independence and checks and balances, even in cases where the final appointment decision would remain with the political level. This is why the Commission has recommended that Romania asks an opinion of the Venice Commission on the new drafts. The Minister of Justice had committed to consult the Venice Commission on this point before the introduction of the amendments directly into Parliament. Since then the Parliament has not yet made a commitment that it will consult the Venice Commission.

In addition to the ongoing process led by the Minister of Justice, there is another parallel and similar proposal from the President of the Senate on the appointment of top prosecutors and of the President of the High Court of Cassation and Justice. This proposal is being discussed in Parliament (in decisional chamber already). The Minister gave a positive opinion, whereas the SCM gave a negative opinion. This parallel approach has added a further element of uncertainty to the process.

Recommendation 2: *Ensure that the Code of Conduct for parliamentarians now being developed in Parliament includes clear provisions on mutual respect between institutions and making clear that parliamentarians and the parliamentary process should respect the independence of the judiciary. A similar Code of Conduct could be adopted for Ministers.*

Overview of progress

Past CVM reports have acknowledged that the successful prosecution and conviction of many prominent figures in Romania is a sign of judicial independence, showing that even high office holders and prominent personalities are not beyond the law if they have committed a crime. However, they have also noted that this work has triggered a reaction in terms of public attacks aiming at discrediting individual magistrates or the judicial institutions. This remains the case in 2017, with risk to public confidence in the judicial system as a whole, as well as the impact on individual magistrates. The Venice Commission has noted that: "Compliance with the rule of law cannot be restricted to the implementation of the explicit and formal provisions of the law and of the Constitution only",¹⁶ and

¹⁵ In an opinion of 2014 on the Romanian Constitution, the Venice Commission stressed, that "only a few of the countries belonging to the Council of Europe have a prosecutor's office forming part of the executive authority and subordinate to the Ministry of Justice (e.g. Austria, Denmark, Germany, the Netherlands). The Commission notes that there is a widespread tendency to allow for a more independent prosecutor's office, rather than one subordinated or linked to the executive. [...] Also, it is important to note that in some countries, subordination of the prosecution service to the executive authority is more a question of principle than reality in the sense that the executive is in fact particularly careful not to intervene in individual cases. Even in such systems, however, the fundamental problem remains as there may be no formal safeguards against such intervention. The appearance of intervention can be as damaging as real interference [...]" The Venice Commission recalls the importance, already discussed during its exchanges with the Romanian authorities and the representatives of the associations of Romanian magistrates, of a unified and coherent regulation of the status of prosecutors, with clear, strong and efficient guarantees for their independence. It invites the Romanian authorities to review the system in place with a view to addressing the shortcomings noted in terms of coherence and available guarantees for its proper operation."

¹⁶ Venice Commission, [Opinion no. 685 / 2012](#), CDL-AD(2012)026, Opinion on the compatibility with Constitutional principles and the Rule of Law of actions taken by the Government and the Parliament of Romania in respect of other State institutions and on the Government emergency ordinance on amendment to the Law N° 47/1992 regarding the organisation and functioning of the Constitutional Court and on the

the Commission recommendation sought to encourage the putting in place of a mechanism which could create more of a sense of responsibility for public statements and their consequences.

A new Code of Conduct for parliamentarians was prepared in May 2017 and was adopted by both Chambers of Parliament on 11 October 2017.¹⁷ The Code of Conduct does not specifically mention respect for the independence of the judiciary but includes a general provision on the respect of separation of powers. "*Deputies and senators shall exercise their mandate in accordance with the principle of the separation and balance of powers — legislative, executive, and judicial — within the framework of constitutional democracy.*" The Code includes a process and sanctioning mechanism in case of breach of the code. However, as the provision on respect of separation of powers is very general, establishing breaches and imposing sanctions for excessive criticism of the judiciary may require practical examples and guidelines. GRECO has noted how further practical implementation steps can help the practical application of such a Code.¹⁸ A specific opportunity exists in the form of decisions by the Superior Council of Magistracy against statements of a Member of Parliament criticising a magistrate or the judicial system (see below), which could be used to automatically trigger follow-up in Parliament. In the reporting period, no cases of application of the Code of Conduct for Members of parliament have been reported.

In July 2017, the Government adopted a Code of Conduct for Ministers,¹⁹ which also includes a general provision on the respect of separation of powers. As with the Code of Conduct for parliamentarians, the regime for application and sanctions is not set out in detail and has not yet been tested.

The Superior Council of Magistracy (SCM) is the guarantor of the independence of the judiciary. As in previous years, the SCM has acted to defend the independence of the judiciary against political and media attack. In the reporting period, the SCM took 2 decisions that media or political statements have violated the independence of the judicial system and 7 decisions that statements have affected the independence or professional reputation of a magistrate.²⁰ Overall the actions and the set of tools at the disposal of the SCM against political statements and media attacks endangering the independence of the judiciary appeared not to be effective in counteracting the level and intensity of criticism faced by the judicial system as a whole and by individual magistrates. In the reporting period, criticism of the judicial system and magistrates in the media has been particularly strong and present. The individual targets of these attacks appeared to be especially prosecutors and judges dealing with high-level corruption cases. It has also extended to criticism directed at the judicial system as a whole.²¹

The Superior Council of the Magistracy is also guarantor of the independence of the judiciary when it provides an opinion on relevant draft laws and this role should be recognised by all state powers. In January, February and September 2017, the SCM issued negative opinions on draft laws, also in some

Government emergency ordinance on amending and completing the Law N° 3/2000 regarding the organisation of a referendum of Romania,

¹⁷ <https://www.juridice.ro/wp-content/uploads/2017/10/Codul-de-conduită.pdf>. The Code of Conduct does not appear to be advertised and linked on the website of the Parliament (respective chambers).

¹⁸ A similar analysis was made in the 4th evaluation of the Group of states Against Corruption (GRECO) http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/Eval%20IV/GrecoEval4%282015%294_Romania_EN.pdf

¹⁹ <http://gov.ro/ro/guvernul/sedinte-guvern/cod-de-conduita-al-membrilor-guvernulu>. The Code of Conduct does not appear to be advertised and linked on the website of the government.

²⁰ The average duration from the request till the decision was of 58 days. In the same time, there were 9 decisions in which the request of defence of the reputation has been withdrawn (7 requests from prosecutors and 2 from judges)

²¹ Statements quoted in the media included arguments that the whole judicial system is dysfunctional, that the prosecution services in particular "are out of control", and therefore the "judicial system urgently needs reform" that will bring "the situation back to normality".

cases criticising the decision-making process, when it felt these could negatively impact the independence of the judiciary.²²

Judicial reform

Recommendation 3: *The current phase in the reform of Romania's Criminal Codes should be concluded, with Parliament taking forward its plans to adopt the amendments presented by the government in 2016 after consultation with the judicial authorities. The Minister of Justice, the SCM and the High Court of Cassation and Justice should finalise an action plan to ensure that the new deadline for the implementation of the remaining provisions of the Code of Civil Procedures can be respected.*

Overview of progress

Criminal Code and Code of Criminal procedures

The new Criminal Code and Code of Criminal Procedures entered into force on 1st February 2014. Their entry into force was a successful endeavour from both the Romanian government and the magistracy. However, a number of developments have called into question the stability of the Codes, and in some cases urgent amendments have been required. The Governments since 2014 have proposed a number of amendments to address shortcomings, which were consolidated in several draft laws in 2016 to ensure stability of the legal framework. These amendments have still to a large extent to be approved in Parliament.²³ The Commission therefore recommended that the current phase of this reform needed to be concluded, with Parliament taking forward its plans to adopt the amendments presented by the government in 2016 after consultation with the judicial authorities.

The Commission also recommended that the Government and Parliament should ensure full transparency and take proper account of consultations with the relevant authorities and stakeholders in decision-making and legislative activity. (See also recommendation 4 below).

In 2017 there have been a number of developments with regard to the Criminal Code and the Code of Criminal Procedures. While some of these developments serve the objectives underpinning the Commission recommendation, others raise questions about both the stability of the reform and the transparency and inclusiveness of the process.

The Parliament did not adopt the draft amendments proposed by the government in 2016, which had been the result of broad consultations with the judiciary.²⁴

In parallel, from March to June, the Government has prepared a new draft law amending the Criminal Code and Code of Criminal Procedures. The draft aims to align the legislation with recent Constitutional Court (CCR) decisions; it has been consulted with the judiciary and civil society, and aimed at following strictly the decisions of the CCR. The draft was ready for adoption mid-June, but a new decision from the CCR on 6 June on the abuse of function halted consideration of the draft and a new consultation started on introducing a monetary threshold to determine whether abuse of function is a criminal offence. Eventually, the Minister of Justice split the package in two draft laws: one whose objective is compliance with the CCR decisions (ongoing) and another one regarding the transposition of provisions of two EU directives, on confiscation and presumption of innocence (the transposition deadlines are 4/10/15 and 1/04/18, respectively).²⁵ Regarding the compliance with CCR decisions,

²² http://old.csm1909.ro/csm/linkuri/02_02_2017_86205_ro.pdf;
http://old.csm1909.ro/csm/linkuri/25_01_2017_86049_ro.htm;
<https://www.csm1909.ro/PageDetails.aspx?PageId=299&FolderId=4535>;
http://old.csm1909.ro/csm/linkuri/03_10_2017_89465_ro.pdf

²³ CVM reports 2015, 2016, 2017

²⁴ The progress reports from the Government and the Parliament do not mention progress on these pending proposals.

²⁵ Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union as well as Directive 2016/343

no new law has been proposed yet, but the decision of the Constitutional Court on the abuse of function entered into effect in August, creating legal uncertainty for ongoing criminal files.

In May, in a complementary exercise, the Minister of Justice opened a larger consultation with the judiciary, legal practitioners and academia on improvements to the codes – in particular with regard to problems resulting from the application of the codes. The consultation will be concluded in November and may lead to additional amendments of the Criminal Code and Code of Criminal Procedures in the near future. In addition, in new rulings in 2017, the Constitutional Court ruled as unconstitutional a number of provisions²⁶ of the Criminal Code and Code of Criminal Procedures, which could require further urgent amendments.

Other amendments to the Codes more specifically concern the legal framework for the fight against corruption and also illustrate shortcomings in terms of consultation and preparation. On 31 January 2017, the Government adopted an Emergency Ordinance (EOG 13/2017) amending the Criminal Code and the Code of Criminal procedures, together with a draft law on pardons, with clear implications for corruption cases. The adoption of the Emergency Ordinance was eventually repealed before its entry into force.^{27, 28} Further, in April, while the Minister of Justice was preparing a draft law to align the provisions on conflict of interest with a CCR decision, Parliament adopted a law largely decriminalising conflict of interest as a criminal offence, such that 3 out of 4 activities which could constitute the crime have been removed.^{29, 30} Though challenged in the CCR, the Court upheld the law and it entered into force. The Office of the Prosecutor General estimates that 27 ongoing and 128 past cases of conflict of interest are potentially affected.

Civil Code and Code for Civil Procedures

The January CVM report included a recommendation that the Minister of Justice, the Superior Council of Magistracy (SCM) and the High Court of Cassation and Justice (HCCJ) should finalise an action plan to ensure that the new deadline for the implementation of the remaining provisions of the Code of Civil Procedures can be respected. In December 2016, a new deadline of January 2019 was set for the entry into application of those provisions. There are four sets of provisions.

The first concerns proceedings in Council Chambers. The entry into application of these provisions requires that there are enough Council rooms in the courts concerned. A working group on ensuring the proper infrastructure was set up by the Minister of Justice. The first phase to collect all the needs of the courts in terms of infrastructure has been finalised as planned and the working group has prepared an action plan for infrastructure arrangements which will now be consulted with the relevant courts, and then adopted by the Government.³¹

Another set of provisions concern the threshold to file a second appeal at the High Court of Cassation and Justice in litigation cases with a financial claim. Both the law currently in force (dating from

of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.

²⁶ On the 16 decisions ruled by the CCR in 2017, the majority referred to procedural aspects, such as the possibility of revision of courts decisions, including acquittal decisions (CCR decision no 2/2017) or procedures of cassation (CCR decision of 17 October 2017), possibility of challenging a solution (CCR 18/2017), challenging a measure of technical surveillance (CCR 244/2017). The CCR also interpreted the sense in which a provision could be constitutional, e.g. provisions on and similar to the abuse of office (CCR 518/2017 and 392/2017).

²⁷ The Parliament adopted on 24 February the Government Emergency Ordinance repealing the Emergency Ordinance 13/2017

²⁸ The draft law on pardons is pending in the Chamber of Deputies, and was already adopted by the Senate.

²⁹ On 24.07.2017 promulgated and becomes Law no. 193/2017

³⁰ The 3 elements eliminated are: (1) elimination of liberal professions or of people exercising a public function from the scope of the provision; (2) situations where the public official took part in the decision process through which a material benefit has been obtained directly to him or a close relative; (3) situations where the public official acts procures a profit to a person from whom he benefited of an advantage of all nature.

³¹ When possible, additional infrastructure work should be included in already-planned court renovation works in partnership with the World Bank..

2013) and the provisions of the Code of Civil Procedures to enter into force in January 2019 set a minimum threshold to the value of the claims for allowing a second appeal to the HCCJ.³² These provisions are part of the judicial reform promoted by the reform of the four codes that would diminish the workload of the HCCJ in trying individual cases, and enable the HCCJ to focus on cassation and interpretation of the law. Previous CVM reports had welcomed this evolution and reported evidence that the goal of greater efficiency in the provision of justice had been achieved.³³ However, in a new decision the Constitutional Court has decided that the setting of a threshold for second appeals is unconstitutional.³⁴ As this decision risks overwhelming the HCCJ with second appeal cases, the Minister of Justice is preparing a Government Emergency Ordinance, consulted with the HCCJ and the SCM, which would mitigate the impact of the CCR decision on the workload of the HCCJ. Nevertheless, it is unclear whether there will be an impact on reasonable deadlines to reach final decisions and whether solutions will also need to be found for possible increase of workload in lower courts.

In a similar exercise as for the Criminal codes, the Minister of Justice has launched a consultation of practitioners and academic experts on issues with application of the Civil Code and Code of Civil Procedures. The consultation is ongoing and could lead to new amendments in the near future.

Recommendation 4: *In order to improve further the transparency and predictability of the legislative process, and strengthen internal safeguards in the interest of irreversibility, the Government and Parliament should ensure full transparency and take proper account of consultations with the relevant authorities and stakeholders in decision-making and legislative activity on the Criminal Code and Code for Criminal Procedures, on corruption laws, on integrity laws (incompatibilities, conflicts of interest, unjustified wealth), on the laws of justice (pertaining to the organisation of the justice system) and on the Civil Code and Code for Civil Procedures, taking inspiration from the transparency in decision-making put in place by the Government in 2016.*

Overview of progress

The 2017 CVM report had highlighted the difficulties with certain legislative practices allowing for the sudden introduction of changes through Parliament, with a lack of better regulation and consultation, and noted that this made it harder to demonstrate the sustainability of the legal framework. This recommendation is therefore explicitly aimed at strengthening internal safeguards against abrupt reversals of the progress made, in order to ensure the irreversibility required to satisfactorily fulfil the CVM benchmarks. Openness to debate and consultation is also a mark of a general confidence that judicial reform is an agreed objective and that those responsible for proposing and making laws are confident of explaining their position.

Throughout 2017 there have been a number of examples of legislative decisions lacking transparency and predictability, or consultation of the relevant authorities.

A few days after the January 2017 report, the Government adopted in an extraordinary session the Emergency Ordinance 13/2017, amending the Criminal Code and Code of Criminal Procedures without prior notice. This change came as a surprise and the implications for the fight against corruption sparked massive street protests throughout the country, which led to the withdrawal of the Emergency Ordinance. After these events, the Government changed course and part of this involved a more inclusive and transparent process, although exceptions remained. As mentioned earlier, the Minister of Justice is finalising amendments of the Criminal Code and Code of Criminal Procedures to reflect Constitutional Court decisions. In this process the Minister of Justice organised four public debates and there was a constructive consultation and discussion with the judiciary, NGOs and other stakeholders. Such a transparent and inclusive process was not put in place in the case of the

³² At 1 million Lei and 500.000 Lei respectively

³³ CVM Report 2016

³⁴ Decision no 369/2017, published in the Romanian Official Gazette, Part I, no. 582 on 20th July 2017

amendment of the Justice laws proposed in August. The amendments of the Justice laws have been under preparation since 2015. Previous governments have consulted broadly on the project and the Superior Council of Magistracy and the judiciary as a whole had been strongly involved in the process. In January 2017, the new Government decided to consult the new SCM on the drafts and the SCM finalised a proposal and transmitted it to the Minister of Justice in April. In August, the Minister of Justice announced totally new and controversial amendments to the Justice laws via a media conference, without either a public consultation or a targeted consultation with the institutions involved. This may have contributed to the many negative reactions to the initiative, particularly with memories of the process around Emergency Ordinance 13/2017 still fresh. Many institutions, magistrates and other stakeholders commented unfavourably on the amendments. Eventually, following a negative opinion from the SCM, which the Minister has the legal obligation to request, the Minister of Justice first announced that new version of the draft laws would take some of the SCM views into account. At the end of October 2017, there was a change in the legislative procedure. On 25 October a Parliamentary Committee took up the draft Justice laws as a parliament own initiative. These new texts were neither discussed with the judiciary, nor adopted by the Government. The following day, the highest representatives of the judiciary in Romania, the President of the High Court of Cassation and Justice, the Prosecutor General and the Superior Council of Magistracy, publicly questioned the sudden change in legislative process. Their position is that the process of legal drafting and impact analysis and the interinstitutional dialogue which should have been done at the level of the Government have now been skipped.³⁵ The President of the Parliamentary Committee declared that they would invite the judicial institutions and legal professions for discussions. The Parliament on 1 November asked the judiciary to submit their comments by 9 November. The SCM issued a negative opinion on the draft Justice laws in Parliament. However the calendar envisaged is very tight (adoption by the end of the year) while the Parliament has not yet made any commitment that it will await the opinion of the Venice commission on the key aspects of the revision that may have a bearing on to judicial independence.

In the Parliament, there were a number of examples of decisions in the area of justice which were not subject to prior consultation of the affected institutions as highlighted in other sections of this report: the Parliament modified the incompatibility regime for MPs, decriminalised several conflict of interests offences, and even proposed the possibility of reviewing of all judgments of the last 20 years.^{36,37} Other amendments have been proposed and are up for debate in the decisional chamber, so these could potentially be adopted anytime.

In recognition of the situation, the President of the Legal Committee of the Senate has invited the Minister of Justice and the Superior Council of Magistracy to set up a permanent dialogue between State institutions on amendments to the criminal codes and other important legislation, in order to set up a predictable amendment process, ensuring debate and public consultation. The Parliament has taken up the idea and has created a Special Parliamentary Committee on Systematization, Unification and Ensuring Legislative Stability in the Judiciary, beginning of October.³⁸ This Committee is expected to take up the pending proposals on the Criminal code and the code of Criminal procedures

³⁵ <http://www.scj.ro/1376/5019/Comunicate-de-presa-2017/Comunicat-de-presa-cu-privire-la-procedura-de-modificare-a-legilor-justitie>; <https://www.csm1909.ro/PageDetails.aspx?PageId=299&FolderId=4695>; http://www.mpublic.ro/ro/content/c_26-10-2017-15-10;

³⁶ In spring 2017, Parliament adopted an Emergency Ordinance from 2016 which aligned the Codes with a Constitutional Court Decision and had been consulted when adopted by the Government. At the stage of the decision making chamber, the Parliament however amended the draft to include provisions allowing the review of all the judicial decisions taken since the entry into force of the Romanian Constitution. This amendment was adopted without any prior consultation or analysis. The law as adopted by Parliament was eventually referred to the Constitutional Court which annulled the amendments (CCR decision 377/2017)

³⁷ Other examples included legislation with an impact on the justice system and the fight against corruption: such as the law on the status of local administrations, framework law on salaries of public personnel, and the law on financing of political parties.

³⁸ The President of this Committee is the Minister of Justice who had put forward the Government Emergency Ordinance 13/2017 in January.

and ensure their adoption, in addition to the new ones under preparation. The Justice laws will also be taken up by this Committee. The operation and outcome of this committee will be directly relevant to the fulfilment of the recommendation.

Recommendation 5: *The Government should put in place an appropriate Action Plan to address the issue of implementation of court decisions and application of jurisprudence of the courts by public administration, including a mechanism to provide accurate statistics to enable future monitoring. It should also develop a system of internal monitoring involving the SCM and Court of Auditors in order to ensure proper implementation of the Action Plan.*

Overview of progress

Respect and implementation of court decisions is an integral part of the efficiency of the judicial system as set out in Benchmark One.³⁹ This recommendation concerns enforcement of decisions against the State, in which a public institution has to pay an amount of money or in which a public institution has to fulfil an action. Non-implementation or delayed implementation of court decisions by the administration erodes confidence in justice and wastes time and resources in follow-up cases or appeals on repetitive decisions.⁴⁰

As already mentioned in the January CVM report, following condemnation of Romania by the European Court of Human Rights in a group of cases on non-enforcement or delayed enforcement, in December 2016 Romania proposed to the Council of Europe Committee of Ministers an action plan to address the structural problems of non-enforcement of court decisions against the State.^{41, 42} This action plan and the additional measures required by the Council of Europe Committee of Ministers is of direct relevance to addressing this recommendation.

This action plan presented by Romania sets out the following actions:

- to examine, by December 2017, the modification of the mechanism currently in place for the implementation of pecuniary awards against the state to ensure that it complies with the standards elaborated by the Court in its case law;
- to examine, by December 2017, (i) the creation of a judicial or administrative procedure to establish whether a failure to implement arises from an objective impossibility and to ascertain alternative means of implementation and (ii) the reform of the statutory limitation regime in respect of enforcement proceedings to preclude the state from relying on it when the opposing party is a private individual;
- to define, by April 2018, legislative or administrative measures enabling the State to assume the debts of companies under its responsibility, when such companies are subject to bankruptcy proceedings or have already been wound-up;
- to carry out, by May 2018, an in-depth analysis of the necessity for and modalities of a mechanism at national level to monitor the implementation of court decisions by the State; in the meantime, it is envisaged to make it mandatory for all public authorities and institutions regularly to monitor the implementation of court decisions delivered against them.

The Committee of Ministers of the Council of Europe reviewed the action plan in March 2017 and requested additional actions, in particular regarding implementation of decisions in which there is an

³⁹ Guide on Article 6 of the European Convention on Human Rights – Right to a fair trial (civil limb), http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf

⁴⁰ An example of repetitive case in 2016 was VAT or environmental tax cases where the national and European level (ECJ) had already given clear rulings, but where the administration continued to bring cases forward.

⁴¹ COM(2017) 44 p.6

⁴² Action plan of structural measures in relation to the Săcăleanu group of cases (73970/01) [http://hudoc.exec.coe.int/eng#{"EXECDocumentTypeCollection":\["CEC"\]}](http://hudoc.exec.coe.int/eng#{)

obligation for the State to perform a specific act (other than a pecuniary award), and remedies when there is no voluntary implementation:

"The authorities should therefore define, without delay, concrete measures to be adopted in the framework of the intended reforms and supplement the timetable provided with the deadlines foreseen for the adoption of these measures. [...] At the same time, additional action appears required to address all the concerns expressed by the Committee with regard to the safeguards under in domestic law for ensuring voluntary and timely implementation of court decisions by the state and the remedies available. [...] The authorities already envisage reforming the mechanism in place for the payment of pecuniary awards to ensure that it meets this requirement. However, domestic law contains different procedures for the implementation of decisions imposing an obligation to perform a specific act, and the safeguards ensuring timely and voluntary compliance with these types of decision must also be reinforced.[...] Finally, having regard to the structural nature of this problem, the authorities' attention should again be called to the necessity for legal remedies. As the revised action plan is silent on this point, it is necessary to reiterate that the authorities should review the effectiveness of the existing procedures in the light of the requirements of an effective remedy developed by the Court in this field and, if necessary, to put in place remedies meeting these requirements."

At the end of August, Romania updated its action plan for the Council of Europe, addressing some of the additional requests. However information on effective progress in implementing these actions remains to be provided.

In parallel, the Ministry of Justice and the judicial institutions are modernising the IT system for the management of court cases, and within this project they are planning to produce statistics and monitoring of court decisions involving public institutions. The finalisation of this project will take several years up to 2020 and will be financed by EU funds. This project is a positive development but would usefully be accompanied by an effective monitoring of implementation of court decisions by public institutions at national and local level.

Recommendation 6: *The Strategic Judicial Management, i.e. the Minister of Justice, the SCM, the HCCJ and the Prosecutor-General should ensure the implementation of the Action Plan as adopted and put in place regular common public reporting on its implementation, including solutions to the issues of shortages of court clerks, excessive workload and delays in motivation of decisions.*

Overview of progress

The comprehensive Action Plan adopted in 2016⁴³ setting out the structural reform steps to be taken until 2020 is now under way. It should bring major benefits to the users of the justice system, and altogether improve public trust in the system.

One of its first deliverables was the setting up of the Judicial Strategic Management Council to ensure a necessary and smooth cooperation between the authorities responsible for the management of the justice system in their respective areas of competence, namely the Minister of Justice, the SCM, the HCCJ and the Prosecutor-General. The Judicial Strategic Management Council should also follow up the implementation of the Strategy for the Development of the Judiciary 2015-2020 and its action plan. So far, institutions have individually reported measures taken to implement actions from the Action Plan, but the overview is yet to be compiled.

⁴³ Action Plan for implementing the Strategy for the Development of the Judiciary 2015-2020 approved through the Government Decision no. 282/2016

The Judicial Strategic Management Council met for the first time this year on 12 June. In its second meeting on 14 September, the Strategic Judicial Management assigned to a new technical Working Group the monitoring of the implementation of the Strategy and the Action Plan, with quarterly reporting. This monitoring and reporting mechanism should facilitate a consolidated overview of the effective progress in implementing the Action Plan.

The implementation of the action plan will be financed also through EU structural funds. The Superior Council of Magistracy, the National Institute of Magistracy, the National School of Clerks and the Judicial Inspection are involved in the development of projects within a call for projects launched in August 2017 under the specific objective 2.3 of the Administrative Capacity Operational Programme (financial allocation available - 260 million RON / EUR 57.7 million).

Recommendation 7: *The new SCM should prepare a collective programme for its mandate, including measures to promote transparency and accountability. It should include a strategy on outreach, with regular open meetings with assemblies of judges and prosecutors at all levels, as well as with civil society and professional organisations, and set up annual reporting to be discussed in courts' and prosecutors' general assemblies.*

Overview of progress

The 2016 and 2017 CVM reports underlined the importance for the new Superior Council of Magistracy (SCM) to maintain the momentum of reform, to articulate a clear collective philosophy on the basis of a new programme and to take measures for increased transparency and accountability.

On 27th December 2016, the Senate validated the elections of the 14 members, judges and prosecutors of the SCM. On 6th January 2017, the new SCM started its activity. After several adjournments, the Senate appointed the two SCM members representing the civil society in early September.⁴⁴

At the end of February 2017, the SCM set out its priorities for its entire mandate 2017-2022, and organised working groups on each priority. These include:

1. Independence-responsibility: Identify efficient leverages to reinforce the independence of the judiciary, correlated with increasing magistrates' responsibility;
2. Financial independence of the judiciary, in particular salary of magistrates. Ensuring real independence of the judiciary through financial independence: intensifying actions in order for the HCCJ to take the court's budget, elaborating distinct draft law to reinforce the guarantees for independence regarding salaries of the magistrates.
3. Ensuring an optimum workload for courts and prosecutors' offices adapting human resources to the concrete needs. Making legal framework more flexible to ensure efficiency of judicial activity.
4. Improving infrastructure for courts and prosecutor's offices. SCM infrastructure. Identifying viable solutions for courts buildings and development of IT infrastructure.
5. Communication, elaboration of an efficient and predictable public communication strategy, promoting the principle of institutional transparency.

The SCM has already taken some measures to promote transparency. A new SCM website is now up and running, and appears more user-friendly. Among the actions for increasing transparency, representatives of courts, magistrates' professional associations or NGOs can participate in Council meetings, with the possibility of written or verbal interventions. The SCM is also organising permanent consultation of courts and prosecutor's offices and centralising their points of view, also publishing them on the web portal for magistrates. When the SCM has been consulted on new draft laws this year, it has sought the views of all courts and prosecutors' offices and reflected them in its

⁴⁴ Mr. Victor Alistar and Mr. Romeu Chelariu

motivated opinions. The SCM has also expressed the intention to better motivate its decisions and ensure public communication on the reasons for its decisions.

The SCM is also working on a collective programme and strategy for better outreach. A draft Communication strategy is being discussed at working group level promoting measures for improving the public image of the judiciary and its relations with mass media. The strategy is also looking at achieving a rapid informative flow through setting up a mechanism for institutional cooperation, as well as at the cooperation with the Government and the Parliament.

In its January report, the Commission had also recommended that the SCM should continue to report publicly on actions it has taken in defending the independence of justice and protection of reputation, independence and impartiality of magistrates. This would be an important illustration of the priority given to this role.

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

Recommendation 8: Ensure the entry into operation of the PREVENT system. The National Integrity Agency and the National Public Procurement Agency should put in place reporting on the ex-ante checks of public procurement procedures and their follow-up, including ex post checks, as well as on cases of conflicts of interest or corruption discovered, and the organisation of public debates so that the government, local authorities, the judiciary and civil society are invited to respond.

Overview of progress

The PREVENT system is designed to prevent conflicts of interests in public procurement procedures by setting up an ex-ante verification mechanism to detect situations that may generate conflicts of interests in procurement procedures launched through the electronic procurement system, and to allow the contracting authorities to remedy these situations prior to the award of the contract. It is the result of a close collaboration between the National Integrity Agency (ANI), the agency for public procurement (ANAP) and the Digital Agenda Agency, as well as the Government. It entered into operations end of June as planned.⁴⁵

The PREVENT system involves the analysis of the data and information filled in an integrity form by staff of the contracting authority, by cross-checking this information with relevant databases (National Trade Register Office, Directorate for Persons Record and Databases Management). It can automatically track relations that may exist between evaluation committee members and persons with decision-making powers in the contracting authority on the one hand, and relevant representatives of the tenderers in public procurement procedures on the other hand. The results of this cross-checking is verified by ANI inspectors, who, if there appears a possible conflict of interest situation, issue an integrity warning to the contracting authority. The contracting authority must take all necessary measures for removing the possible conflicts of interests and inform ANI, in order to lift the warning and proceed with the contract award.

In the first three months of operation, June–September 2017, ANI has used PREVENT to analyse 2995 public procurement procedures, with a total amount of 6,1 billion LEI (approx. EUR 1,3 billion).⁴⁶ ANI issued three integrity warnings regarding possible violations of the legislation on the conflicts of interests in public procurement. In all three cases, the management of the contracting authorities has taken measures to rectify the situation. In another seven situations, ANI has notified the National Agency for Public Procurement (ANAP) concerning possible irregularities in public procurement procedures, as a result of PREVENT's analysis.

⁴⁵ <https://www.integritate.eu/prevent.aspx>

⁴⁶ 10% of these procedures refer to EU funded contracts

More broadly, ANI's track record remained constant on investigations of incompatibilities and administrative conflicts of interests. Between 1 January and 13 October 2017, ANI finalised 1310 cases (of incompatibility, wealth investigations and conflicts of interest) a comparable number to the same period of 2016. However, as noted in previous CVM reports, the legal framework for integrity remains under challenge. In April 2017, unexpected modifications of the law on incompatibilities for Members of Parliament⁴⁷ were adopted. A negative opinion had been issued by ANI but the amendment went ahead. Furthermore, legislative proposals which would take away the three year restriction to occupy an elected function after a final decision on incompatibility or conflict of interest are still pending in Parliament. CVM reports have also noted how such changes make it all the more difficult to consolidate the long-term sustainability of the integrity framework through a single codification.⁴⁸

ANI continued to develop its preventive work, including reaching out towards local authorities and the Parliament. ANI is also closely involved in some activities of the National Anti-Corruption Strategy. Despite the increase of activity, including PREVENT, the budget of ANI has been sharply reduced in 2017.

Recommendation 9: *The Parliament should be transparent in its decision-making with regard to the follow-up to final and irrevocable decisions on incompatibilities, conflicts of interests and unjustified wealth against its members.*

Overview of progress

The January 2017 CVM report noted that there has been substantial progress in the follow-up of reports from the National Integrity Agency (ANI), but that the court proceedings remain very long and there are still exceptions to the applications of sanctions. In particular CVM reports had highlighted the delay and the inconsistency in the application of sanctions for Members of Parliament who are found incompatible or in conflict of interest following a final court decision or a final ANI report. The Commission had therefore recommended that the Parliament should be transparent in its decision-making with regard to the follow-up to final and irrevocable decisions on incompatibilities, conflicts of interests and unjustified wealth against its members.

Article 7 of the Statute of Senators and Deputies regulates how the Parliament should proceed when a member has been found incompatible. Although the termination of office is automatic on the date the decision of incompatibility becomes final and irrevocable,⁴⁹ other steps are needed to put this into effect. The President of the Chamber to which the member belongs has to take note of the termination of the mandate of the Deputy or the Senator, and to put the question to the vote of the plenary session of the Chamber by which the place of the Deputy or Senator shall become vacant.⁵⁰ However there is no deadline for this step to take place.

⁴⁷ Law no.87 of 28 April 2017 modifying Law no. 161/2003 regarding some measure to ensure transparency in public functions, business environment and corruption sanctioning

⁴⁸ CVM report 2017 COM(2017) 44

⁴⁹ Act No 96 of 21 April 2006 on the Statute of Deputies and Senators, Article 7 (2): *The termination of office of Deputies or Senators due to incompatibility occurs:....c) on the date of the final and irrevocable judgement dismissing the appeal against the National Integrity Agency report stating the incompatibility; d) on the expiry date of the term stipulated in Act No 176/2010 on the integrity in the exercise of public functions and dignities, [...], from the date of taking knowledge of the evaluation report of the National Integrity Agency, unless within that period the Deputy or Senator disputed the report at the administrative litigation court. Acknowledgement shall be done by signing the receipt of the National Integrity Agency report by the Deputy or Senator concerned or, if they refuse its receipt, by the announcement made by the President of the plenary session of the Chamber to which they belong.*

⁵⁰ Act No 96 of 21 April 2006 on the Statute of Deputies and Senators – Article 7 (4).

In cases of administrative conflicts of interests, Article 19 and 51 of the Statute regulates the applicable sanction, the procedure and the deadlines, if the Member of Parliament appeals the sanction. The applicable sanction is a 10 % allowance reduction for up to three months.⁵¹ In the reporting period, the Commission was informed that debates within the Legal Committee and the Plenary Session of the Parliament are transmitted live and the video recording is available also after the session. This allows access to parliamentary debates though more detailed information would be necessary to assess how the Parliament has addressed the cases on which it receives information from ANI in 2017 in order to assess whether this would respond to recommendation 9. ANI has sent six requests to the Parliament to take action concerning Members of Parliament with a final court decision against them. Three cases concern final court decisions reached in 2017 (1 incompatibility, 2 administrative conflicts of interests)⁵², for which ANI requested the Parliament to apply the corresponding sanction on 17 March, 7 April and September. There was no information that these cases have been yet taken forward to conclusion in Parliament. Three other cases concern election and validation in the new Parliament of persons under an interdiction to occupy a public office for a period of 3 years following a final court decision against them for incompatibility or administrative conflict of interests.⁵³ ANI signalled these cases to the Parliament in February, but today there is no information that the Parliament has followed up. There are no clear precedents for such cases; however it is up to the Parliament to find a solution rapidly in these cases as the Parliament has confirmed their mandate despite the interdiction.

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

***Recommendation 10:** Adopt objective criteria for deciding on and motivating lifting of immunity of Members of Parliament to help ensure that immunity is not used to avoid investigation and prosecution of corruption crimes. The government could also consider modifying the law to limit immunity of ministers to time in office. These steps could be assisted by the Venice Commission and GRECO⁵⁴. The Parliament should set up a system to report regularly on decisions taken by its Chambers on requests for lifting immunities and could organise a public debate so that the Superior Council of Magistracy and civil society can respond.*

Overview of progress

This recommendation concerns the accountability of the Parliament in its decisions on requests from the prosecution to authorise preventative measures such as searches or arrest and on requests to authorise the investigation of an MP when he/she also is or has been a Minister. This is a power under the Constitution, mirroring many parliamentary systems where immunities are designed to protect MP in the exercise of their elective mandate. However, the recommendation concerns not the fact that this power exists, but the way in which it is exercised. Previous CVM reports have highlighted that many such decisions had been taken in a way which appeared to the public as attempts to limit or avoid investigation and prosecution of corruption crimes. The perception that immunities can be abused to cover corruption crime sometimes sparked public protest. Therefore having criteria for deciding on

⁵¹ Act No 96 of 21 April 2006 on the Statute of Deputies and Senators – Article 19 and Article 51.

⁵² Case 1: Deputy, incompatibility, final court decision 30/03/2017; case 2: Senator, administrative conflict of interests; final court decision 08/03/2017; Case 3: Senator, administrative conflict of interests; final court decision 07/06/2017.

⁵³ Case 1: Senator, incompatibility, final court decision 04/03/2015; Case 2: Deputy, incompatibility, final court decision 03/11/2016; Case 3: Deputy, administrative conflict of interest, final court decision 25/11/2015;

⁵⁴ The Group of States against Corruption (GRECO) was established in 1999 by the Council of Europe to monitor compliance with the organisation's anti-corruption standards.

such requests from the prosecution is one way of being able to show that decisions have an objective basis.⁵⁵

Parliamentary representatives responded to the Commission recommendation to defining objective criteria by suggesting that this was in principle not possible due to the practice of using secret voting for these decisions. Nevertheless, the Chamber of Deputies made an attempt to address recommendation 10 by putting in place a procedure such that the report of the Legal, Discipline and Immunities Committee advising the plenum of the Chamber of Deputies on the vote shall provide either the arguments in favour of accepting the request from the prosecution, if the Committee voted favourably, or the arguments in favour of rejecting the request, if the Commission voted negatively. In one case, this launched a debate, where the Committee was criticised for using arguments which some members of Parliament considered were rather in the prerogative of the courts. Defining such important dividing lines would be part of the criteria-setting approach recommended by the Commission.

As for the subsidiary recommendation that the law might be changed to clarify that Ministerial immunity related only to actions during their time in office, Parliamentary representatives argued that this would need a Constitutional change: the Commission's recommendation related rather to whether such a change might not be possible through other means, possibly by amending the law of 1999 on ministerial responsibilities, such as to increase transparency and objectivity in decision-making on requests of starting criminal prosecution against former ministers, in order to safeguard public perception on equality before the law.⁵⁶

In the reporting period, there have been three requests from the prosecution to start criminal prosecution concerning MPs who are also former or sitting ministers. Two have been rejected by the Chamber of Deputies, one in March and one in October, one has been rejected by the Senate in September.⁵⁷ In the same period, two requests for starting criminal prosecution of former ministers who are not MPs were accepted by the President of Romania.

Regarding the second part of the recommendation, "to set up a system to report regularly on decisions taken by its Chambers on requests from the prosecution to authorise preventative measures such as searches or arrest or to authorise the investigation of an MP when he/she also is or has been a Minister, and to organise a public debate so that the Superior Council of Magistracy and civil society can respond", the information received states that debates in Parliamentary committees and plenum are broadcasted and can also be viewed online after the session took place. The fact that parliamentary debates are public and can be accessed via media and the web does not provide the dialogue and accountability mechanisms that were the subject of this recommendation.

More broadly, the results of the judicial institutions involved in fighting high level corruption have been maintained, although in difficult circumstances (see recommendation 2). In the reporting period, the National Anti-Corruption Directorate sent 573 defendants to trial in 209 cases (compared to 238 in 2016). 209 final conviction decisions (compared to 214 in 2016) were issued against 439 defendants. Seizing measures were ordered for 59 million EUR and final confiscations amount to about 7,4 million EUR. In 2017, the High Court of Cassation and Justice solved 10 high level corruption cases at first instance and settled two high-level corruption cases by final decision.

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

Recommendation 11: Continue to implement the National Anti-corruption Strategy, respecting the deadlines set by the government in August 2016. The Minister of Justice should put in place a

⁵⁵ Based on guidelines from the Venice Commission and GRECO

⁵⁶ Legea nr. 115/1999-Lege privind responsabilitatea ministerială, republicată, în „Monitorul Oficial al României”, partea I, nr. 200 din 23 martie 2007.

⁵⁷ The report of the Legal Commission stated that by secret vote (7 to 4), it has been decided to propose the refusal of the request.

reporting system on the effective implementation of the National Anti-corruption Strategy (including statistics on integrity incidents in public administration, details of disciplinary procedures and sanctions and information on the structural measures applied in vulnerable areas).

Overview of progress

The January report highlighted the potential of the National Anti-Corruption Strategy (NAS) presented by the Government in August 2016 to be an effective corruption prevention policy, if it is properly implemented and followed up on the ground, including at local level. EU funds can have a major part to play in supporting this work.

Although the implementation of the anti-corruption strategy has kicked-off at technical level, the Commission has been given no evidence of strong visible political support from key Ministers such as those responsible for central and public administration or for historic risk areas such as health or education. In June, the Minister of Justice invited the two Chambers of Parliament to sign a joint statement supporting the NAS 2016-2020. This has not yet taken place.

At working level, the NAS Technical Secretariat within the Ministry of Justice has pursued the implementation of the actions in the NAS. In the first months of 2017, the Secretariat focused its efforts on ensuring that the public institutions willing to adhere to the strategy took all formal steps within the set deadline⁵⁸: assessing the corruption risks, defining an integrity plan and adopting the declaration of adherence to the fundamental values, the principles and NAS objectives 2016-2020.⁵⁹ A high number of public institutions have decided to participate to the NAS. The Secretariat received 1610 accession declarations and 746 integrity plans from central and local level public institutions. All central public administrations have adhered to the NAS. It is worth noting that the participation has also now spread to State Owned Enterprises (77 so far), Regulatory agencies⁶⁰ and the National Health Insurance House. All judicial institutions have also adhered to the fundamental values, principles, objectives and monitoring mechanism of the NAS.

In May, the NAS Technical Secretariat organised cooperation platforms meetings with the main stakeholders of the NAS.⁶¹ During the meetings, the members of the platforms presented the latest developments in the implementation of NAS and institutional approaches to the strategic document, and agreed on the themes of the thematic evaluation missions to be carried out during 2017.⁶² The evaluation missions are carried out by teams of experts, designated by platform members, to assess how integrity-enhancing measures are taken and corruption-related vulnerabilities are reduced.⁶³ In June, an interinstitutional working group was set up for defining the methodology for assessing corruption risks at central level; and in September another working group was set up for ex-post evaluation of integrity incidents and also includes all anticorruption law enforcement authorities.

⁵⁸ Six months after the adoption of the Strategy

⁵⁹ The main actions include: adopting the declaration of adherence to the fundamental values, the principles, objectives and the monitoring mechanism of the NAS, including the list of subordinate / coordinated structures under the authority; consulting employees in the process of developing the integrity plan; identifying the risks and vulnerabilities specific to the institution; identifying measures to address the institution-specific vulnerabilities, as well as implementing the managerial internal control standards; approval and distribution within the institution of the plan and declaration of membership of the NAS; annual assessment of the implementation of the plan; participating in the coordination and monitoring activities of the strategy.

⁶⁰ National Regulatory Authority for Energy and the National Mineral Resources Agency

⁶¹ May 16th - meetings of the cooperation platforms of central public authorities and independent authorities and anti-corruption institutions; May 17th - Meeting of the Business Cooperation Platform; May 18th - meeting of the civil society cooperation platform

⁶² Declaration of gifts, whistleblowers' protection, and sensitive functions

⁶³ The institutions to be assessed in 2017: the National Integrity Agency, the Romanian Ombudsman and the National Council for Solving Complaints, the Ministry of Foreign Affairs, the General Secretariat of the Government, the Ministry of Health, and possibly the Ministry for the Business, Commerce and Entrepreneurship. Missions took place in October and November 2017.

The NAS Technical secretariat has also set up a new portal⁶⁴ to ensure information flow and enable electronic reporting for all institutions participating in the NAS.

Regarding other developments in the implementation of the NAS 2016-2020, a methodology for monitoring implementation was approved and will result in the first reporting on the implementation of the measures at the beginning of 2018. A few elements can be reported already. The specific objective "*Continuing progress in impartial investigation and court resolution of high-level corruption at local level*" is being pursued by the judicial institutions. Regarding the objective of "*Developing a culture of transparency for open government at central and local level*" the Unique Register of Transparency of Interests -⁶⁵ which was set up in 2016 is being continued. It includes a calendar of public events and meetings for members of the Government, as well as a register for companies, organisations and interests groups. The first report of January 2018 will be important to review the methodology and check whether the measures planned are effectively implemented.

At the level of the prosecution offices, the results of the fight against low-level corruption are as follows: 1379 cases were solved and 304 defendants sent to court, while 152 court decisions remained final convicting 220 defendants for corruption crimes (for 12 acquittals) in the January-August 2017 period.

The Ministry of Justice obtained funding through the European Structural funds for the project "Strengthening the Administrative Capacity of the Technical Secretariat of the National Anti-Corruption Strategy 2016-2020", to support the implementation of the anti-corruption measures.⁶⁶ Other projects in amount of about EUR 12 million should start soon.

Recommendation 12: *Ensure that the National Agency for the Management of Seized Assets is fully and effectively operational so that it can issue a first annual report with reliable statistical information on confiscation of criminal assets. The Agency should put in place a system to report regularly on development of administrative capacity, results in confiscation and managing criminal assets.*

Overview of progress

The January 2017 CVM report noted that the National Agency for the Management of Seized Assets (ANABI) has been set up and that the next step was to demonstrate it could function properly, provide transparent data on the confiscation of criminal assets and eventually increase the proportion of assets effectively recovered.

The Agency became operational on 27 December 2016. ANABI has its own building, administrative departments in charge with financial and human resources, and has a staff of about 25 people, which is already half of the planned staff for full operations. The staff has been recruited through competitive procedures and detachments from relevant institutions. Beyond the founding legal instrument for the agency, the legal framework for its operations is nearly complete. The proposal to transpose the EU Directive [2014/42/EU](#) on the freezing and confiscation of instrumentalities and proceeds of crime in

⁶⁴ www.sna.just.ro

⁶⁵ www.ruti.gov.ro

⁶⁶ The project includes: Organizing and conducting 'peer review' missions within central public institutions and authorities; Developing and disseminating a general model of good practices to implement institutional transparency and corruption prevention measures in public administration, and which will include working tools for their effective implementation at national and local level; Performing an intermediate audit on the implementation of NAS 2016-2020; Evaluation of the legislation on the protection of whistleblowers and the migration of public sector employees to the private sector; Organizing two anti-corruption conferences; Generating an Index type score of institutional integrity for the vulnerable sectors identified in the strategy; Carrying out 2 criminological studies and 2 sociological researches on the phenomenon of corruption in Romania; Public information campaign to raise awareness and increase the level of anti-corruption knowledge among staff in central public institutions and authorities and citizens; Organizing training sessions.

the European Union adopted by the Government in August 2017 will also ensure that ANABI shall be the national authority responsible for collecting statistical data and will be able to provide information on delays in the enforcement of confiscation orders.

The Coordination Council overseeing the activity of the agency started meeting in June 2016 and includes representatives of the Ministry of Justice, the Ministry of Finance and Ministry of Interior, the Superior council of the Magistracy and the prosecution services. The Council is now fully operational and has met four times this year and approved the first Annual Report of ANABI. The website of ANABI provides clear, up-to-date and transparent information on the activity of the Agency and the Coordination Council.⁶⁷

ANABI published its first annual report in February 2017.⁶⁸ The report included an inventory of the seizures ordered by the Prosecutor's Offices in 2016 and the sums of money resulting from the selling of confiscated assets – 20.536.268 lei. ANABI continues its close cooperation and complementarity with ANAF, responsible for executing the final confiscation orders. According to the law, these sums of money should be redistributed to the beneficial institutions for social and public re-use. Part of this should be allocated to funding civil society projects⁶⁹ such as legal education, criminality prevention, assistance to victims and other projects of public interest. Because of insufficient administrative capacity, the agency was so far unable to launch a call for proposals this year. However preparations for a call of proposals in 2018 are ongoing and should be finalized by the end of 2017. The agency filed a request for administrative capacity support through EU structural funds.

Since March, the agency has started carrying out its activities of temporarily storing and managing seized movable assets. The agency finalised also a national identification of storage lands and buildings for keeping seized movable assets. The agency organised also several sales of seized assets through public auctions.

In June, ANABI's unique bank account became operational. It provides a unique central bank account for managing and tracking all sums of money subject to seizure in ongoing investigations and trials, the sums of money resulting from sales of perishable goods and from interlocutory sales. According to ANABI, the transition of the current decentralized and non-uniform system towards using the unique bank account will greatly facilitate the work of the prosecutors and the agency through standardized procedure.

Regarding the execution of final court decisions, for 2016 and first semester 2017, the National Agency for Fiscal Administration (ANAF) reported that the courts transmitted 903 final judgements for enforcements and the following amounts of money resulting from the sale of assets confiscated by court decisions in criminal matters: 20 million RON for 2016 and 7,7 million RON for the first half of 2017.

However, data on the effectiveness of the execution of all relevant court decisions remains an open issue. To address this, ANABI is launching a registry which will keep track of all relevant court decisions in relation to confiscation of criminal assets, and will be linked with the execution database of the fiscal administration ANAF. The project will develop an IT system which will allow at a central level to monitor the stage of execution of all relevant final court decisions. This will allow ANABI to report on the precise and complete situation over the entire process of asset recovery, and inform relevant institutions on problems or delays with the execution. The definition and specification of the IT project are ongoing. The Agency expects the IT registry to be operational second half of 2018. In the meanwhile ANABI has requested from the courts, with the help of the Minister of Justice and the support of the SCM, an inventory of all court relevant decisions, which will allow a first analysis of the effective execution of court decisions including confiscation of criminal assets.

⁶⁷ anabi.just.ro

⁶⁸ 6.960 seizures ordered in 1.061 criminal files by 160 Prosecutor's Offices

⁶⁹ According to art.37 of ANABI Law 318/2015

ANABI reports good cooperation with the judicial institutions,⁷⁰ including prosecution services such as DNA and DIICOT, which provide constructive feedback and support. ANABI has organised training sessions related to best practices in the investigations techniques and the use of analytical software applications, and developed an operational guide for practitioners to conduct financial investigation in transnational cases with an asset recovery component. Together with the Office of the Prosecutor General, ANABI is also planning to organise regional and national competitions for prosecutors in asset recovery cases.⁷¹

ANABI also exercises the competence of the Asset Recovery Office. From January 2017 until the 15th of June, the Romanian Asset Recovery Office dealt with 86 incoming requests and 21 outgoing requests. The Member States most frequently requesting information were France, the United Kingdom, Italy, Germany and Spain and ANABI sent the largest number of requests to Hungary, Italy, Austria and France. ANABI also dealt with several international confiscation orders.

⁷⁰ A member of the Superior Council of Magistracy sits in the Coordination Council

⁷¹ Part of it will be funded by EU funds