



Council of the
European Union

000046/EU XXVII. GP
Eingelangt am 23/10/19

Brussels, 23 October 2019
(OR. en)

13383/19
ADD 1

COVEME 3

PROPOSAL

From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	23 October 2019
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union

No. Cion doc.:	SWD(2019) 393 final
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 Cooperation and Verification Mechanism

Delegations will find attached document SWD(2019) 393 final.

Encl.: SWD(2019) 393 final



EUROPEAN
COMMISSION

Brussels, 22.10.2019
SWD(2019) 393 final

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 Cooperation and Verification Mechanism

{COM(2019) 499 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: Fight against Fraud Department

DNA: National Anti-Corruption Directorate

ECHR: European Court of Human Rights

HCCJ: High Court of Cassation and Justice

MoJ: Ministry of Justice

NAS: National Anti-corruption Strategy

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

CVM report November 2017: COM(2017)751 and SWD(2017)701 – *report of progress in 2017*

CVM report November 2018: COM(2018)851 and SWD(2018) 551 – *report of progress from November 2017 to October 2018*

¹ Previous CVM reports can be consulted at: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/effective-justice/rule-law/assistance-bulgaria-and-romania-under-cvm/reports-progress-bulgaria-and-romania_en

1. INTRODUCTION

This technical report summarises the information which the Commission has used as the basis for its assessment of Romania's progress under the Co-operation and Verification Mechanism (CVM) since the last CVM report of 13 November 2018.²

This information has been collected from a variety of sources. The Commission has had the benefit of working closely with the relevant authorities in Romania, providing information on progress in detailed reports, as well as in face-to-face meetings, both in Brussels and Bucharest. Commission contacts with the Romanian administration and society across the full range of EU policies, including through the European Semester for economic governance, help to inform the CVM reports. In addition to official contacts with Romanian authorities, the Commission meets with non-governmental organisations active in the area of judicial reform and anti-corruption work, with professional associations of judges and prosecutors, and with representatives of other EU Member States in Romania. More generally, 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.³ The variety of opinions expressed by the different Romanian interlocutors is an important element for an open and transparent debate. The Commission bases its assessment on all sources available, also taking into account divergent views.

The Commission Decision of 2006 setting up the CVM defined four benchmarks for Romania. The four benchmarks were conceived in the circumstances of the day and their concrete wording reflects this, but the underlying themes have remained fully relevant. Since the time when these benchmarks were adopted, there have been major developments in Court of Justice and European Court of Human Rights (ECHR) case-law, European and international standards and best practices.⁴ There has also been more readily available information on national justice systems in the EU,⁵ which also helps to give an objective and comparable measure of the development of the Romanian judicial system and the fight against corruption. Analysis of these topics has also become a regular feature in the European Semester for economic policy coordination in recent years. A more general debate on the rule of law has also taken place: in July 2019 the Commission adopted a Communication on *Strengthening of Rule of Law within the Union – a blueprint for action*, in which it announces its intention to establish an annual rule of law review cycle covering all Member States.⁶

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 European Social Fund (ESF) Administrative Capacity Operational Programme will have provided funding of about EUR 100 million for judicial reform projects, linked to the development of the strategic management of the judicial system, reinforcing the capacity of the institutions and improving their performance, and the performance of practitioners (judges, clerks, prosecutors etc.), information and judicial education campaigns, and improved transparency and integrity in the judicial system. In addition, the ESF also supports reform and improvements in public

² COM(2018) 851 final. All the reports under the Cooperation and Verification Mechanism are available on the Commission's website: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/assistance-bulgaria-and-romania-under-cvm/reports-progress-bulgaria-and-romania_en

³ In particular, the Venice Commission adopted an opinion in June 2019 on emergency ordinances GEO No. 7 and GEO No.12 amending the laws of justice (Opinion 950/2019) following up the October 2018 opinion on the justice laws (Opinion 924/2018) and the opinion 930/2018 on the amendments to the Criminal Code and Criminal Procedure Code. The Council of Europe Group of States against Corruption (GRECO) issued two reports in June 2019: a follow-up report (Greco-AdHocRep(2019)1) on the special report on the amendments on the justice laws of April 2018 (Greco-AdHocRep(2018)2) and the interim compliance report on the fourth evaluation round (GrecoRC4(2019)11).

⁴ The most important being the developments in the Court of Justice case-law on judicial independence, the European Court of Human Rights (ECtHR) 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.

⁵ Including the EU Justice Scoreboard: <http://ec.europa.eu/justice/effective-justice/scoreboard/>.

⁶ COM(2019)343 final. This Communication was a follow-up to a broader review of the Commission's work in the rule of law area, including a call for contributions from Member States and other stakeholders: https://europa.eu/rapid/press-release_IP-19-4169_en.htm

procurement (with around € 10 million contracted so far), and the implementation of the National Anti-Corruption Strategy at local level. European Regional Development Fund (ERDF) resources of up to € 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). Romania is also benefiting from several projects in the justice area with the Structural Reform Support Service (SRSS). Romania has also benefited from bilateral support from EU Member States.⁷

On 25 January 2017, the Commission adopted a comprehensive assessment of ten years' progress in Romania on 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 could 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.

Since the ten-year assessment of January 2017, the Commission has made two further assessments of progress on the twelve recommendations.

The first assessment report of 15 November 2017 concluded that none of the benchmarks could be considered satisfactorily fulfilled. While progress in meeting some recommendations was advancing well, the reform momentum in course of 2017 was lost overall, slowing down the fulfilment of the remaining recommendations, and with the risk of re-opening issues which the January 2017 report had considered as fulfilled. Challenges to judicial independence have also been a persistent source of concern.⁸

The second report adopted on 13 November 2018 concluded that:

“Over the twelve months since November 2017, Romania has taken some steps to implement the recommendations set out in the January 2017 report. In line with the assessment set out in this report, the Commission considers recommendations 8 and 12 can be considered as fulfilled, and further progress has been made on recommendations 5 and 9.

However, the assessment of the January 2017 report was always conditioned on the avoidance of negative steps calling into question the progress made in the past 10 years. The entry into force of the amended Justice laws, the pressure on judicial independence in general and on the National Anti-Corruption Directorate in particular, and other steps undermining the fight against corruption have reversed or called into question the irreversibility of progress, in particular under Benchmarks One and Three.

As a result, the twelve recommendations set out in the January 2017 report are no longer sufficient to close the CVM in line with the objective set out by the President Juncker and to this end additional recommendations are set out in this report. This will require the key institutions of Romania to demonstrate a strong commitment to judicial independence and the fight against corruption as indispensable cornerstones, and to restore the capacity of national safeguards and checks and balances to act when there is a risk of a backwards step.

To remedy the situation the following measures are recommended:

Justice laws

- *Suspend immediately the implementation of the Justice laws and subsequent Emergency Ordinances.*

⁷ Funding from the European Economic Area (Norway) further complements national and EU funding for judicial reform.

⁸ COM(2017)751, p.12. and Council Conclusions on the Cooperation and Verification Mechanism 15587/17

- *Revise the Justice laws taking fully into account the recommendations under the CVM and issued by the Venice Commission and GRECO⁹.*

Appointments/dismissals within judiciary

- *Suspend immediately all ongoing appointments and dismissal procedures for senior prosecutors.*
- *Relaunch a process to appoint a Chief prosecutor of the DNA with proven experience in the prosecution of corruption crimes and with a clear mandate for the DNA to continue to conduct professional, independent and non-partisan investigations of corruption.*
- *The Superior Council of Magistracy to appoint immediately an interim team for the management of the Judicial Inspection and within three months to appoint through a competition a new management team in the Inspection.*
- *Respect negative opinions from the Superior Council on appointments or dismissals of prosecutors at managerial posts, until such time as a new legislative framework is in place in accordance with recommendation 1 from January 2017.*

Criminal Codes

- *Freeze the entry into force of the changes to the Criminal Code and Criminal Procedure Code.*
- *Reopen the revision of the Criminal Code and Criminal Procedure Code taking fully into account the need for compatibility with EU law and international anti-corruption instruments, as well as the recommendations under the CVM and the Venice Commission opinion.*

The Commission will continue to follow closely and will assess the situation before the end of this Commission's mandate. The immediate implementation of the additional measures is essential to put the reform process back on track and resume the path towards the conclusion of the CVM as set out in the January 2017 report. “¹⁰

These additional measures were supported by the Council in its conclusions of December 2018, calling on Romania to fulfil all the recommendations and take prompt action, notably on the additional key recommendations.¹¹ This technical report focuses on the implementation of these recommendations.

2. PROGRESS ON KEY REMAINING STEPS

This section reports on progress on the 12 recommendations of January 2017 and on the 8 additional recommendations of November 2018, as well as relevant developments that have a bearing on the assessment of the fulfilment of the CVM benchmarks.

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

The November 2018 report concluded that “while there has been progress on recommendation 5 (execution of judgements), other steps taken by Romania have reversed or put into question the progress achieved. Recommendations 1, 3 and 4 have not been followed. Recommendations 2, 6 and 7 have seen no progress towards meaningful results. More broadly, legislative changes undermining the guarantees for judicial independence and centralising more power with the Minister of Justice, and a series of steps pressuring key judicial institutions, constitute backtracking by the Romanian authorities from the basis of the January 2017 assessment. The ongoing amendments of the Criminal Code and Criminal Procedure Code also entail serious risks of backtracking. Therefore, the Commission considers that Benchmark One cannot be considered as fulfilled and to achieve this objective additional recommendations are required, as a set out in the conclusion of this report.”

Justice laws

⁹ Council of Europe Group of States against Corruption

¹⁰ COM(2018)851

¹¹ 15187/18 - Council conclusions on the Cooperation and Verification Mechanism, 12 December 2018.

The three Justice laws adopted in 2004 define the status of magistrates and organise the judicial system and the Superior Council of Magistracy.¹² They are therefore central to ensuring the independence of magistrates and the good functioning of the judiciary. The Justice laws were an essential basis for the positive assessment of the progress of Romania in the January 2017 CVM report.

The three laws were amended in 2018 in a tense climate exacerbated by political criticism of the judiciary. The November 2018 report set out the concerns expressed by the Commission, the European Parliament, the Council, other Member States, the Venice Commission and the Group of States against Corruption (GRECO). Concerns by domestic actors including the President of Romania and the High Court of Cassation and Justice, as well as in the Romanian Parliament, led to referrals to the Constitutional Court. The outcome required amendments which addressed some of the initial major problems but was not sufficient to avoid all serious concerns.

The amended Justice laws entered in force in July and October 2018.¹³ The November 2018 CVM report noted that *'they contain a number of measures which - independently but also in terms of their cumulative effect – could result in pressure on judges and prosecutors, and ultimately undermine the independence as well as the efficiency and quality of the judiciary'*. The report also noted that *'none of these changes correspond to CVM recommendations'*.

As a result, the November 2018 report called on Romania to suspend the application of the amended laws and revise the amendments in accordance with Commission recommendations and the recommendations from GRECO and the Venice Commission. The Romanian authorities expressed disagreement with the rationale for the recommendation and stated that it was in any event too late to suspend the application of the laws.

While the Government had already adopted three emergency ordinances in September and October 2018, since the November 2018 report, the Government has adopted two more Emergency Ordinances¹⁴ modifying further the justice laws. Only a few of these changes, such as the postponement of the early retirement scheme, could be seen as a partial step in the direction of the Venice Commission recommendations. The majority of these changes were not in line with the Commission recommendations or the recommendations from GRECO and the Venice Commission. . The speed of adoption, lack of consultation and unclear rationale behind these emergency ordinances have sparked very negative reactions, including arguments that they were unconstitutional.

A first argument was that amending the laws by government emergency ordinances, without debate and consultation or ex-ante control, and the laws enter into force before going to Parliament, sometimes modifying the same provisions repeatedly, has affected the legal certainty and predictability of the organisation of the judiciary, of the judicial process and of judicial decisions. One issue here was that the approach had further damaged the quality of this legislation, already strained by the accelerated parliamentary procedure of 2018, affecting the clarity and readability of the law, for citizens and magistrates alike.

In its opinion 950/2019, the Venice Commission made a thorough critical analysis on the amendments of the justice laws by emergency ordinances. The opinion concludes that: *'most alarmingly, the Government continues to make legislative amendments by emergency ordinances. While the Constitution clearly indicates that this should be an exceptional measure, legislation by the GEOs became a routine. Fundamental rules of the functioning of key State institutions are changed too quickly and too often, without preparation and consultations, which raises legitimate questions about*

¹² Law 303/2004 on the Statute of magistrates; Law 304/2004 on Judicial organisation; Law 317/2004 on the Superior Council of Magistracy

¹³ Law 207/2018 amending and completing Law 304/2004 on the judicial organisation entered into force on 20 July; Law 234/2018 for amending and completing Law no. 317/2004 on the Superior Council of Magistracy entered into force on 11 October; Law 242/2018 amending and completing Law no. 303/2004 on the statute of judges and prosecutors entered into force on 15 October.

¹⁴ Emergency Ordinances No 77/2018 of September 2018, No. 90/2018 of October 2018, No. 92/2018 of 16 October 2018, No.7/2019 of 20 February 2019 and No.12/2019 of 5 March 2019,

*the soundness of the outcomes and of the real motives behind some of those changes. The resulting legal texts are not clear. This practice weakens external checks on the Government, it is contrary to the principle of separation of powers and disturbs legal certainty.*¹⁵

In its Communications of April and July 2019 on strengthening the rule of law in the Union, the Commission recalled the principles underlying the rule of law as recognised by the European Court of Justice and the European Court of Human Rights. These principles include judicial independence and impartiality and legality, and it was noted that this includes transparent, accountable, democratic and pluralistic process for enacting laws, as well as legal certainty.

Regarding the content of the amendments, concerns focused on examples including;

- (1) Accelerating the entry in operation of the special section for investigating crimes committed by magistrates – already identified in November 2018 as a source of concern – and extending its jurisdiction on appeal or even closed cases (see also next section);
- (2) Further weakening the role of the prosecution section of the Superior Council of Magistracy (SCM), notably in favour of the judges section, in particular the prosecution section had no role in the appointments of prosecutors of the special section for investigating crimes committed by magistrates at the creation of the section;
- (3) Increasing from one day to another the seniority requirements for prosecutors (also in management positions) in the National Anti-corruption Directorate (DNA) and in the Directorate for Investigating Organised Crime and Terrorism (DIICOT), without considering the impact on these institutions.¹⁶ According to the law, the new eligibility criteria also apply retroactively to those already appointed, raising issues of retroactive application of the rules.¹⁷

In the Emergency ordinances, the Government has sometimes defined rules which seemed rather to have been set by the SCM.¹⁸ The SCM does not appear to have objected to this.

As also highlighted in June by the Venice Commission and GRECO,¹⁹ the amendments brought by the emergency ordinances did not address the concerns expressed in the November 2018 reports.²⁰

The implementation of the amended laws has led to continued concern about risks to judicial independence, for example in the operation of the special section for investigating crimes committed by magistrates.²¹ This has been identified as exacerbating legal uncertainty and unpredictability.

Uncertainty has been created by the provisions on early retirement, which were strongly criticised for their potential disruption of the judicial institutions. The provisions would allow magistrates to retire after 20 years of service. The duration of initial training was also increased from two to four years.

¹⁵ Venice Commission, Opinion 950/2019, para. 49.

¹⁶ For all prosecutors the seniority requirement went from 6 years before October 2018, to 8 years in the amended justice laws adopted by Parliament, and then to 10 years in the emergency ordinance 92/2018. The 10 years criteria also applies retroactively (EOG 92/2018). In a press statement, the then Minister of Justice stated that the retroactivity was justified in order to ensure that the former Chief of DNA could not access the grade of prosecutor attached at the HCCJ after its dismissal. Later a court overturned the decision in its case.

For top management posts (and heads of sector in the DNA), the seniority requirement was 10 years before October 2018 and remained unchanged in the amended Justice laws adopted by Parliament. It was changed to 15 years by EOG 92/2018 in October 2018, then not mentioned in the EOG 7/2019 of February 2019 and then back to 15 years in the EOG 12/2019 of March 2019.

¹⁷ Whereas the Superior Council of Magistracy made a statement that the new criteria would not apply retroactively, in one court case, the judge dismissed the prosecution findings on the basis that the prosecutor who had investigated the case did not satisfy the new eligibility criteria.

http://portal.just.ro/35/SitePages/Dosar.aspx?id_dosar=8300000000096951&id_inst=35

¹⁸ For example by defining the procedure for organising the competition appointing the management and prosecutors of the special section. This was also the case in the emergency ordinance 77/2018, nominating the management of the Judicial Inspection ad interim.

¹⁹ Venice Commission Opinion 950/2019 and GRECO-AdHocRep(2019)1

²⁰ Venice Commission Opinion 924/2018, GRECO-AdHocRep(2018)2 and CVM report COM(2018) 851

²¹ Further potential problems were identified in the application of the laws, such as the rules for appointments of the management of the judicial Inspection.

With concern that this would result in a gap in essential resources, in particular in the highest courts and specialised prosecutor offices²², entry into force of these provisions was postponed until 1 January 2020. So far the SCM has not provided detailed data on how these provisions would affect the workforce, so the concerns remain as the new date of application nears. This concern is heightened due to the potential cumulative impact with other new provisions such as the introduction of larger panels of judges and weakened criteria for promotion to the High Court of Cassation and Justice.²³ It had been expected that such broad ranging managerial changes would be discussed in the Strategic Judicial Management,²⁴ with a thorough impact assessment on the continuity, celerity and quality of justice.

In July 2019, the Minister of Justice expressed a willingness to identify appropriate legislative solutions, in consultation with the judiciary and the Parliament. There have been no further amendments to the justice laws on the points raised, nor on the two new relevant reports from the Venice Commission and GRECO of June 2019.^{25 26}

Activity of the Special Section to investigate crimes committed by Magistrates

One of the most strongly criticised features of the amended justice laws is the new department for investigating criminal offences committed by magistrates, operational since 23 October 2018. The November 2018 report concluded that the establishment of this new department risked being an (additional) instrument of pressure on judges and prosecutors.

The first concern expressed has been that the creation of the special section specialising in investigating allegations of crimes (such as corruption or abuse in office) committed by magistrates would affect their public standing and reputation, as it singles magistrates out as a specific group deserving special treatment for crimes allegedly committed, putting them under a general suspicion.²⁷ In the specific context prevailing at the time of the creation of the section, where political criticism of magistrates and claims of systematic abuses was frequent, many magistrates expressed the fear that the purpose of creating this department was to seek to pressurise them in their work. Conversely, proponents of the creation of the special section, including some in the judges section of the SCM, cited in particular a need to take corruption crimes involving magistrates outside the competence of the National Anti-Corruption Directorate (DNA). The argument was that the DNA had abused this competence by opening ex-officio investigations, with the intention of putting pressure on judges in DNA-prosecuted trials to obtain high conviction rates. These claims of systematic abuses by the DNA have been strongly disputed by the DNA and by the Public Ministry.^{28 29}

The Bureau of the Consultative Council of European Judges adopted an opinion on the Justice laws in May 2019.³⁰ This in particular criticises the special section and calls for its end: “the CCJE Bureau

²² For details on this issue see Venice Commission Opinion 924/2018 and CVM report of November 2018.

²³ See also Venice Commission opinion 950/2019 and GRECO-AdHocRep(2019)1

²⁴ Made up of the Minister of Justice, the Superior Council of Magistracy, the High Court of Cassation and Justice and the Prosecutor General.

²⁵ See footnote 3. In addition, the Bureau of the Consultative Council of European Judges (CCJE) and the Bureau of the Consultative Council of European Prosecutors (CCPE) adopted opinions in 2019.

<https://rm.coe.int/ccje-bu-2019-4-en-opinion-romania-2019-final-25-april-2019/168094556c>

<https://rm.coe.int/ccpe-bu-2019-3-opinion-romania-2019-final/168094848a>

²⁶ A proposal to dismantle the Special Section put forward by opposition parties is making its way in Parliament. The Government’s opinion is that ‘The Parliament will decide on the opportunity to adopt this legislative initiative’.

²⁷ The specialised prosecution offices in Romania are competent for specific crimes committed by anybody and not just by a specific professional group.

²⁸ In August 2018, numbers entered the public domain without verification, citing thousands of investigations initiated ex-officio against magistrates by the DNA. Corroboration came from the Judicial Inspection, but this appeared to breach the confidentiality of an inspection being carried out in the DNA. The publication of figures from the DNA itself and the Public Ministry did not result in a rectification, even from official sources.

²⁹ As mentioned in the November 2018 CVM report, there were 2396 cases involving magistrates registered between by 2014 and 2018. Less than 8% of these involved criminal judges, and with all complaints from the public registered, less than 3% resulted in effective investigation and trial. This scale was confirmed by the number of ex officio cases transferred to the special section with the transfer of competence (under 40).

³⁰ <https://rm.coe.int/ccje-bu-2019-4-en-opinion-romania-2019-final-25-april-2019/168094556c>

wishes to underline from the outset that it finds it difficult to identify references to such practices in Member States, and moreover to standards in this respect elaborated in international or regional instruments. The specialisation of prosecutors vis-à-vis representatives of specific profession, judges in the case of Romania, immediately raises several questions about the rationale for such a discriminatory approach, its effectiveness and added value. It also raises concerns as regards the public image of the judiciary because such a step may be interpreted by society as evidence of an inclination of the whole professional group to commit a specific type of crime, for example, corruption. In this way, it will not only be derogatory for this professional group but will also damage, possibly severely, the public confidence in the judiciary. '

The way in which the special section was established has also been a source of criticism. In the first place, the Government used emergency ordinances to water down the established norms in terms of criteria for appointments within the section. Government Emergency Ordinance 90/2018 weakened a number of guarantees, including the professional, management and ethical requirements for the candidates, and took away the necessity that high-ranking prosecutors participated in the selection panel and in the final appointment decision. The Ordinance made a one-off modification of the law in such a way as to ensure full control of the appointment process to a small panel consisting only of a few judges of the SCM.³¹ The Venice Commission opinion was very critical on this point, stating that the approach 'cannot be explained otherwise than by a strong mistrust of the Government towards the current prosecutorial members of the SCM and its wish to reduce their role.....the Government should not be able to influence the balance among the members of a constitutional body which has as its main function to protect the independence of judges and prosecutors from the executive.'³² The result was the appointment of a management team in a way which could not command the confidence of the public and the respect from within the judicial system, and which inevitably raised concerns about vulnerability to political influence.³³

The broad and loosely-defined jurisdiction of the section has also raised concerns. The rules on hierarchical control of the activity of the section with regard to the Prosecutor General are unclear. The law adopted in July 2018 paved the way for the transfer to the special section of any investigation which involves a magistrate and the investigation and prosecution of all persons involved in the case, even if the magistrate's role in the file is marginal.³⁴ In practice, the special section required the transfer of a number of high-level corruption investigations and prosecutions. This confirmed the concerns highlighted in the November 2018 report that the section creates an important risk for the effective investigation and prosecution of complex high-level corruption or organised crime cases. The Venice Commission argued that '*participants in the criminal proceedings may be tempted to obtain the transfer of the case to the Section by accusing a magistrate of some misbehaviour. Such files will then be transferred to the Section, even if the evidence against the magistrate is weak at least, until the accusations are verified and more evidence is obtained.*'³⁵ Government emergency ordinances have

³¹ Throughout 2018-2019 the legislator and the Government oscillated between two models of appointment of top prosecutors: one involving the Plenary of the SCM and another the Prosecutors' Section. It is unclear why, for the transitional scheme of appointment of top prosecutors to the Section, the Government entrusted the function to the member of the Judges' Section.

³² Venice Commission opinion 950/2019, para. 37.

³³ The appointment of the senior management aroused controversy, with the chief prosecutor of the special section having been subject to criticism on the grounds of impartiality in the Judicial Inspection, and the deputy chief prosecutor having already received a negative opinion by the prosecution section of the SCM when nominated by the Minister of Justice as chief prosecutor of DNA. In June 2019, the Chief Prosecutor became a Constitutional Court judge, appointed by the Chamber of Deputies. The deputy Chief prosecutor is a candidate to become Chief prosecutor of the Special Section, however so far the SCM plenum has not supported this appointment.

³⁴ Art 88¹ and Art 88⁸ of law 304/2004 provide that the special section to investigate magistrates will take over a case and the investigation of all other persons involved as soon as a magistrate is involved. Particularly Art 88¹(2): *The Section for Investigation of Offences in the Judiciary shall maintain its jurisdiction for prosecution in cases where other persons are being investigated together with the persons provided by in paragraph (1)*

³⁵ This concern was borne out when a denunciation against the prosecutor dealing with a corruption file involving fraud against the financial interests of the Union led to request by the Section to take over the file. The attempt was eventually stopped by the Prosecutor General and the DNA maintained its investigative competence in the file.
<https://www.csm1909.ro/ViewFile.ashx?guid=7541ddb6-a823-473a-b8ed-e10655e07b7d|InfoCSM>

further aggravated the problem of unpredictability and legal uncertainty of the judicial process and for magistrates (both judges and prosecutors) by enlarging the competence of the special section to all cases in court for which the investigation is already finalised, including lodging and withdrawing appeals for cases on trial, final cases and closed cases.^{36 37} The result has been the source of further controversy. In May 2019 the Section reopened a corruption investigation concerning a judge of the SCM which the DNA had closed in August 2018.³⁸ The judge in question had regularly spoken publicly against the amendments to the justice law, including the special section. The special section also lodged appeals in other cases involving magistrates who had been acquitted.³⁹ On the other hand, several appeals introduced by the DNA in high-level corruption cases prior to the transfer of the file to the special section were dropped.⁴⁰

Such examples have led observers both within Romania⁴¹ and outside to conclude that the concerns expressed at the establishment of the Section have been proved justified,⁴² and to therefore call for the Special Section to be disbanded. Both the Venice Commission and GRECO in reports of June 2019 reiterated very serious concerns on the creation of such a section, especially after having witnessed six months of its operation.⁴³

Appointments/dismissals in the judiciary

Appointment/dismissals of prosecutors

The November 2018 report had highlighted the risks in a concentration of power in the hands of the Minister of Justice. It pointed notably to the decisions of the Minister of Justice to request the dismissal procedure of the chief prosecutor of the National Anti-Corruption Directorate (DNA), to propose in September the appointment of a new Chief Prosecutor of DNA despite a negative opinion from the Superior Council of Magistracy (SCM), and also to launch a process to dismiss the Prosecutor General. In view of these worrying developments, the Commission issued three additional recommendations:

- (1) Suspend immediately all ongoing appointments and dismissal procedures for senior prosecutors;
- (2) Relaunch a process to appoint a chief prosecutor of the DNA with proven experience in the prosecution of corruption crimes and with a clear mandate for the DNA to continue to conduct professional, independent and non-partisan investigations of corruption;
- (3) Respect negative opinions from the Superior Council on appointments or dismissals of prosecutors at managerial posts, until such time as a new legislative framework is in place in accordance with recommendation 1 from January 2017.

In response, the then Minister of Justice stated that he could not apply these recommendations and he pursued both the proposal for appointing the chief prosecutor of the DNA, despite a first refusal by the President of Romania, and the dismissal procedure against the Prosecutor General. The proposal for

³⁶ All prosecution services have sent final and closed cases to the special section after its entry into operation.

³⁷ The effect of such wide jurisdiction may also increase the number of complaints against magistrates (prosecutors and judges) as defendants may want to take advantage of delays caused by transfers including for cases already on trial.

³⁸ <https://www.scj.ro/1094/Detalii-dosar?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=100000000322273>

³⁹ <http://www.scj.ro/1094/Detalii-dosar?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=100000000319026>

⁴⁰ <https://www.scj.ro/1094/Detalii-dosar?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=100000000318664>, <https://www.scj.ro/1094/Detalii-dosar?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=100000000318064>

⁴¹ Magistrates associations (Forumul judecatorilor, AMASP, "Initiativa pentru justitie), civil society, Opposition parties.

⁴² A key example concerned a criminal case against the former Chief Prosecutor of the DNA who is also a candidate to be European Public Prosecutor. The timing of the opening of the criminal case and the calendar of summons seemed specifically designed to frustrate this candidacy, and a decision by the High Court of Cassation and Justice on the preventative measures applied qualified them as unlawful. Another example, at the same period, concerns a case opened against the former Prosecutor General for forming an organised crime group in relation to the drafting of the CVM reports.

⁴³ Venice Commission opinion 950/2019 and Greco-AdHocRep(2019)1

the DNA chief prosecutor was refused a second time by the President of Romania in January 2019 and has remained in limbo since then.⁴⁴

The proposed dismissal of the Prosecutor General first received a negative opinion from the SCM. The Minister of Justice nevertheless put the request to the President of Romania, who refused the dismissal in January 2019. Two months later, the Minister of Justice started the appointment process for the prosecutor general post, as his first term mandate was ending in May.⁴⁵ The Minister of Justice first rejected all candidates, declaring them unsuitable for the profile the Prosecutor General of Romania needs, and started a new procedure. All candidates had already held senior management positions in the prosecution, including the incumbent Prosecutor General.⁴⁶ Following the change of Minister of Justice in April, the procedure for appointing the Prosecutor General was suspended.⁴⁷ At the time of writing this report, there is no Prosecutor General and no chief prosecutor in the DNA. The functions are filled ad interim by the corresponding deputies. In September 2019, the issue of top prosecution appointments was discussed between the Minister of Justice and the judicial institutions.

The same appointment procedure applies for all deputy and heads of sector positions within the DNA, and the Minister of Justice had initiated several procedures to fill the posts. In the reporting period one posts was filled, but many remain filled ad interim.

Judicial Inspection

The November 2018 report had expressed concerns both on the activity of the Judicial Inspection and on the interim appointment of the management team. Since the last report, the activity of the Judicial Inspection has continued to raise similar concerns. Criticism focused on the correlation between disciplinary proceedings against magistrates and against the heads of the judicial institutions and that fact that the individuals concerned had often taken public stances against the amendments to the justice laws^{48 49} A further issue were successive cases of ongoing disciplinary investigation documents appearing in the media – with a similar correlation to those critical of the amendments to the justice laws and the special section to investigate crimes committed by magistrates.⁵⁰ In July 2019, the President of the SCM informed the Commission that the issue of leaks had been discussed with the management of the Judicial Inspection in June, after the nomination of the new chief inspector.

In addition, no competition was organised by the Superior Council to appoint a new management of the Judicial Inspection, although the mandate of the management team expired end of August 2018. The decision of the Government to solve the situation by adopting an Emergency Ordinance to nominate the current team ad interim – rather than leaving this to the Superior Council – did nothing to assuage concerns. The November 2018 report had therefore recommended that the Superior Council of Magistracy should appoint immediately an interim team for the management of the Judicial Inspection and within three months appoint through a competition a new management team in the Inspection.

The SCM did not appoint a new interim management team and the management therefore remained in place ad interim until the appointment of the chief inspector in May 2019.⁵¹ The procedure managed

⁴⁴ DNA has therefore worked with ad interim leadership since then.

⁴⁵ The mandate is of 3 years, renewable once.

⁴⁶ The Prosecutor General's application for a second mandate was marked by a high level of criticism in the media. When his candidacy was rejected by the Minister of Justice, the Prosecutor General retired from the magistracy.

⁴⁷ <http://www.just.ro/declaratia-de-pres-a-sustinuta-de-doamna-ana-birchall-ministrul-justitiei-interimar-azi-30-04-2019/>

⁴⁸ The Consultative Council of European Judges (CCJE) and the Venice Commission have both underlined the importance that judges should be free to comment in relevant public debates. Note also the legal provisions restricting the freedom of expression of magistrates criticised by the Venice Commission.

⁴⁹ <https://cursdeguvernare.ro/asociatia-initiativa-pentru-justitie-inspectia-judiciara-incearca-sa-i-intimideze-pe-magistratii-care-lupta-pentru-apararea-independentei-justitiei.html>,
https://www.csm1909.ro/ViewFile.ashx?guid=38b70eb6-641a-4794-9109-e6805dfd778e&id_inst=36,
http://portal.just.ro/36/SitePages/Dosar.aspx?id_dosar=200000000361685&id_inst=36,
<https://www.libertatea.ro/stiri/inspectia-judiciara-s-a-autosesizat-in-legatura-cu-informatiile-despre-augustin-lazar-2594108>,
<https://revista22.ro/actualitate-interna/ij-l-ancheteaz-pe-procurorul-corbu-care-a-spus-c-agresiunile-jandarmilor-nu-se-justific>,

⁵⁰ A judge's association made an official request to the Judicial Inspection regarding the leaks. The Judicial inspection denied any wrongdoing.

⁵¹ The deputy chief inspector was appointed as head of the special section to investigate crimes committed by magistrates.

by the SCM resulted in the appointment of the same chief inspector, despite the prevailing controversy. On 17 July, the SCM decision to validate the selected candidate was challenged in court.⁵² More generally, the procedure raises questions on whether the new provisions in the Justice laws for appointing the management of the Judicial Inspection offer sufficient guarantees and achieve the right balance between judges, prosecutors and the SCM plenum.⁵³

Criminal Codes

In 2018, the Romanian Parliament adopted amendments to the Criminal Code and Criminal Procedure Code. These amendments raised significant legal and policy concerns. They constituted a profound overhaul of the codes of 2014, and notably in terms of the balance between the public interest of sanctioning crime, victim's rights and the rights of the suspects. They clearly went beyond the CVM recommendation to improve the stability of the codes and to limit amendments to where specifically required by Constitutional Court decisions and transposition of EU Directives. The amendments did not enter into force as they were challenged at the Constitutional Court by the High Court of Cassation and Justice, the opposition parties and by the President of Romania. The Constitutional Court ruled in October 2018 that a substantial number of the amendments were unconstitutional. The November 2018 report therefore recommended to:

- (1) Freeze the entry into force of the changes to the Criminal Code and Criminal Procedure Code;
- (2) Reopen the revision of the Criminal Code and Criminal Procedure Code taking fully into account the need for compatibility with EU law and international anti-corruption instruments, as well as the recommendations under the CVM and the Venice Commission opinion⁵⁴.

In March 2019, the Government prepared several emergency ordinances modifying the Criminal Code and Criminal Procedure Code. One of the drafts aimed at a more limited set of amendments, drafted in particular to transpose EU Directives and implement Constitutional Court decisions, but raised other issues. Another draft would have allowed an extraordinary review for all final criminal cases ruled by the High Court of Cassation and Justice between 2014 and 2018. Facing strong criticism on these projects, the Government eventually decided not to take them forward.

In April 2019, the Parliament revised the draft laws of 2018 following the Constitutional Court rulings and adopted revised amendments of the Criminal Code, the Criminal Procedure Code and the special law on corruption in an expedited procedure of less than one week. Whereas some of the problematic provisions envisaged in the earlier drafts had disappeared from the new laws, others remained. Many amendments continued to raise concerns on the grounds of weakening the criminal investigation and sanctioning regime for corruption crimes, with severe consequences on the capacity of law enforcement and the judiciary to combat all types of crimes.⁵⁵ The justification provided by the majority supporting the changes in Parliament was that the new version maintained only those amendments considered constitutional after the Constitutional Court control of October 2018. This implies that the desirability of the amendments in policy terms was not considered, despite the

⁵² http://portal.just.ro/46/SitePages/Dosar.aspx?id_dosar=4600000000042849&id_inst=46 and <http://www.scj.ro/1094/Detalii-dosar?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=100000000323236>

⁵³ Under the old law 317/2004, both the Chief Inspector and the deputy Chief Inspector were selected by the SCM Plenum through by a competition including a written test, an interview and the presentation of the management project. Under the new law, only the Chief Inspector is appointed by the SCM after an interview before a commission with 3 judges, 1 prosecutor and one member of civil society. The SCM plenum formally appoints the candidate but can only object on the grounds that the rules were not respected. The deputy Chief Inspector and the Directors of respective Sections are selected by the Chief Inspector, whose powers to organise the inspection have also been increased.

⁵⁴ In October 2018, the Venice Commission adopted a critical opinion, pointing to rule of law concerns in leaving crimes unpunished, to the lack of quality of the legislation, and to shortcomings in its preparation as well as contradictions with the case law of the European Court of Human Rights and with the international obligations of the country, especially regarding the fight against corruption. (Opinion 930/2018).

⁵⁵ Examples include limitations on the collection and use of evidence and financial data; the significant shortening of prescription periods; mitigating circumstances; suspending the enforcement of additional penalties for the duration of the suspension of the penalty of imprisonment; favourable treatment for denunciation of the crime within one year maximum; and decriminalisation of negligence in office.

importance of the laws for the criminal policy of the State. These amendments were again challenged to the Constitutional Court by the opposition parties and the President. After eight consecutive deferrals, the Constitutional Court ruled at the end of July that the amended laws are unconstitutional as a whole and not in line with its previous decisions.

As mentioned under recommendation 4, in the referendum on justice of 26 May, an overwhelming majority voted in favour of banning amnesty and pardon for corruption offenses. In August, the Parliament rejected a law on amnesty and pardon from February 2017, which had remained on the parliamentary table.

Cooperation between the intelligence services and the judicial institutions

The past few years have seen a debate concerning the cooperation in criminal cases between the Romanian Intelligence Service ('SRI') and various judicial institutions, including the DNA and the General Prosecutor's Office, and in more general terms on the relationship between the SRI and the judicial institutions.

The November 2018 report noted that 'The operation of the intelligence services is not a matter for the EU and falls outside the CVM benchmarks. It is the role of the courts to establish whether or not specific allegations of abuses are substantiated and an open and impartial investigation would be needed to establish whether there were systemic failures such as illegal gathering of evidence or illegal influence on magistrates, and whether the existing legal safeguards need to be strengthened.'

The main development in 2019 relevant for the CVM report is the decision of the Constitutional Court on two cooperation protocols signed between the Public Ministry and the SRI in 2009 and in 2016.⁵⁶ In short, on the protocol signed in 2016 by the Public Ministry and the SRI, the Constitutional Court ruled that the 2016 Protocol is legal. Emergency Ordinance 6/2016 amending the criminal procedure code had required a protocol of cooperation to establish the manner of collaboration between services.⁵⁷ On the 2009 protocol, the Constitutional Court ruled that the protocol went beyond the constitutional role of the public ministry and that, for all future and pending cases, the courts, together with the prosecutorial offices, should verify whether the evidence gathered in the context of the protocol had been administrated with full respect of the law, and decide on appropriate legal measures. The decision does not apply to court decisions which became final before the ruling.

It is still early to determine the full impact and consequences of the practical implementation of this decision, in particular on the fight against corruption.^{58 59} The High Court of Cassation and Justice will have a crucial role to play to ensure consistency of the case law.⁶⁰

The Superior Council of Magistracy also informed the Commission that the Judicial Inspection has prepared a report on the protocol between the SRI and the Prosecution services. The report has been transmitted to the Council for debate and endorsement, but has not yet been made public.⁶¹

The 2018 November report highlighted that 'it is clearly important to ensure a framework where the intelligence services are under proper supervision, where crimes can be effectively investigated and sanctioned while fully respecting fundamental rights, and where the public can have confidence that

⁵⁶ CCR Decision no 26/2019 of 16 January 2019 admitting a legal conflict of constitutional nature between the Public Ministry-POHCCJ and the Parliament. <http://www.ccr.ro/jurisprudenta-decizii-de-admitere/>

⁵⁷ Part of the protocol was declared unconstitutional by the CCR Decision 26/2019 but this does not affect the operational part of the protocol.

⁵⁸ Preliminary estimates suggest that this may impact on around 400 court cases.

⁵⁹ In a recent ruling by the Court of Appeal of Suceava, it was decided not to exclude evidence based on past interceptions. Judges considered here that the Constitutional Court itself stated that offer of technical support by the SRI is not equivalent to performing the act of criminal investigation. Curtea de Apel Suceava, Încheierea de cameră preliminară nr. 15 din 19 martie 2019, portal.just.ro

⁶⁰ Additional uncertainty for high-level corruption cases comes from two other constitutional court decisions annulling court decisions from the High Court of Cassation and Justice, one opening the possibility for an extraordinary appeal to some final decisions issued in 2018; and the second decision annulling the court proceedings in corruption cases held at the High Court of Cassation and Justice which were not final on 23 January 2019. (see also benchmark 3)

⁶¹ The report has however been leaked to the media.

judicial independence is secure'. The Constitutional Court decision also points to the need for the Parliament to strengthen its control on the intelligence services.⁶²

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.

Successive CVM reports had highlighted the need for sufficient checks and balances in the procedure to appoint top prosecutors, as well as the extent to which the same appointment and dismissal procedure would apply at lower management level within the prosecution. The November 2017 report had underlined the lack of progress. The November 2018 report concluded that the situation had regressed.⁶³

Since the last report, Government Emergency Ordinances 92/2018, 7/2019 and 12/2019 have further modified the article on the appointment of top prosecutors. The Ordinances modified the seniority requirements from 10 year to 15 years, then was not mentioned anymore and then back to 15 years. The endorsement of the prosecution section of the SCM was transferred to the plenum in Ordinance 7/2019 of the SCM and then back again to the prosecution section in Ordinance 12/2019 (see also above). The constant modifications created further uncertainty and a lack of confidence in the procedure. Although the procedure was modified four times in less than six months, none of these changes addressed the issue of the balance between the influence of different institutions on the process and the concentration of power with the Minister of Justice.⁶⁴ Both the Venice Commission and GRECO have reiterated their earlier recommendations in opinions issued in June 2019. In particular the Venice Commission concludes that *'the scheme of appointment and dismissal of the top prosecutors remains essentially the same, with the Minister of Justice playing a decisive role in this process, without counterbalancing powers of the President of Romania or the SCM. It is recommended to develop an appointment scheme, which would give the Prosecutors' Section of the SCM a key and pro-active role in the process of the appointment of candidates to any top position in the prosecution system'*.

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.

A new Code of Conduct for parliamentarians is in place since the end of 2017.⁶⁵ 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. Although the hope was that the codes of conduct would be carried through as a practical tool to address the problem, the November 2018 report found that with a lack of explicit provisions on the respect for the independence of the judiciary, the Code was not yet performing this function.

In the reporting period, the Chamber of Deputies mentions that seven sanctions were applied for breaching the code of conduct and the details can be found on the website of the Chamber.⁶⁶ From the information made available by Parliament, the cases do not appear to refer to criticism of the judiciary susceptible to undermine its independence. It has also been noted that all seven cases concern sanctions against members from opposition parties.

⁶² CCR decision 26/2019

⁶³ COM(2018) 851 and SWD(2018) 551.

⁶⁴ In its opinion 950/2019 the Venice Commission notes "GEO no. 92 provided for the web broadcasting of interviews conducted by the Minister of Justice with the prospective candidates to the top positions in the prosecution system (Article 54 (1-1) of Law no. 303). Broadcasting of interviews adds transparency, but it does not remove the inherently political nature of the process of appointment and cannot replace the examination of the merits of the candidates by an expert body."

⁶⁵ <https://www.juridice.ro/wp-content/uploads/2017/10/Codul-de-conduită.pdf>.

⁶⁶ <http://www.cdep.ro/pls/dic/site2015.page?id=1046>

In July 2017, the Government adopted a Code of Conduct for Ministers,⁶⁷ which also includes a general provision on the respect for the separation of powers. In April 2019, the Government amended the code of conduct, and this now explicitly mentions the respect of the independence of justice under the general principles.⁶⁸

In the reporting period, criticism of the judicial system and individual magistrates in the media and from the Government and the Parliament representatives has continued to be particularly common, in particular against the institutions dealing with high-level corruption.

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.*

Criminal Code and Criminal Procedure Code

For developments regarding the Criminal Code and the Criminal Procedure Code, see above.

Civil Code and Code for Civil Procedures

The November 2018 report acknowledged the amendments to the Code of Civil Procedure annulling three out of the four provisions which still needed to be implemented. In particular, a major change was made in eliminating the preliminary analysis stage in the Council Chamber in the civil procedure. The process for amending the Code of Civil procedure was finalised in December 2018. The November 2018 report noted that the amendments should take particular account of the workload of the High Court of Cassation and Justice. No additional information on the latter has been received from the Romanian authorities.

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.*

The November 2018 report criticised the legislative process amending the justice laws and amending the Criminal Code and Criminal Procedure Code, seen as unpredictable and rushed and lacking effective analysis, motivation, consultation and policy debate.

The process used for this legislation has continued to raise concerns. Further amendments of the justice laws, changing fundamental rules on the functioning of the judiciary, were made without appropriate preparation and consultation. The process lacked transparency and predictability, and the immediate entry into force of the new provisions raised very serious challenges. As mentioned earlier in this report, the amendment of the Justice laws by five government emergency ordinances in less than six months was strongly criticised by the Venice Commission,⁶⁹ due to its impact on the quality of legislation, legal certainty, external checks on the Government, and the principle of separation of powers.

⁶⁷ <https://sgg.gov.ro/new/wp-content/uploads/2019/03/MEMO-12.pdf>.

⁶⁸ Article 3 of the Code of Conduct for Ministers, regarding the principles of the Code, underlines the fact that: "The Members of the Government exercise their mandate in accordance with the checks and balances principles, in the framework of constitutional democracy, while respecting the independence of justice, on the basis of the loyal collaboration between authorities/institutions."

⁶⁹ Venice Commission opinion 950/2019.

Similarly, the revision of the amendments of the criminal code and criminal procedure code and the special law on corruption were passed through the committees and both chambers of Parliament in less than one week, with consequently minimal debate. The Constitutional Court rejected both laws in their entirety, as the laws failed to take duly into account previous Constitutional Court decisions (See earlier under Criminal Codes).

This was a major reason why the Commission wrote to the Government, Parliament and to the President of Romania in May 2019 expressing concerns of risks to the rule of law, citing the process undertaken for key legislative changes in the justice laws and the criminal codes.

As the situation continued to deteriorate, on 26 May, the President of Romania called a referendum on justice. The participation rate was above 40%. An overwhelming majority (80,9%) voted in favour of banning amnesty and pardon for corruption offenses and 81,12% voted in favour of banning the adoption by the Government of emergency ordinances in the area of crimes, punishments and judiciary organisation, also supporting the right to challenge ordinances directly at the Constitutional Court. Although the referendum is not legally binding, the Prime Minister declared that the Government would follow the results and would abstain from adopting emergency ordinances in the area of justice.⁷⁰

The Parliament has also decided to dismantle the Special Parliamentary Committee on systematisation, unification and ensuring legislative stability in the judiciary, which had initiated the amendments of the justice laws and the criminal codes and was responsible for some of the most abrupt procedures used.

Legislative developments in relation to the integrity legal framework (incompatibilities, conflict of interests, wealth declarations) have created similar concerns. CVM reports have repeatedly highlighted the lack of stability and clarity of the integrity legal framework, and regretted the difficulty to consolidate the rules in a clear and predictable legal framework, as the rules are spread in many (sometimes contradictory) laws and are continuously being modified. In this reporting period, several legislative amendments in different laws have significantly increased this lack of clarity and legal certainty. The recent changes have had a significant impact on the integrity legal framework, but there does not appear to have been a transparent and inclusive legislative process or a clear analysis and debate of the consequences. The societal benefits of the amendments are unclear and the laws were adopted despite a negative opinion from the National Integrity Agency (ANI). The risk is that courts and individuals will find it increasingly difficult to understand how and in which circumstances the laws and sanctions for incompatibilities or conflict of interests will apply, if at all. (See also benchmark 2).

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.*

Respect and implementation of court decisions is an integral part of the efficiency of the judicial system as set out in Benchmark One.⁷¹ Following a condemnation by the European Court of Human Rights in 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.⁷² This action

⁷⁰ In August, however, the Government published online for public consultation a draft emergency ordinance modifying the criminal codes in the aftermath of a murder case that shook the public opinion in July 2019. Some of the envisaged changes to the substantive and procedural criminal legislation seek to reverse previous measures related to the conditional release from prison or eliminate certain restrictions on law enforcement action in relation to serious crimes. <http://www.just.ro/proiect-pentru-modificarea-legislatiei-penale-si-procesual-penale-in-cazul-infractiunilor-grave-si-foarte-grave-contra-persoanei-in-special-in-situatiile-in-care-este-afectata-valoarea-sociala-supre/>

⁷¹ 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

⁷² COM(2017) 44 p.6. The Action plan of structural measures in relation to the Săcăleanu group of cases can be found at

plan and the additional measures required by the Council of Europe Committee of Ministers are of direct relevance to addressing this recommendation.

The November 2018 CVM Report found that there had been progress on this recommendation. The report noted that steps were under way to progress on the action plan and that a list of measures to take had been submitted to the Government in September 2018. The report further noted that in parallel the Ministry of Justice and the Superior Council of Magistracy were also advancing with an IT registry of court decisions in which the State is a debtor or a creditor.⁷³

In April 2019, the Government approved the list of measures and tasked the responsible inter-ministerial working group to draft the legal proposals. These measures include amendments to the legal framework in order to guarantee timely execution and a mechanism to supervise and prevent late execution of judgements for which the State is a debtor, to be set up under the auspices of the Ministry of Justice.⁷⁴ The working group and the Ministry of Justice are currently analysing the solutions and preparing the measures for adoption by the Government.

Complementing the activity of the working group, the Ministry of Justice with the support of the Superior Council of Magistracy has progressed on the setting up of an IT registry of court decisions in which the State is a debtor or a creditor. The IT application has been developed and tested in particular in courts with high volumes of activity until end of June 2019, which should pave the way to operationalisation of the registry in all courts, pending final approvals and updates of the courts' IT system (ECRIS). Once operational, the registry will make available statistics on effective enforcement, and will allow responsible entities to monitor the execution of judgements.

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.*

The November 2018 CVM Report had seen no progress towards meaningful results on this recommendation. The report noted that the Strategic Management Council has not developed into a forum able to address major strategic questions for the judicial system.

Between November 2018 and September 2019, there was no meeting of the Strategic Judicial Management. As noted earlier in this report, the amended justice laws, which have brought fundamental changes in the functioning and the organisation of the justice system, have been taken forward through unilateral Emergency Ordinances and decisions from the judicial institutions rather than through consensual decisions from the Strategic Judicial Management. In July 2019, the Minister of Justice stated that she will convene the Strategic Judicial Management, to discuss subjects of common interest for all participants in the judiciary, as well as the necessary steps in view of the implementation of CVM, GRECO and the Venice Commission recommendations. The meeting took place on 17 September and the Minister proposed to have meetings every six weeks.

At technical level, the judicial institutions reported progress on some of the ongoing projects and activities, and in March 2019 the Government adopted a technical revision of the Action Plan for the implementation of the Strategy for the Development of the Judiciary 2015-2020, prepared in 2018. There was also an evaluation of the Strategy by an external contractor. In Spring 2019, the Minister of Justice also unblocked recruitments and resources for the judicial institutions and the National Agency for the Management of Seized Assets (ANABI).

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806dda63>.

⁷³ COM(2018) 851 and SWD(2018) 551.

⁷⁴ Memorandum on "Measures to Ensure the Execution of Judgments against a Public Debtor, in accordance with the case law of the European Court of Human Rights regarding non-execution or execution with delay of the judgments handed down against a public debtor (the Scăleanu vs. Romania group of cases)."

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.*

Previous CVM reports have underlined the importance for the Superior Council of Magistracy (SCM) to maintain the momentum of reform, to articulate clear collective positions and philosophy and take measures for increasing its transparency and accountability. The November 2017 report noted that the Superior Council of the Magistracy (SCM) had set out its priorities for its mandate (2017–2022), providing a first basis to promote the accountability of the institution.

The SCM reports that in 2019 it continued the implementation of its priorities and of the action plan to implement the CVM recommendation, including on measures to increase transparency. In June 2019, the SCM organised a public debate in the context of new provisions in the Justice laws aiming to increase the decisional transparency and institutional opening of the SCM.⁷⁵

However, as already underlined in the November 2018 report, circumstances have made it increasingly difficult for the Council to maintain the approach set out in its priorities. Divisions in the Council had made it difficult to react in one voice, in particular on legislative changes or even in more managerial areas (for example analysing the impact of amendments such as the early retirement scheme and delayed entry into the profession). Since the last report, these concerns have been confirmed.

First, the manner in which the Council works raises concerns about institutional independence and authority. An example of this is in communication. There are many examples where public statements issued on behalf of the SCM or on behalf of one of the sections had not in fact been endorsed by the Plenum or the corresponding section, but rather reflected only the position of the President of the SCM or a subset of members.^{76 77} There is also a confusion between the roles of the sections and the role of the Plenum. Stemming from the Constitution, the defence of the independence of the justice system is the responsibility of the Plenum, but the judges section has made a series of public statements in this regard, which had not been endorsed by the Plenum.⁷⁸ This situation is also reflected in the the new justice laws, and exacerbated by the government emergency ordinances on the justice laws, which made it possible for decisions on key issues to be determined by only a few SCM members.⁷⁹ Examples already mentioned are the appointments of the management of the special section to investigate magistrates and of the chief inspector. All these elements risk weakening the public confidence in the judiciary.

The SCM is the defender of the independence of justice. The January 2017 report had noted that a proactive approach by the Superior Council was an important element in fulfilling Benchmark One. The November 2018 report however pointed that the Council was not able to provide a strong stance in this area. Since November 2018, the activity of the Council in defending the independence of the judiciary continues to be limited, despite the overall situation in terms of the legal challenges in the justice laws and the pressure on the magistracy and judicial institutions. Between November 2018 and June 2019, the SCM has taken only two decisions to defend the independence of the judicial system and 19

⁷⁵ The meeting was attended by magistrates, journalists, representatives of professional associations, civic associations as well as public institutions in the judiciary. Issues addressed included institutional transparency and access to public interest information, the protection of personal data, the right to information, the right to privacy, the presumption of innocence.

⁷⁶ Although a close analysis of the statement shows that the statement only reflects the position of a subset of the members of the Council, this nevertheless creates confusion as it can be perceived as an authoritative statement from the SCM. Examples include : letter to the Venice Commission <https://cdn.g4media.ro/wp-content/uploads/2019/06/Lia-Savonea-raspuns-Comisia-Venetia.pdf>, communique on Greco reports: <https://www.csm1909.ro/PageDetails.aspx?FolderId=7219>

⁷⁷ Another example regards the amendment of the Criminal Code and Criminal Procedure Code in Spring 2019 where a negative opinion from the SCM had been expressed only by the Section for Prosecutors. However, a collective voice was reached when a negative opinion from the SCM Plenum was issued on 5 March 2019 for the EOG 7/2019.

⁷⁸ <https://www.csm1909.ro/PageDetails.aspx?FolderId=7350>;

⁷⁹ See also Venice Commission opinion 950/2019

decisions to defend the professional reputation, independence and impartiality of magistrates.⁸⁰ Furthermore, analysis finds that the time taken to take decisions has increased in the last two years, thereby decreasing the impact of the decisions of the SCM.⁸¹ The SCM has also never clearly explained why the conclusions it has voiced on the justice laws are so clearly in opposition to those of other stakeholders.⁸² Where the SCM has cited a defence of the independence of the judiciary, it has sometimes raised issues of potential political partiality.⁸³

In view of these developments, Romanian stakeholders have questioned the legitimacy and accountability of some members of the SCM.⁸⁴

Judicial Inspection

Developments concerning the Judicial Inspection are explained earlier in the report in relation to the additional recommendations of November 2018.

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

The November 2018 report concluded that *‘the significant progress marked under Benchmark Two in November 2017 has stalled. Recommendation 8 is fulfilled as long as PREVENT is consolidated as an effective preventative tool. Progress on recommendation 9 requires the current lack of clarity on the rules to be resolved.’*

Amendments to the integrity legal framework

The National Integrity Agency (ANI) has maintained a steady track record since the last report. In the period November 2018-August 2019, ANI identified 173 integrity issues out, with 126 cases of incompatibility, 34 cases of administrative conflict of interests, 4 cases of unjustified wealth and 9 cases of possible criminal or corruption offences. During the same period, 223 cases have become definitive, either through final Court decisions that confirmed ANI’s report, or through the fact that there was no legal challenge to the ANI evaluation report.⁸⁵

Previous CVM reports had highlighted the continued challenges to the integrity legal framework. In the last two and a half years five legislative proposals modifying the integrity laws have been adopted. Rather than bringing clarity to the existing framework, new amendments have been adopted by Parliament. These have weakened certain provisions and the ability of ANI to maintain its track record, and risks exacerbating the fragmented legal landscape. The 2018 CVM report had highlighted in particular two legislative proposals adopted by Parliament in July 2018, despite a negative opinion from ANI. The first would set a prescription deadline of three years for the deeds that determine the existence of the state of conflict of interests or incompatibility.⁸⁶ The second proposal would amend

⁸⁰ At least four decisions concern the same judge.

⁸¹ <http://www.forumuljudecatorilor.ro/wp-content/uploads/Analiza-activitatii-CSM-in-privinta-apararii-corpului-magistratilor.pdf>

⁸² November 2018 CVM report, two Venice Commission opinions, two GRECO reports, opinion from the CCJE, opinion from the Human Rights Commissioner <https://rm.coe.int/report-on-the-visit-to-romania-from-12-to-16-november-2018-by-dunja-mi/1680925d71>

⁸³ For example statements condemning declarations (1) of the President of the European Parliament criticising the preventive measures taken by the special section to investigate magistrates preventing the EPPO candidate to attend the hearing at the European Parliament; (2) of the President of Romania rejecting the proposal for minister of justice made by the Prime Minister in August 2019.

<https://www.csm1909.ro/PageDetails.aspx?FolderId=6842>;

<https://www.csm1909.ro/PageDetails.aspx?Type=Button&FolderId=7350>

⁸⁴ In June 2019 civil society organisations request the resignation of the SCM President. End of August two magistrate associations make a similar request.

⁸⁵ 155 cases of incompatibility and 68 cases of administrative conflict of interests.

⁸⁶ Law modifying Law 176/2010 regarding integrity in public functions.

the sanctioning regime regarding conflict of interests for local elected officials.⁸⁷ These amendments were unsuccessfully challenged at the Constitutional Court by the President of Romania, and both became law in April 2019.^{88,89} Further proposals for amendments are pending in Parliament.⁹⁰

The introduction of a general statute of limitations for civil, administrative and disciplinary liability for conflicts of interests and incompatibilities of three years after the facts have been committed has raised serious concerns.⁹¹ It will result in the prescription of the cases, if more than three years have passed since the integrity incident was committed to the point when an evaluation report is issued by ANI. This appears inconsistent with other provisions of the ANI legal framework, which allow investigations until up to three years after the end of the mandate of the official concerned. This new statute of limitations has already resulted in the automatic closure of 119 files by the integrity inspectors.⁹² In addition, it is unclear whether a sanction can still be applied after a final court decision upholding an ANI report, if the final court decision is only issued after the end of the three years prescription period, as is the case today.

The other amendment modified the list of applicable administrative sanctions for locally elected officials found in conflict of interests. This potentially creates a divergence with the sanctions already foreseen in the ANI law, with a new administrative sanctioning regime for conflict of interests which ANI considers as not being dissuasive.⁹³

This situation increases the legal uncertainty as regards the applicable integrity regime and therefore a risk that the dissuasive sanctions identified in the benchmark and assessed in the January 2017 report no longer apply.

The budget of ANI was sharply reduced in 2017⁹⁴ and this situation had continued in 2018. For 2019, ANI received a budget of 22.5 million RON, 15 % more than the budget implementation for 2018.⁹⁵ According to ANI, this amount is sufficient for the daily operation of the agency. ANI successfully applied for EU funds for a project to improve its investigative IT tools.

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.*

As the previous CVM report noted, the PREVENT system is now fully operational. From the start of operations in June 2017 until 15 August 2019, PREVENT has analysed 33,384 public procurement procedures⁹⁶ including 4,194 referring to European funds. Furthermore, since the beginning of

⁸⁷ Law modifying Law 393/2004 on the Statute of locally elected officials.

⁸⁸ Even if the final form of text modifying Law 161/2003 addressed some of the identified shortcomings

⁸⁹ Modification of Law no 176/2010 regarding integrity in public functions by introducing a prescription deadline for the deeds determining the existence of the conflict of interest or incompatibility situation and Promulgated by Decree no 169/2019

⁹⁰ In total, seven proposals are currently pending in Parliament, concerning the modification and/or completion of Law No 176/2010 (3 projects), Law No 161/2003 (2 projects), Law No 95/2006 (1 draft) and Law No 7/2006 (1 draft). Three of them are older from 2015, and one from 2019 is currently under CCR scrutiny.

⁹¹ ‘Civil or administrative disciplinary liability for the acts that determine the existence of conflict of interest or incompatibility of persons in the exercise of public dignities or offices is removed, and can not be held in the case of expiration of the general prescription period of 3 years since the date of their being committed, in accordance with art. 2.517 of Law no. 287/2009 on the Civil Code, republished, as subsequently amended.’

⁹² ANI forecasts a total number of 200 files to be closed by the end of this year

⁹³ Instead of the sanction of “removal from office” in the ANI law and applied so far, the law on local elected officials introduces a new explicit sanctioning regime for conflicts of interests entailing the application of the following penalties: warning; calling to order; right to take the floor; removal from the meeting room; the temporary exclusion from the local council and the specialised committee; reduction of the meeting allowance by 10 % for a maximum of six months; withdrawal of the meeting allowance for one or two meetings.

⁹⁴ From about 33 million RON in 2016 to 22,5 million RON in 2017.

⁹⁵ The budget for 2019 is similar than the budget for 2017.

⁹⁶ The number doubled since 2018

PREVENT, integrity inspectors have issued 100 integrity warnings⁹⁷ regarding public procurement procedures, amounting to over 1.14 billion RON (approx. €243 million). Out of these, in 97 cases, the leader of the contracting authority removed the causes that generated potential conflict of interests. In addition, the ANI has also notified the National Agency for Public Procurement (ANAP) of 52 cases of possible irregularities⁹⁸ in the public procurement procedures regarding possible conflicts of interest between members of the contracting authority and bidders within the tender.⁹⁹

The PREVENT system also appears to act as an important deterrent. ANI reports that the number of investigations opened in alleged cases of conflict of interests related to public procurement contracts has significantly dropped (by almost 50%) since the system is operational.

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.*

The November 2018 report had referred to a number of cases of final decisions of incompatibilities or conflict of interests against MPs. The report had noted that in some cases, Parliament had not yet reacted and for the others, Parliament had written to ANI that no disciplinary sanction would be applied. The argument was that no action was taken because the integrity incident in question came in a previous mandate or position. The CVM report pointed that this was not an interpretation applied so far by the courts or other public institutions, and therefore that there was a need for clarity on the incompatibilities and conflict of interests in a way which fulfils the CVM benchmark of securing 'mandatory decisions on the basis of which dissuasive sanctions can be taken'.

According to progress reports submitted by the Parliament, there are no cases of violation of the incompatibility or conflict of interest regime by MPs in the current mandate. The cases referred to in the previous CVM report have been resolved.¹⁰⁰

According to ANI, there were no new cases of incompatibility or conflict of interests¹⁰¹ concerning Members of Parliament since the last CVM report. In the pending cases where the Agency had requested the Parliament to apply disciplinary measures in cases of parliamentarians found in incompatibility and administrative conflicts of interest, the situation remained unchanged since the last CVM report.

On the preventive side, ANI is running a project with Transparency International giving information and guidelines to Members of Parliament regarding integrity rules. Overall, there seems to be an increased awareness of elected officials on the integrity rules, but subject to the concerns about legal certainty mentioned above.

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

The November 2018 CVM report concluded that '*on the basis of an analysis of Benchmark Three, the Commission can confirm its conclusion from November 2017 that more work is needed on recommendation 10. Moreover, the basis for the positive assessment reached in respect of Benchmark*

⁹⁷ In addition to the warnings, the PREVENT system has also raised awareness among contracting authorities who regularly contact both the National Integrity Agency and the National Agency for Public Procurement for advice on conflict of interest and integrity rules when preparing procurement procedures.

⁹⁸ In the period 1s November 2018-15 August 2019 and 52 since 27 June 2017

⁹⁹ These concern cases of potential conflict of interest as defined by the transposed EU public procurement directives but do not fall under ANI competence and are therefore to be followed up by ANAP.

¹⁰⁰ In the Evaluation Report on Romania under the Fourth Evaluation Round by GRECO recommended inter alia that ways be found to accelerate and enforce the judicial decisions concerning incompatibilities. On the basis of the information provided by the Romanian Parliament, GRECO decided to close the recommendation and referring to the fact that within the framework of the National Anticorruption Strategy for 2016-2020, further results concerning conflicts of interest and incompatibilities are expected later in 2019, following a project implemented by ANI together with Transparency International Romania.

¹⁰¹ No final court decisions upholding ANI report or new report from ANI.

Three in January 2017 has been reopened by Romania. Therefore recommendation 10 can no longer be deemed to suffice in order to close the Benchmark and to this end additional recommendations are included in the conclusions of this report.'

Since the last report, despite the prevailing circumstances, the judicial institutions involved in fighting high-level corruption continued to investigate allegations and sanction high-level corruption crimes. From September 2018 to August 2019, the National Anti-Corruption Directorate (DNA) sent 349 defendants to trial in 182 cases. 213 final conviction decisions were issued against 513 defendants. Special confiscation measures were ordered for €27 million and final decisions on compensation to civil parties of € 95,1 million, including EUR 83 million as compensation awarded to public authorities and institutions. In the first six months of 2019, the High Court of Cassation and Justice (HCCJ) solved three high level corruption cases at first instance and settled four high-level corruption cases by final decision.¹⁰² Although still strong, this represents some deceleration in track record.

The November 2018 report highlighted a number of concerns in the fight against high-level corruption:

- (1) the appointment procedure for high-level prosecutors and the lack of checks and balances discussed under recommendation 1;
- (2) the amendments of the Justice laws;
- (3) pressure on the justice institutions responsible for investigation and sanctioning, likely to damage their independence, and finally;
- (4) ongoing changes to the Criminal Code, Criminal Procedure Code and special law on corruption.

Developments under the reporting period are relevant to all these concerns.

The appointment procedure for the DNA Chief Prosecutor and the . additional recommendation of November 2018 to appoint a Chief prosecutor of the DNA with proven experience in the prosecution of corruption crimes and with a clear mandate for the DNA to continue to conduct professional, independent and non-partisan investigations of corruption is covered in other sections.

With the creation of the Special Section to investigate offences committed by magistrates, part of the DNA's jurisdiction was transferred (275 cases were sent to the special section as a result). The assessment of the operation of the Special Section will therefore have a direct bearing on the overall assessment of action against high-level corruption, particularly given the transfer of corruption cases to the Special Section in cases where the involvement of a magistrate was far from the centre of gravity of the case, and the decision to drop appeals in high-level corruption cases lodged by the DNA. Another legal amendment which has made the work of the DNA more challenging makes changes to the conditions and the procedure for the appointment and delegation of prosecutors to the DNA. This has created difficulties in recruiting and delegating prosecutors within the DNA.

The public criticism of the DNA continued in 2019. Examples are the allegations of abuses in relation to cases of corruption involving magistrates, the collaboration with the Intelligence Services or general criticism on the cost of DNA. The period of reference also saw a sharp increase of pressure on the HCCJ, which is competent for many high-level corruption trials. Of particular significance was a controversy started in August 2018 in relation to the High Court's interpretation of the procedural rules on the constitution of the appeal panels of 5 judges at the HCCJ in criminal cases. This was challenged by the Minister of Justice, and eventually the Government invoked a Constitutional Conflict between the Parliament and the HCCJ to take the issue to the Constitutional Court. This was followed by a second challenge raised by the President of the Chamber of Deputies, following questions initiated by the Chief Prosecutor of the Special Section, in relation to the composition of the

¹⁰² Compared to the period between September 2017 and August 2018, where the DNA sent 854 defendants to trial in 299 cases. 266 final conviction decisions were issued against 659 defendants. Seizing measures were ordered for € 447 million and final confiscations amount to about € 67,4 million, with final decisions on compensation to civil parties of € 109 million, including € 81 million (74%) as compensation awarded to public authorities and institutions and to companies with state capital.

3-judge panels for first instance corruption trials at the HCCJ. The Constitutional Court admitted both conflicts. Some commentators considered that it was in the competence of the HCCJ to interpret this law and that the decision of the Constitutional Court to rule on the issue has broader consequences.

The result was legal uncertainty concerning ongoing and past trials and a risk that changes in the working methods of the HCCJ would entail major delays in the administration of justice. Although the decisions of the Constitutional Court do not apply to past cases where a final judgement has been rendered, their consequences have to be assessed on a case by case basis on ongoing cases. This can entail delays and restart of trials, as well as allowing for the re-opening of final cases in certain conditions.¹⁰³ A few high-level corruption cases have now been re-opened for extraordinary review. The full consequences are not yet known.¹⁰⁴

In addition, the Judicial Inspection filed a disciplinary file against the President of the HCCJ and the SCM judges section asked for its revocation in relation to these constitutional conflicts. These disciplinary actions were later dismissed, but in July 2019, the President of the High Court announced she would not apply for a second term, explicitly citing the pressure imposed by these steps.

Another area of concern is the uncertainty with regard the Criminal Code and Criminal Procedure Code and the special law on corruption. As described under Benchmark 1, new amendments were adopted in April 2019 and, if taken forward, these would impact the prosecution and sanction of corruption crimes. Some of the amendments would strongly limit the possibility to prosecute and sanction corruption-related crimes.¹⁰⁵ These amendments have been ruled unconstitutional in July 2019. In the November 2018 report, the Commission's recommendations had emphasised the need for compatibility with EU law and international anti-corruption instruments when revising the Criminal Code and Criminal Procedure Code. There is no indication that this consideration was part of the debate in the April adoption procedure.

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 GRECO. 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.*

The Parliament has reported that the Chamber of Deputies adopted in June 2019 changes to the Regulation of the Chamber of Deputies in the sense of this recommendations. The Regulation was modified to explicitly refer to the criteria set up in the Venice Commission Report “on the purpose and waiver of parliamentary immunity”, when the legal committee makes a decision 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 is also or has been a Minister. Deadlines for the procedures have been set.¹⁰⁶ The final vote in the Plenary remains secret.

¹⁰³ In early 2019, consideration was given to legislation to extend the possibility for extraordinary review to all final court decisions at the HCCJ in criminal cases since 2014.

¹⁰⁴ The motivation of the Constitutional Court decision on the three judges panel was published in the Official Journal on 10 October 2019.

¹⁰⁵ Examples include limitations on the collection and use of evidence and financial data; the significant shortening of prescription periods; mitigating circumstances; suspending the enforcement of additional penalties for the duration of the suspension of the penalty of imprisonment; favourable treatment for denunciation of bribery crime within one year maximum; decriminalisation of negligence in office and of aggravated abuse in office; and higher thresholds for proving intent and for extended confiscation of criminal assets.

¹⁰⁶ Art.157, (2) (...) The request must be substantiated in fact and in law. The Permanent Bureau of the Chamber of Deputies has the obligation to request the Legal, Discipline and Immunities Commission to submit, in maximum 5 days, a first evaluation of the respective request and an estimate of the time needed to conduct the hearing of the MP and to study the documents submitted by the General Prosecutor. On the basis of the preliminary assessment, the Permanent Bureau of the Chamber of Deputies shall set a deadline for submission of the report by the Legal, Discipline and Immunities Commission, which may not exceed 14 days.

These new rules do not apply to the Senate. On 3 June 2019, the Senate refused a demand from the prosecution dating from November 2018 to start an investigation against an MP for allegations of corruption. A few days earlier, the Legal Committee of the Senate had given a positive opinion on the request.

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

The November 2018 CVM report concluded that *‘on the basis of an analysis of Benchmark Four, the Commission can confirm its conclusion from November 2017 that more work is needed to progress towards completing the Benchmark. Corruption prevention is held back by political developments, which undermine the credibility of progress (recommendation 11). Concerning recommendation 12, the Commission can conclude this recommendation is fulfilled, but it will be important to ensure sufficient human resources for ANABI.’*

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 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).*

In the reporting period, the technical secretariat for the National Anti-Corruption Strategy (NAS) in the Ministry of Justice continued to monitor the implementation of Strategy and to carry out the measures under its responsibility. The annual report for the activities of 2018 was published in September 2019.¹⁰⁷

A first priority has been to ensure the internal auditing of all institutions adhering to the NAS, which should take place every two years. The objective of the internal audit mission is to evaluate the inventory of institutional transparency and corruption prevention measures. The audit missions taking place this year focus in particular on three themes: Code of ethics/deontology/conduct; Ethics Advisors; and sensitive functions.¹⁰⁸ The internal public audit missions are ongoing and the NAS Technical Secretariat has already brought together over 500 audit reports.

A second priority has been the six-monthly meeting of the cooperation platforms, which took place 17-19 April 2019 with the representatives of central public administration institutions, independent authorities and anti-corruption institutions: the Platform of the central public administration, the Platform of the independent authorities and anticorruption institutions, the Platform of the business environment and the Platform of civil society.¹⁰⁹

An important work strand for 2019 has been the thematic peer review missions within a set of public institutions and focused on common themes. Topics under evaluation in this thematic round are: conflicts of interest during and after the exercise of the function; transparency of public institutions and access to public information; incompatibilities; declaration of gifts; and protection of whistleblowers. Since the last CVM report, evaluation missions took place at the Ministry of Culture and National Identity, the Competition Council and the Ministry of Economy. A series of other missions are planned.¹¹⁰ As for the local public administration, the NAS secretariat and the Ministry of

(3) The report will contain all the arguments, both in favour of the approval of the application and those against its approval. (...) All the arguments will be related to the fulfilment of the criteria and guidelines for the waiver of parliamentary immunity contained in Chapter V of the "Venice Commission Report on the scope and lifting of parliamentary immunities CDL-AD (2014) 011.

¹⁰⁷ <https://sna.just.ro/Rapoarte+de+monitorizare>

¹⁰⁸ According to the methodology, the 12 measures of institutional transparency and corruption prevention will be evaluated over 8 years, namely 3 measures every 2 years.

¹⁰⁹ The aim of the meeting was to analyse the Methodologies adopted in 2018 and identify possible problems that may arise in their interpretation and application by public institutions.

¹¹⁰ Including at central ministries, ANI, the Permanent Electoral Authority, National Office for the Prevention and Control of Money Laundering, High Court of Cassation and Justice, Prosecutor's Office attached to the High Court of Cassation

Local Development and Public Administration (MDRAP), with the support of the National Integrity Agency, have started a programme of more than 80 evaluation missions for 2019 at the headquarters of county councils and city halls of municipalities and cities, half of which have already taken place.

The authorities also report the continuation of corruption prevention actions in central ministries and public institutions. The Permanent Electoral Authority took measures to improve the selection and assessment of electoral experts and computer operators, to increase integrity and reduce the vulnerabilities and corruption risks during elections. The Ministry of Education reports that since the academic year 2018-2019, all masters and doctoral programmes include mandatory courses on ethics and integrity. On budgetary transparency, since April 2019, quarterly reports on the budget commitments of the public institutions are being published. The Ministry of Public Finance and the Ministry of Economy organised training sessions on strengthening integrity in public enterprises.¹¹¹

The General Anti-corruption Directorate (DGA) within the Ministry of Interior (MoIA) continued its activity for the prevention of corruption and investigation of integrity incidents.¹¹² In particular, a process of identifying and assessing the risks and vulnerabilities to corruption within the MoIA structures was finalised at the end of June 2019. Several thousand employees of the Ministry attended anti-corruption training sessions. DGA is also involved in several research projects which will feed reflection on improving its activities.¹¹³

The National Integrity Agency (ANI) also participates in prevention activities under the NAS. In August 2018 ANI launched an EU-funded project ('LINC') in partnership with Transparency International Romania, with the aim of increasing the capacity of the central public administration and Parliament to identify, sanction and prevent cases of conflicts of interest, incompatibilities and unjustified assets. Several training activities and debates were organised.

One of the objectives of the Strategy is to improve performance in the fight against corruption, by the application of criminal and administrative sanctions. The institutions responsible for this objective are the National Integrity Agency (ANI), the National Anti-Corruption Directorate (DNA) and the General Prosecution. The Public Ministry has maintained its activity in the fight against corruption not falling under DNA's remit. In the first two semesters of 2019, the Public Ministry pursued the prosecution of corruption crimes, with 2065 cases solved, 183 indictments against 353 persons.¹¹⁴ Another objective of the Strategy is to consolidate the confiscation of criminal assets (see recommendation 12). In first half of 2019 the General Prosecution (including the Directorate for Investigating Terrorism and Organised Crime (DIICOT) seized more than €1 billion as provisional measures in cases relating to tax evasion, € 24 million in money laundering and € 10 million in smuggling cases. Results for ANI and DNA are reported under benchmark 2 and 3 respectively.

While the technical activity on the Strategy continues in many central and local administrations and the judicial institutions continue to sanction corruption, several ongoing legislative initiatives have raised concerns as regards their potential knock-on effects on the implementation of the strategy. In particular, as mentioned earlier, the amendments to the Criminal Code and the Criminal Procedure Code and amendments to the special corruption law adopted by Parliament on 25 April 2019 risked weakening the legislative framework for investigating and sanctioning corruption crimes. (See benchmarks 1 and 3). In the same vein, the amendments concerning the integrity laws risk weakening their impact and the dissuasive effect of sanctions (See Benchmark 2).

and Justice, the Superior Council of Magistracy.

¹¹¹ This is the continuation of a project to strengthen integrity in public enterprises between the Ministry of Justice and the American Chamber of Commerce.

¹¹² Annual Report on the assessment of integrity incidents registered within MoIA, <http://www.mai-dga.ro/wp-content/uploads/2019/02/Bilant-DGA-2018.pdf>

¹¹³ Two research projects in collaboration with the National Anticorruption Directorate (DNA) and the Prosecutor's Office attached to the High Court of Cassation and Justice (PHCCJ), to diagnose the corruption activities involving employees of the Ministry of Internal Affairs between 2014 and 2018.

¹¹⁴ As well 119 plea bargains concluded involving 131 persons

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.*

Since November 2018, the Agency for the Management of Seized Assets (ANABI) has continued to take its activities forward and exercises all functions and duties provided by Law 318/2015. The human resources situation of the agency has improved. In December 2018, the Government approved the organisation of competitions for ten vacancies. In order to complete the current scheme (27 employees), three selection procedures are under way to fill 7 vacancies. In the coming months, steps will be taken to fill 8 other vacancies, in order to fill 42 posts.¹¹⁵ The Agency had successfully applied for technical assistance with EU funds (€1,3 million) in 2018, which will facilitate the externalisation of some tasks to support the agency, notably on the organisation of grants and training activities for prosecutors.

In its annual report for 2018 published in April 2019,¹¹⁶ ANABI reports an increase in the amounts of money actually seized in criminal proceedings¹¹⁷ and in the final court decisions relating to confiscation.¹¹⁸ In 2018, the total amount resulting from the enforcement of special or extended confiscation measures was approximatively 12,5 million RON, out of which 6,5 million RON originates from the selling of movable and immovable seized property. In previous years, according to the law, ANABI distributed part of the money to public institutions for crime prevention measures,¹¹⁹ but at the end of 2018 the Government abrogated this article in the ANABI law, in an emergency ordinance.¹²⁰

The Agency is currently launching a second tender procedure for the development of a national integrated system of for the confiscation and recovery of criminal assets ROARMIS (Romanian Assets Recovery and Management Integrated System), as there were no bids submitted for the first one organised in December 2018 and January 2019.¹²¹

The Agency is also operating as Asset Recovery Office for Romania. During 2018, the Romanian Asset Recovery Office has dealt with 186 incoming requests (requests from other Member States) and 103 outgoing requests (requests to other Member States in 50 requests from Romanian authorities). The Member States most frequently requesting information were Hungary, France, Italy and Spain and ANABI sent the largest number of requests to Germany, the United Kingdom and Italy. Between January and May 2019, the Romanian ARO received 92 requests from foreign authorities and sent 23 requests.

¹¹⁵ In October 2018 the agency was operating with a staff of only 20 people out of the 35 foreseen.

¹¹⁶ <https://anabi.just.ro/docs/pagini/38/RAPORT%20ANUAL%202018%20actualizat.pdf>

¹¹⁷ In total 875,5 million lei had been seized by the third quarter of 2018.

¹¹⁸ The National Agency for Fiscal Administration (ANAF) reports that 1271 court decisions relating to confiscation remained final during 2018

¹¹⁹ The CVM November 2018 report noted that "the amount to be distributed for 2018 to eligible beneficiaries for social and public re-use was 2,2 million lei. Part of this was allocated to funding civil society projects 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 in this area."

¹²⁰ EOG 114/2018 of 28 December 2018. The draft Law on the approval of EOG 114/2018 is under discussion in the Chamber of deputies (PL-x no 93/2019)

¹²¹ This IT system will allow monitoring the measures taken by the authorities at each step of the asset recovery process. Using its analytical functions ROARMIS may also become a very useful tool in generating statistics and reports, best practices and identifying priority areas for the development of policies, strategies and plans to increase efficiency in the process of asset recovery in Romania.