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

**On Progress in Romania under the Cooperation and Verification Mechanism**

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

## On Progress in Romania under the Cooperation and Verification Mechanism

### I. The Cooperation and Verification Mechanism: Supporting Romania in Justice Reform and the Fight against Corruption

In the run-up to the accession of Romania to the EU in 2007, it was agreed that further work was needed in key areas to address shortcomings in judicial reform and in the fight against corruption. This led to the establishment of a framework to support Romania and to monitor progress in these areas, the Cooperation and Verification Mechanism (CVM).<sup>1</sup> Benchmarks were established in four areas: Judicial reform, integrity, the fight against high-level corruption, and the prevention and fight against corruption in the public sector. The Decision included regular reporting from the Commission, and provided that the mechanism will continue until the objectives of the CVM are met and all four benchmarks are satisfactorily fulfilled<sup>2</sup>.

Five years after accession is an appropriate time to assess whether the objectives of the CVM have been fulfilled. The technical report accompanying this assessment summarises the key developments of the past five years. This report takes stock of what has been achieved so far and what remains to be accomplished. It covers both the legislation and tools which are in place, the elements of the legal framework which still need to be completed, implementation and also whether ownership is sufficiently embedded to maintain the direction of reform. In so doing, the Commission takes into account the sustainability and irreversibility of the reform process as the determining elements of its assessment.

During these five years there have been periods of progress and setbacks, times when co-operation has worked well and times when the mechanism has been resented and resisted. So this report recognises the overall progress made since accession.

Nevertheless, this report is adopted at a time when important questions are raised with regard to respect for rule of law and the independence of the judiciary in Romania. Overall progress has to be assessed in the context of a wider social recognition of key principles such as the rule of law, and the independence of the judicial process as part of the checks and balances of a well-functioning democracy. A well functioning, independent judicial system, and respect for democratic institutions are indispensable for mutual trust within the European Union, and for gaining the confidence of citizens and investors.

The Commission considers that recent steps by the Romanian Government raise serious concerns about the respect of these fundamental principles. These steps took place in an

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<sup>1</sup> Conclusions of the Council of Ministers, 17 October 2006 (13339/06); 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, 13 December 2006 (C (2006) 6569 final)

<sup>2</sup> It also provided for the possibility of a safeguard mechanism, which has not had to be invoked.

overly polarised political system where mistrust between political entities and accusations are a common pattern; however this political context cannot explain the systematic nature of several actions. While certain actions may be partly explained by this political polarisation, they raised serious doubts about the commitment to the respect of the rule of law or the understanding of the meaning of the rule of law in a pluralist democratic system. Political challenges to judicial decisions, the undermining of the constitutional court, the overturning of established procedures and the removal of key checks and balances have called into question the Government's commitment to respect the rule of law and independent judicial review. The Commission is in particular extremely concerned by the indications of manipulations and pressure which affect institutions, members of the judiciary, and eventually have a serious impact on society as a whole. Whilst this report looks at the last five years as a whole, the current controversies pose a serious threat to the progress achieved so far and raise serious questions as to the future of the reforms already launched. This report therefore includes specific recommendations to address the current situation and to help restore respect for principles which are cornerstones of European democracy.

Today's European Union is highly interdependent. The rule of law is one of the fundamental values of the EU and there is a strong common interest in it which mirrors the interest of Romanian public opinion in these issues.<sup>3</sup> Eurobarometer polling has shown that 93% of Romanians consider corruption to be an important issue for their country, and 91% have the same response over shortcomings in the judicial system. The same poll also concluded that 76% of Romanians supported the EU helping to tackle these issues.<sup>4</sup>

The CVM does not ask Romania to achieve higher standards than exist in other Member States. Its target is to help Romania achieve standards comparable to other Member States, an objective supported by 72% of Romanians.<sup>5</sup> For the purpose of situating within this context what has been achieved by Romania since accession, the situation in other Member States is an important factor. The Commission uses in this report points of reference and comparative indicators where they are available.<sup>6</sup> To compare progress in Romania with the situation in other Member States, the Commission also drew upon senior experts from key professions dealing with these issues.<sup>7</sup>

Since 2007, the EU budget supported the fight against corruption and judicial reform in Romania through the Structural Funds with over €12m. This includes projects in the areas of education, health, regional affairs, in the judicial sector and with the National Integrity Agency. Additional support was provided by pre-accession funds. At the same time, Member States have supported Romania with bilateral projects in all areas of judicial reform and the fight against corruption.<sup>8</sup>

## **II. Analysis of progress under the CVM 2007-2012**

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<sup>3</sup> The Conclusions of the European Council of 28 and 29 June include a commitment by the EU within the Compact for Growth and Jobs to tackle delays in judicial systems as part of the modernisation of public administrations (European Council Conclusions 29 June 2012, page 8).

<sup>4</sup> Flash Eurobarometer poll conducted by the Commission in Romania in May 2012 (Flash Eurobarometer 351 "The Cooperation and Verification Mechanism for Bulgaria and Romania" at: [http://ec.europa.eu/public\\_opinion/index\\_en.htm](http://ec.europa.eu/public_opinion/index_en.htm)).

<sup>5</sup> Flash Eurobarometer 351

<sup>6</sup> Points of reference include the work of the Council of Europe, the OECD and UN agencies.

<sup>7</sup> Experts used in 2012 included senior practitioners from France, Germany, the United Kingdom, Ireland, Spain, Poland and Slovenia.

<sup>8</sup> Technical report, page 48.

The Commission's overall assessment of progress since Romania's accession shows that many of the building blocks required are now in place, even though recent events have called into question the irreversibility of the reform process. The CVM has made a major contribution to a transformative process in Romania. The focus has therefore shifted to ensuring that their implementation delivers the results required, and that the ownership exists to maintain the momentum of reform, including in challenging political circumstances.

Since 2007, Romania has created or has under way the basic legal framework in all areas covered by the CVM. When completed, the introduction of the new codes should represent a substantial modernisation of the legal system. Other political decisions have also provided a solid framework, such as the national anti-corruption strategy. Many important institutions also contribute to this solid basis, including The National Anti-Corruption Directorate (DNA) and the National Integrity Agency (ANI).

This framework has been carried forward in many ways. For example, the track record of DNA and ANI, the steps taken by the High Court to tackle key high-level corruption cases, and some examples of government bodies addressing corruption in their ranks are steps in the right direction. It is welcome that the judicial leadership has shown its commitment to independence in the face of recent events. However, the implementation of this framework of rules by the judiciary and administration in general has not yet met the objectives of the CVM. In some cases, implementation has just started, as the reforms have been introduced recently. In other cases, implementation has met difficulties, often linked with ownership of the reforms by the authorities. Not all agencies of government can be considered today to be working together to the same ends.<sup>9</sup> There are still obstacles to making progress on the fight against corruption, conflict of interest and public procurement. The leadership shown in addressing high-level corruption trials at the High Court has yet to be reflected in courts at other levels.

It is also the case that in some important areas, changes have come about primarily as the result of external pressure. The CVM itself has been central to this process – and is recognised as such by Romanian public opinion.<sup>10</sup> It has helped to maintain the direction of reform at moments of pressure and to encourage changes which require the courage to challenge vested interests. The need for external pressure raises questions about the sustainability and irreversibility of reform, questions accentuated by current events.

The process of change mapped by the CVM reports has not been an even trend. Different governments and Parliaments have given different emphasis to these issues. The issues concerned are important political issues and a degree of debate and difference is a normal part of the political process. Some institutions have become quickly operational; others have taken time to build momentum. The process whereby attitudes have evolved in both the administration and the judiciary is irregular as well as gradual.

Ownership and implementation are therefore the key elements in the fulfilment of the CVM benchmarks. They determine the sustainability and irreversibility of reform. They are demonstrated through the actions, results and decisions taken by those with the authority to

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<sup>9</sup> For example, the work of ANI would be much more effective if it enjoyed full cooperation from other government agencies and energetic follow-up by the judiciary.

<sup>10</sup> These conclusions are supported by public perception. 65% of respondents of a Flash Eurobarometer poll conducted in Romania believe that EU action through the CVM has had a positive impact in addressing shortcomings in the judicial system (59% share this view regarding corruption). At the same time, a large majority believes that the situation in these two areas has stayed the same or has deteriorated in the last five years. (Flash Eurobarometer 351).

influence the direction and speed of change. The forthcoming appointments of a new General Prosecutor and Chief Prosecutor of the DNA will thus be key indicators of the sustainability of reform. The Commission also urges the government to take the steps needed to remedy the damage done to reform in recent weeks.

## II.1 Judicial Reform 2007-2012

*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*

### *Recent events concerning the independence of the judiciary and the rule of law*

Judicial independence remains an important issue for Romania. Since accession, the judiciary has been able to affirm its independence gradually, in particular through the successful investigation, prosecution and trial of an increasing number of high-level corruption cases. This has led to significant achievements at the level of prosecution and, since 2010, also at the level of courts as described under chapter II.2 in this report. A final conviction in an emblematic high-level corruption case in June and the actions of the High Court of Cassation and Justice, the Superior Council of the Magistracy<sup>11</sup> and of the Constitutional Court in resisting political challenges to judicial independence and in affirming professional integrity in the aftermath of this verdict has marked a step change in this sense.

However, the Commission is concerned by the recent pressure exercised by members of the Romanian Government and senior politicians on the Constitutional Court: these are unacceptable interventions against an independent judicial institution. The Government and all political levels must respect the separation of powers. They must also strictly respect the independence of the judiciary.

In particular, the Commission is concerned by the recent limitation of competences of the Constitutional Court in regard to parliamentary decisions. The Romanian authorities must urgently restore these competences in accordance with the Romanian Constitution. The Commission has been informed by letter of 16 July from the Prime Minister of Romania that this requirement will be met.

Judicial independence and the separation of powers are fundamental building blocks of a democratic society. In the coming months all political levels in Romania will need to demonstrate through their actions their commitment to these principles in order to restore confidence. The Commission will closely monitor developments in this area.

### *Main developments 2007-2012*

The legislative framework for the judicial system has been reformed with a view to updating its judicial system and to target it on today's priorities. When all the new codes are brought into force, Romania will have overhauled its criminal and civil legislation. In the interim, the Small Reform Law was an example of practical, pragmatic legislation addressing real shortcomings. Other laws have put in place important steps to secure higher accountability and integrity for the judiciary.

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<sup>11</sup> In June, the SCM's public stance to defend the independence of the judiciary in the light of public interventions in respect of one important high-level corruption case sent an important message.

The judiciary has evolved since 2007. There are many signs that judges and prosecutors have gained more professional confidence. For the most part, professionals subscribe to the concept of judicial reform and recognise its benefits. The engagement for reform of individual magistrates, professional associations and civil society has increased considerably during recent years. There are concrete examples of good professional practice which deserve to be taken up as best practice elsewhere.

Pulling together these steps to draw the full benefits will require stronger efforts by the judiciary, the executive and the political class alike. The key progress has been legislative so far, and with major pieces of legislation only recently adopted or not yet in force, and others still pending in Parliament, a determined strategy will be needed for the reforms to meet their potential to drive change on the ground. Inconsistent jurisprudence, difficulties with enforcement and inefficient judicial processes remain a widespread problem.<sup>12</sup> The response of the judiciary to challenges to integrity and accountability has not been sufficient to rebuild public confidence.

The tools now exist for the judicial leadership and the executive to consolidate reform. For this to be achieved, a more consistent effort and better managerial focus within the SCM will be required, as well as a new level of cooperation between the executive and the judiciary, with the support of Parliament and of civil society. Government and politicians must set a clear example: any pressure exerted on courts creates distrust between branches of government. If the SCM can offer leadership in the cause of reform, and receive the support of the executive to implement change, direct benefits in areas such as the organisation of courts and the distribution of workload could be felt relatively quickly. The results of two ongoing World Bank projects will provide important instruments and policy recommendations for the next steps.<sup>13</sup>

### *The legislative framework*

Since accession, Romania has pursued an ambitious legislative agenda. This has included new Civil and Criminal Codes and the accompanying procedural codes, with the explicit aim of modernising the judicial process. International experience was drawn upon in support of these efforts. The adoption of the codes in 2009 and 2010 represented a major result on the part of the Government, the Parliament and the judiciary, even if the implementation process has been lengthy. So far, only the new Civil Code has entered into force. The new Civil Procedure Code will enter into force this autumn and the new Criminal and Criminal Procedure Codes are currently foreseen for entry into force next year. Though there have been concerns about whether the systems are in place to effectively implement the changes, and measures to prepare for implementation will need to be intensified, these Codes represent a major attempt at modernisation and if properly implemented, could bring considerable benefits for the efficiency, transparency and consistency of the judicial process.

In parallel, Parliament has also passed a number of other important legislative measures. The "Small Reform Law" which entered into force in 2010 brought concrete improvements to the

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<sup>12</sup> Statistics of the ECHR show that Romania counts the second highest number of ECHR judgments among any EU Member State which are pending execution. A large number of these judgments concern difficulties with civil enforcement, the excessive length of civil proceedings and the absence of an effective remedy and ineffective criminal investigations. (Council of Europe: Supervision of the Execution of Judgements and Decisions of the ECHR, Annual Report 2011 at: [http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM\\_annreport2011\\_en.pdf](http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM_annreport2011_en.pdf))

<sup>13</sup> The World Bank is currently carrying out a Functional Review of the Romanian judicial system financed with EU funds. A second project to improve the capacity to gather and process judicial data and to establish optimal workload indicators across the judicial system is currently being undertaken by consultants financed from a World Bank loan..

consistency and efficiency of the judicial process. Legislation was also amended to strengthen the accountability of the judiciary and to reform appointments to the High Court of Cassation and Justice. Such measures provide the opportunity to address public concerns about the objectivity of judicial appointments and the disciplinary process in the judiciary: it will take a sequence of good examples to turn around the negative legacy of the past.

### *Consistency of the Judicial Process*

The High Court of Cassation and Justice has the primary responsibility for the unification of jurisprudence. A number of important steps have been taken since 2007. The Small Reform Law amended the appeal in the interest of the law procedure, with a view to strengthening its efficiency. The new procedure codes introduce a preliminary ruling mechanism as a new instrument for legal unification, as well as reforming jurisdictional arrangements to help unification.<sup>14</sup> The High Court has also taken the initiative to hold structured discussions on issues of jurisprudence with appeal courts and developed sentencing guidelines for certain corruption offences. Failure to respect the High Court's rulings in appeals in the interest of the law, as well decisions of the Constitutional Court, has now become a potential grounds for disciplinary measures.<sup>15</sup>

However, these mechanisms have not yet been able to overcome inconsistency which is a major frailty of the Romanian judicial system.<sup>16</sup> Part of the problem seems to lie in insufficient awareness of the importance of legal unification among the magistracy, perhaps linked to an extreme interpretation of independence. The principle of "same penalty for same offence", and its role in dissuading crime, does not seem to be fully appreciated. Nor does its relevance to the accountability and integrity of magistrates. This may help to explain why analysis shows that measures for legal unification are not well used by judges.<sup>17</sup> At the same time, consistency of jurisprudence has not yet been made a priority by the SCM and by court presidents. Even where judges want to improve consistency, they lack the tools needed to access jurisprudence of other courts. A full electronic publication of court decisions, including decisions of the High Court of Cassation and Justice, is not yet in place. Appeal courts publish some decisions, but do not apply uniform criteria for this purpose. The main judicial database (ECRIS) is limited to accessing court rulings of the same appeal court circumscription; judges cannot compare court rulings nationwide.<sup>18</sup> An alternative system, Jurindex, is not being updated.

Experts recommend a stronger emphasis on lodging appeals in the interest of the law and to encourage consistent practice by judges through a full publication of motivated court decisions, regular case discussions in all courts and an active promotion of legal consistency by court presidents and the SCM. The judicial leadership could also put a higher premium on legal consistency in judicial promotions and appointments, give the Judicial Inspection a role

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<sup>14</sup> The goal of the new preliminary ruling procedure was to introduce a more proactive procedure than the current appeal in the interest of the law (see Technical Report pages 6 – 7)

<sup>15</sup> Non-compliance with the rulings of the Constitutional Court and of the High Court of Cassation and Justice's appeals in the interest of the law may be the object of a disciplinary investigation and sanction following amendments to provisions in the judicial laws on the disciplinary responsibility of magistrates adopted in late 2011 and promulgated in early 2012..

<sup>16</sup> Inconsistent jurisprudence is frequently reported in Romania and confirmed by stakeholders such as foreign investors, law firms and professional associations of magistrates. Inconsistent decisions have been identified by experts in particular in sensitive cases involving high-level defendants and in public procurement cases.

<sup>17</sup> This includes disregard for the jurisprudence of superior courts and the limited usage of the appeal in the interest of the law procedure. The number of appeals in the interest of the law decreased in 2011 compared to the years 2007-2009.

<sup>18</sup> with the exception of judges at the High Court of Cassation and Justice who can access all judgements included in the database.

in the analysis of inconsistent jurisprudence, extend sentencing guidelines and use the National Institute of the Magistracy to make consistency a major theme of initial and continuous training.

Further reform of the High Court of Cassation and Justice could also help consistency. Important progress has been made in this regard through the Small Reform Law and through the new Procedure Codes. The reforms brought by the new Procedure Codes must be introduced in a way which ensures that the High Court is not inundated with abusive applications and that only those cases raising important legal questions are admitted. This requires an appropriate filter for second appeals and preliminary ruling requests. There may also be other tasks which could be transferred to other courts from the High Court, such as the competence to try cases in first instance and to rule on a number of internal judicial issues.<sup>19</sup> This would allow the High Court to concentrate on its prime role of legal unification, as is the case in most EU Member States. The High Court also needs to have the premises and staffing necessary for its tasks.<sup>20</sup>

### *The organisation and efficiency of the judicial system*

Public administration in Romania has been measured by the World Bank and was found to be the least effective in the EU.<sup>21</sup> The judicial system suffers from some of the same weaknesses. Despite some improvements, the overall picture is of a lack of dynamism in addressing problems which have a real impact on the ability of the judicial system to dispense justice, and to do so in a swift and consistent way. These problems include capacity constraints and workload pressures upon judges and prosecutors, which result in a large measure from imbalances in resourcing and acute variations in workload between geographic locations and jurisdictional levels. Other problems have included a high number of vacancies, the provision of training at entry to the profession, and shortcomings in the structure and internal organisation of courts and prosecutors' offices.

Efforts have been made to address these issues. These have included periodic recruitment competitions, the streamlining of some procedures,<sup>22</sup> and decisions to strengthen the initial training capacity at the National Institute of the Magistracy. In 2011, a small step was taken towards rationalisation by closing nine redundant courts and three courts with minimum activity, as well as their associated prosecutors' offices.

However, the impact of these measures remains limited. Key efficiency indicators such as workload disparity and vacancy rates have not improved since 2007.<sup>23</sup> Resource pressures and a conflict between the executive and the judiciary in 2009 slowed down reforms and led to a large number of retirements at a time when caseload was rising steadily.

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<sup>19</sup> The High Court tries a variety of offences in first instance, where the offence is committed by certain qualities of defendants. It also rules on internal judicial matters such as the requests of parties to transfer cases to other courts or of conflicts of jurisprudence between courts.

<sup>20</sup> Logistical reasons have been given to explain the fact that the provisions on the preliminary ruling in civil law in the Civil Procedure Code come into force four months after the rest of the Code.

<sup>21</sup> World Bank Governance Indicators 2011

<sup>22</sup> The Small Reform Law notably allowed for the prosecution to take-over the motivations of the police in deciding not to open an investigation in certain simple cases, granted the prosecution greater possibilities not to pursue cases where existing evidence does not warrant further investigation, and reduced legal remedies for minor cases.

<sup>23</sup> Romania is regularly sentenced by the ECHR for infringements of procedural rights due to excessive judicial delays. Delays in the publication of court motivations above the legal limit of 30 days are frequent. Reliable case retention data is so far not available and should be delivered by a World Bank study in early 2013.



The judicial system does not possess and has not developed effective performance indicators to inform total resource needs and resource allocations within the judicial system. Romania has recently recognised these weaknesses and they will now be addressed by a project funded by the World Bank which will prepare and pilot revised case and workload indicators by early 2013.

Cooperation on human resource policy for the judiciary between the SCM, the executive and the leadership of the prosecution has seen continuous difficulties.<sup>24</sup> Legislation is still pending to introduce the function of court managers and redefine the role of court clerks, a measure with considerable potential to reduce the workload of magistrates. Improvements to the capacity of the National Institute of the Magistracy and the introduction of equal recruitment standards for different categories of candidates have only recently been made, too late to properly prepare for the implementation of the new codes. So far, a joint implementation plan for the new codes has not been agreed.<sup>25</sup>

Pressures on public finances might have been expected to drive efficiency gains. But this effect is yet to be seen. Reasons for this include a lack of direction on managing the judiciary in the SCM and disagreement between the judiciary and government. The SCM has not been able to put together a human resources strategy to change structures and systems, focusing instead on requesting more staff and resources. Parliament has also contributed to this inertia, watering down proposals to restructure the court system.<sup>26</sup> New legislation has been criticised for failing to take into account the risk of provoking a spate of new cases before the courts.

### *Judicial practice*

Judicial practice still shows significant weaknesses, illustrated in the assessment of judicial practice by courts in cases of high-level corruption. Some of these weaknesses are structural: the Romanian legal system has features which make it vulnerable to abuse, such as the fact that prescription periods are not ended or suspended at the moment of an indictment. This is often exacerbated by a lax handling of court process which appears overbalanced in favour of defendants.<sup>27</sup> Experts have identified these weaknesses in the handling of trials as particularly significant in comparison to practice in other Member States. The judiciary has also found it difficult to bring complex financial cases to successful conclusion in court. This relates in particular to cases involving public procurement - public procurement cases are an exception to the general positive trend regarding high-level corruption cases in court (see below). Such cases require particular skills in prosecutors and judges, fostered through training, specialisation and external expertise. In addition, although foreseen by the law, the budget for court experts is in practice rarely available, so that defendants often pay for expertise called

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<sup>24</sup> Responsibilities in the management of the human resources of the judiciary are shared: the Superior Council of the Magistracy has management responsibility for recruitment, career progression, training and disciplinary action. The Minister of Justice holds budgetary responsibility and legal initiative. The General Prosecutor is responsible for the results of the prosecution, but all matters impacting on the career of a prosecutor are decided by the Council.

<sup>25</sup> Current recruitment capacities cannot deliver the number of new recruits in time and of adequate quality and preparedness as estimated as required by an impact study carried out for the new codes.

<sup>26</sup> This concerns notably the proposals of the Minister of Justice and the General Prosecutor to close small courts and prosecutors' offices and to redistribute the posts to areas in most need.

<sup>27</sup> The Commission's assessment on these points can be found on pages 13-14 in the Technical Update SEC(2011)968 published on 20 July 2011. It includes references to leniency in addressing postponement requests by defendants, weaknesses in the administration of evidence and in handling procedural irregularities, and organisational issues.

for by court, in addition to their paying for their own expertise.<sup>28</sup> This raises issues about the independence and impartiality of the supposedly independent court-appointed experts.

An example of how proactive leadership can make a difference has been seen in the change in approach of the High Court of Cassation and Justice since the appointment of new management in 2010.<sup>29</sup> It can now offer best practice to other courts in areas such as case management, taking into account the risk of reaching prescription periods, and sending a message that the court will resist spurious attempts to delay proceedings. Maintaining and extending these achievements will be important for progress in judicial reform overall.

### *Accountability*

At the end of 2011, Romania strengthened the legal basis for judicial accountability. Parliament passed amendments introducing new disciplinary offences and strengthening existing sanctions; they extended the role of the Minister of Justice and of the General Prosecutor in the course of disciplinary proceedings and increased the independence of the Judicial Inspection.<sup>30</sup> The judicial inspectorate now has the opportunity to refocus on more targeted, swift and pro-active disciplinary investigations, and to develop a stronger advisory capacity within the inspectorate for shortcomings of judicial organisation, procedures and practice. The SCM should further utilise this potential by asking the inspectorate to undertake systematic monitoring of key aspects of judicial practice, legal unification, and the adoption by court presidents of best practice in management.<sup>31</sup> It will also be important to use the new rights in full respect for the independence of magistrates, to dispel the judiciary's concerns that the new law could be abused.

The most important impact of the law will come if it is seen to be used to provide clear, consistent and dissuasive sanctions. The reputation of the judiciary, and of the SCM's ability to police it, has been damaged by a series of cases of wrongdoing where the response of the judicial leadership has seemed weak and timid.<sup>32</sup> In many Member States, there would be an expectation that those in positions of public authority accept that they must withdraw from their duties if needed, to protect the reputation of the public body concerned. The fact that judges under severe public criticism have continued to sit in court while investigations proceed has damaged the reputation of the courts. Clear rules should be established, such as the immediate suspension of magistrates under investigation for serious crimes such as high-level corruption, in order to protect both the individual magistrate and the judiciary as a whole.<sup>33</sup> This could be included in the integrity strategy of the SCM.

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<sup>28</sup> Technical Update SEC(2011)968 of 20 July 2011, page 14. Since the Commission's last annual report, the High Court of Cassation and Justice has received a special budget for court experts.

<sup>29</sup> Examples of important innovations include the introduction of sentencing guidelines for corruption offences and steps to improve the celerity of high level corruption trials. However, best practices applied in these discrete areas have not yet been mainstreamed.

<sup>30</sup> These legal amendments will allow the Minister of Justice and the General Prosecutor to initiate disciplinary action, through the Judicial Inspection. The Judicial Inspection now has a stronger mandate to look into judicial practice and may also appeal disciplinary sanctions imposed by the Superior Council of the Magistracy.

<sup>31</sup> The Judicial Inspection delivered three first reports in this sense at the end of 2011 and in the beginning of 2012: two thematic reports on important case delays and on celerity of high-level corruption cases and a report on management practice at the High Court of Cassation and Justice.

<sup>32</sup> The Commission reported on such cases in February 2012 (COM(2012)56final, page 3)

<sup>33</sup> The Commission reported in February 2012 on cases of judges at the High Court of Cassation and Justice who continue to sit in court while under investigation for high-level corruption. Other judges escaped disciplinary responsibility through retirement (COM(2012)56 final, page 3). However, the recent SCM response to the launch of an investigation into one of their own SCM members has shown a more proactive approach to address threats to the reputation of the judiciary.

Romania also improved the appointment procedures to the High Court of Cassation and Justice at the end of 2011 by adopting more transparent and objective procedures which allow for a more comprehensive and objective independent assessment of the merit of candidates. This represents an important step in improving the accountability of the High Court of Cassation and Justice.

## II.2 Fight against Corruption 2007-2012

*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*

Fighting corruption and promoting integrity is a challenging task which needs the engagement of all powers of the state, and needs to be driven top down, so that it percolates through society as a whole. A key starting point is the ability of the Romanian judicial system and of the Romanian administration to apply the rule of law. Since accession, Romania has made important progress in the prosecution and trial of high-level corruption cases. The National Anti Corruption Directorate (DNA) has proved an energetic and impartial prosecutor of these cases. Romania has also been able to establish a system to detect and sanction conflict of interest, incompatibilities and unjustified assets. The National Integrity Agency (ANI) is an institution prepared to pursue its mandate with conviction. Recent action to accelerate high-level corruption trials in the High Court has started to redress one of the major problems limiting dissuasive action against corruption. Stronger legislation to promote integrity within the judiciary itself, and a law introducing extended confiscation of criminal assets, has been adopted. The new national anti-corruption strategy offers an important focus to drive anti-corruption work towards best practice: it now needs to be implemented as designed and given sufficient time to prove its effectiveness. These are significant steps towards meeting the objectives of the CVM. However, in the light of current events, preserving the progress made, maintaining their momentum and ensuring institutional stability are the first building blocks in demonstrating sustainability.

These steps have come in a climate where the vast majority of Romanians see corruption as a major problem.<sup>34</sup> They have not yet convinced Romanians that the situation is improving; with most considering that the situation has deteriorated.<sup>35</sup> Public concerns will only be dispelled when objective and final sentences are reached in the most important high-level corruption trials and when best practice in the conduct of trials is seen to be the norm. Too few cases of conflict of interest are pursued, in particular in public procurement, and even when pursued in court, sanctions in this area are in law not dissuasive. A convincing track record of confiscated unjustified assets has not yet been achieved. Turning the new national

<sup>34</sup> According to a Special Eurobarometer of February 2012, 96% of Romanians, a slightly higher percentage than in 2007 considered corruption a major problem (Special Eurobarometer 374 at: [http://ec.europa.eu/public\\_opinion/index\\_en.htm](http://ec.europa.eu/public_opinion/index_en.htm)) Since 2007, Romania has lost 6 places in the TI corruption perception index with the decline of their perception rating. The Freedom House rating remained unchanged.

<sup>35</sup> According to a Eurobarometer of February 2012, 67% of Romanians consider that corruption had increased in the last three years

anti-corruption strategy into a tool to mainstream anti-corruption work across all institutions will be an important test of implementation.

In addition, in spite of their significant achievements, the authority of these anti-corruption institutions has been put in question. The legal basis for the work of the National Anti-Corruption Directorate (DNA), the prosecution and the National Integrity Agency (ANI) has been challenged repeatedly since 2007; some of these challenges are still pending. The forthcoming appointments to the posts of General Prosecutor, Chief Prosecutor of DNA and for other senior appointments within the prosecution are an opportunity to show that the political and judicial leadership is fully supportive of a strong and independent pursuit of corruption. This calls for a transparent and objective appointment process within the existing legal framework, through an open competition using clear criteria, targeting the strongest possible leadership and with the goal of continuity in the functioning of these institutions. The efficient conduct of a number of high-level corruption cases which have reached final stage in court will test the Romanian judiciary's ability to continue to affirm its independence and apply the rule of law.

### *High-Level Corruption*

The performance of the National Anti-Corruption Directorate (DNA) in the investigation and prosecution of high-level corruption cases can be considered one of the most significant advances made in Romania since accession. DNA has been able to deliver a constantly increasing number of indictments year by year, with investigations carried out swiftly and in a pro-active way. Since 2007, cases at the highest levels of political life and within the judiciary have been raised by DNA against people from all major political parties.<sup>36</sup>

The performance of DNA has led to a consequential increase in court decisions and convictions in high-level corruption cases, in particular since 2010.<sup>37</sup> However, the efficiency of court proceedings and the consistency and dissuasiveness of court judgments in cases of high-level corruption have not matched the progress in the prosecution. Since 2007, high-level corruption cases have suffered significant delays in court. Causes have included weaknesses in legislation and shortfalls in capacity. Shortcomings in judicial practice detailed in the previous section of this report have been particularly evident in high-level corruption cases, with excessive room given by judges to defendants' attempts to protract and frustrate court proceedings – including when cases are nearing prescription periods.<sup>38</sup>

Some causes of delay have been removed: the Small Reform Law and amendments to the Law on the Constitutional Court introduced important changes to accelerate trials by removing the suspensive effects of exceptions of unconstitutionality and illegality raised by defendants. An interpretative ruling of the High Court has also "stopped the clock" for periods

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<sup>36</sup> DNA indicted 167 cases against 415 defendants in 2007 and 233 cases against 1091 defendants in 2011. About 60% of all investigations take less than 6 months. Since 2007, DNA has indicted a former Prime Minister, a former deputy Prime Minister, a number of former ministers and Members of Parliament, numerous prefects, mayors, county councillors and heads of state-owned enterprises. In 2011, DNA indicted two Members of Parliament and one influential mayor of the then governing coalition and one MP of the opposition at the time.

<sup>37</sup> Non-final decisions were reached against 199 defendants in 2007 and against 879 defendants in 2011; final decisions were reached against 109 defendants in 2007 and against 158 defendants in 2011.

<sup>38</sup> The possibility of prescription in Romania does not end when investigations or court proceedings start, as in many other jurisdictions.

during which a trial was previously suspended pending a ruling on an exception of unconstitutionality.<sup>39</sup>

Nevertheless, a number of high-level corruption cases were lost or partially lost to prescription in early 2011.<sup>40</sup> In mid-2011, it became clear that a number of important high-level corruption cases – cases which had been delayed for years for various reasons – looked likely to reach their prescription periods. In line with the Commission's recommendations,<sup>41</sup> the new leadership of the High Court of Cassation and Justice promoted best practice through a more efficient and rigorous management of trials. These measures led to a number of first instance decisions in important cases from late 2011, as well as the first final corruption convictions with imprisonment pronounced against a former Prime Minister, a former Minister and against a current Member of Parliament.<sup>42</sup>

A further concern in Commission reports has been the consistency and dissuasiveness of sentences in high-level corruption cases.<sup>43</sup> A joint study of the judiciary and the Ministry of Justice recognised this issue in 2009 and developed corrective action which led to certain improvements. In the absence of action by the judicial leadership, a group of judges from the Bucharest Court of Appeal drafted sentencing guidelines to improve consistency for corruption offences in 2010. These guidelines later inspired the High Court of Cassation and Justice's new management to draft and adopt its own sentencing guidelines for certain corruption offences in 2011.

These examples show that the Romanian judiciary can react to objective shortcomings in a pragmatic way. The sentencing guidelines have created a basis, if applied and expanded to cover other offences, for more consistency and predictability in sentencing of high-level corruption cases. The measures taken by the High Court regarding case management and judicial practice represent an important recognition that the courts have a responsibility to see that justice is served, and can lead, if they are sustained, to a series of final decisions in cases involving senior politicians in the course of this year. The first of these decisions was reached last month, with the final decision of a trial involving a former Prime Minister providing a demonstration that the High Court is beginning to deliver decisions even against the highest ranking and politically influential defendants.

However, these cases of best practice have not been actively mainstreamed and there is little evidence that they are being adopted in other courts. Despite the visible improvements at the High Court, at other courts many other high-level corruption cases involving local dignitaries such as prefects, presidents of county councils or mayors continue to experience questionable delays and interruptions. It is important to note that cases involving corruption and fraud in public procurement see particularly slow progress in court. An effort will be required to assess the reasons for these significant delays and to improve the availability of expertise and specific knowledge to judges.<sup>44</sup> Most sentences in high-level corruption cases are still suspended. Very few final sentences of imprisonment have so far been pronounced in

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<sup>39</sup> This was achieved by excluding from the time period in calculating the date of prescription, periods of time during which a trial was suspended pending the ruling of the Constitutional Court on an unconstitutionality exception.

<sup>40</sup> See Technical Report page 29.

<sup>41</sup> The Commission's report of 20 July 2011, COM(2011) 460 final, recommended that Romania "take urgent measures to improve judicial practice and case management and accelerate important high-level corruption cases to avoid reaching statute barred periods in all cases". The same report further recommended that Romania "continue the reform of the High Court of Cassation and Justice in order to strengthen its cassation role and to increase its capacity to deal with high-level corruption cases".

<sup>42</sup> See Technical Report, page 25.

<sup>43</sup> See for example, the Commission's assessment on page 15 in the Technical Update SEC(2011)968 published on 20 July 2011.

<sup>44</sup> Out of 43 indictments registered by DNA in courts since 2006, only two final decisions were reached.

important cases involving senior politicians<sup>45</sup>. This has negative implications for the dissuasiveness of the system.

An effective fight against high-level corruption requires respect for judicial action and the full support by the political class to investigations by the judiciary. The adoption of an ethical code in 2011 by the then governing party can be considered a significant step. As a result of this code, the same party excluded an influential mayor when indicted for high-level corruption.<sup>46</sup>

By virtue of the Romanian Constitution, as interpreted through the jurisprudence of the Constitutional Court, Parliamentary approval is required to authorise the arrest or search of parliamentarians, and is also required to approve the opening of criminal investigations against parliamentarians who are current or former Ministers. Refusal of the Parliament to allow the opening of criminal investigations in such cases generates a de facto immunity from criminal investigation and in turn blocks the course of justice. Since 2007 a number of MPs, including a former Prime Minister, have been shielded from criminal investigation by the Parliament's refusals to allow the opening of criminal investigations.<sup>47</sup> The fact that Parliament does not motivate refusals to allow the opening of criminal investigations makes it difficult to establish the objectivity of decisions.<sup>48</sup> In addition, the fact that parliamentarians can still sit whilst also convicted of serious offences like corruption damages the reputation of Parliament – many parliamentary systems have the practice of suspending parliamentarians at indictment in such cases, and exclusion on conviction.<sup>49</sup>

In the recent establishment of the new government there were contradictory signals. The nomination and indeed appointment of Ministers with final or pending court rulings against them led to understandable controversy and indicated an unwillingness to accept and to understand that the rule of law is a fundamental principle.<sup>50</sup> This shows that there is still some way to go in terms of setting high standards in high office.

### *Integrity*

On accession, Romania agreed to put in place a legal and institutional framework to prevent and sanction corruption by addressing incompatibilities, conflict of interest and unjustified wealth. The National Integrity Agency (ANI) verifies situations of conflict of interest and incompatibility and identifies potential unjustified wealth among public officials and elected politicians. Its findings or referrals can be appealed to or confirmed by the Courts, or followed up by other judicial or administrative bodies.

Set up in 2007, ANI swiftly became operational and put in place an efficient administration and investigation methodology. It established centralised, electronic public access to all declarations of assets and interests, an important contribution to transparency. With support from both the national budget and EU funds, it set up a computerised case management

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<sup>45</sup> Data since 2007 shows that about 60% of sentences are set by courts at the legal minimum or below. Though the share of suspended sentences for imprisonment decreased from 75% (2007-2009) to 60% in 2011, suspended sentences are still predominant, particularly in important cases. All three current or former Members of Parliament who received final sentences in 2011 three received suspended sentences.

<sup>46</sup> This is not yet standard practice: the local elections in June included several mayoral and county council president candidates under arrest, criminal investigation or trial for corruption, a number of whom were elected.

<sup>47</sup> See Technical Report pages 26 – 27.

<sup>48</sup> See Technical Report page 27.

<sup>49</sup> Three Members of Parliament who have been convicted for high-level corruption by final decision continue to sit in Parliament.

<sup>50</sup> These rulings followed appeals to court against ANI findings on incompatibility.

system and cooperation agreements with a variety of administrative and judicial authorities. Today, ANI has evolved into an essential component of the anti-corruption institutional framework and can demonstrate significant results.<sup>51</sup>

However, ANI's progress has been held up by a series of challenges. ANI's legal base was declared unconstitutional in 2010, putting in doubt ANI's core power to seek the confiscation of unjustified assets.<sup>52</sup> The debate on how to amend ANI's legal basis revealed that the political will to effectively tackle integrity and to fulfil accession commitments was shallow. Representatives from all major political parties in Parliament re-opened the issue of ANI's existence. Parliament has also failed to implement decisions on incompatibility and conflict of interest.<sup>53</sup>

ANI's weakened legal base makes it more difficult for ANI's work to bring results and is still the subject of constitutional challenge, although two complaints were rejected by the Constitutional Court in June.<sup>54</sup> The new wealth investigation commissions – established as an extra stage between ANI and courts for cases where ANI suggests the confiscation of unjustified assets – seem to have made the task of pursuing unjustified wealth more difficult. The commissions add an extra layer of jurisdiction but offer less transparency and fewer rights for the parties. Despite efforts to bring the key players together in seminars, their procedures have not been fully unified and weaknesses have appeared concerning the handling of evidence. So far not a single case processed by the wealth investigation commissions since their re-establishment in 2010 has been finally determined by court. The legal framework also hampers the work to address administrative conflicts of interest. Separate legal processes are required first to determine any appeals lodged to ANI's finding of conflict of interest, and subsequently to cancel legal acts such as public procurement contracts concluded in a situation of conflict of interest.<sup>55</sup>

The effectiveness of the Romanian integrity system also suffers from slow court proceedings, inconsistent jurisprudence and an insufficient cooperation between other administrative authorities, the judiciary and ANI. Judicial procedures for cases under all three attributions of ANI have been particularly slow. Altogether, courts have so far finally confirmed only four cases of unjustified wealth, and all these cases pre-date the new law (one dates from 2005). Simple cases of incompatibility can take several years to be finally determined by courts. This has led to cases where sanctions could not be applied, as mandates had already expired. Inconsistent jurisprudence has also been a problem in cases raised by ANI, but prompt corrective action has not yet been taken by the judiciary.<sup>56</sup> Although ANI has established cooperation agreements with a number of other administrative institutions and with the prosecution, this cooperation has not led to significant results so far, with the exception of a productive co-operation with DNA. Very few signals have reached ANI from other

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<sup>51</sup> See Technical Report pages 18 – 19.

<sup>52</sup> The power of ANI to suggest the forfeiture of unjustified assets to court was considered to breach the constitutional principles of the separation of powers and the presumption of, and prohibition from confiscating, legally acquired wealth.

<sup>53</sup> The legal committee of the Chamber of Deputies proposed that no action should be taken against two MPs with definitive findings of incompatibility or conflict of interest against their names. Final decisions of the Parliament in respect of both cases are still pending.

<sup>54</sup> The amended law also forced ANI to abandon a significant number of cases investigated at that moment due to the introduction of prescription periods. The vast majority of these cases concerned elected politicians

<sup>55</sup> So far, an administrative conflict of interest has been confirmed in only two cases; in neither case have the underlying contracts been cancelled.

<sup>56</sup> Recent cases in public discussion include two Members of Parliament who are also University Rectors. In one case an incompatibility was identified, in the second case, the same court denied an incompatibility. A similar episode has been repeated at another Court of Appeal. These cases are now pending appeal at the High Court of Cassation and Justice.

institutions and follow-up to ANI's referrals by other institutions has been lacking, leading to only one indictment and one additional tax demand.<sup>57</sup>

Nevertheless, ANI has proved increasingly able to focus on important and complex cases since 2010. A screening exercise to identify conflict of interest among local councillors has led to a significant number of potential cases – the extent to which these cases will be followed up by the prosecution and the courts will be an important test.<sup>58</sup> A similar exercise has been launched with authorities managing EU funds. These are welcome developments. The investigations of ANI should in future be even more guided by risk assessments and by focusing on vulnerable areas. This may have implications in terms of increasing the staffing resources of ANI.<sup>59</sup>

Despite the weaknesses in judicial follow-up, a significant number of incompatibility findings have become definitive and led to resignations and disciplinary sanctions.<sup>60</sup> Results are more disappointing regarding the follow up to ANI's cases concerning the confiscation of unjustified assets and conflict of interest. Improvements to ANI's legal basis may help to address this issue,<sup>61</sup> but the political, judicial and administrative system as a whole needs to see ANI as an asset to be encouraged. The handling of ANI cases by the courts and the cooperation between institutions needs to improve if the Agency is to serve its purpose as driving a major shift in attitudes towards integrity in Romania.

#### *Prevention and sanctioning of general corruption in the public sector*

As well as ensuring that corruption is sanctioned when identified, a sustainable decrease in corruption requires action to make corruption less likely in the first place. Preventive measures to reduce opportunities and risks for corruption, such as transparent procedures and predictable decision-making by public institutions, are a key step.

The overall direction of action is framed by a national anti-corruption strategy. The last five years present a mixed picture in this regard. The 2008-10 Strategy failed to deliver the impact sought. However, a comprehensive new strategy was adopted in March this year, and the decision of the new Government to re-endorse the strategy unchanged, accompanied by the endorsement of the Parliament, suggests general political backing. The new strategy has taken up many recommendations from an impact analysis of the previous two strategies and provides a good basis to coordinate and focus the activities of different state institutions. It also allows for a monitoring of progress following a series of indicators. Adoption by Parliament was a useful way to underline that all influential parts of society have a part to play in making the strategy a success.

Follow-up is heavily dependent on the actions of each part of government. As a dedicated and well-staffed anti-corruption body with both a preventive and an investigative role, the General

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<sup>57</sup> Overall, as of March 2012, ANI has carried out nearly 4000 verifications and issued findings or referrals in over 500 cases: including 250 findings of incompatibility, 37 cases of (administrative) conflict of interest, 24 cases of suspected unjustified assets and 239 referrals of possible criminal offences to the prosecution.

<sup>58</sup> The screening exercise has so far resulted in 75 findings of incompatibility, 9 findings of administrative conflict of interest, and referrals to prosecutors covering 50 suspected criminal offences.

<sup>59</sup> A useful step is the support of the Ministry of Justice for improving the salaries of ANI personnel.

<sup>60</sup> So far findings by ANI of incompatibilities have been finally confirmed by the courts or have become definitive by virtue of not being appealed within the time periods stipulated by law in 118 cases. In 53 of these cases officials resigned as a result, in 8 cases disciplinary committees pronounced dismissals and in a further 16 cases other sanctions were taken.

<sup>61</sup> A joint working group between the Ministry of Justice and ANI has already made proposals which have not so far been taken forward.



Anti-Corruption Directorate of the Ministry of Administration and Interior (GAD) has made important progress in tackling corruption within the Romanian police and the Ministry's other structures. GAD is so far the only department with a detailed corruption risk assessment and has also forwarded a significant number of corruption signals to the prosecution.<sup>62</sup> To build upon these achievements and fulfil its potential, GAD should now expand their track record of cases in further areas of serious and complex corruption, including public procurement and investigations into corrupt links between police and organised crime.

Comparable results have not been reached in other sectors of government activity. Cases of corruption are numerous in areas like tax administration, education, health and infrastructure investment; however risk analysis in these sectors has only recently started and only a few measures have been taken in areas that are the most corruption-prone and budget-sensitive.<sup>63</sup> The educational sector has piloted some useful prevention measures, including proposals of the National Integrity Centre, such as video surveillance at baccalaureate exams and is drafting a sector strategy in the context of an EU-funded anti-corruption project. Other key risk areas to cover are school infrastructure investments and corruption in the examination system in schools and degree awarding within universities. Activities in the health sector are now beginning, with the launch of another important EU-funded project.<sup>64</sup> These have been some useful pilot activities in corruption-sensitive areas with an important impact on the state budget, but have yet to be carried through into a systematic approach. Few activities have taken place in areas such as tax and customs, although particular risks in these areas would justify creating strong preventive units with a pro-active mandate.<sup>65</sup> Administrative control authorities have an important role, but do not yet generally perform corruption risk assessments to address vulnerable areas and generally do not cooperate with judicial authorities or with ANI. Experts suggest insufficient independence and political influence as important underlying reasons for inaction.<sup>66</sup>

The low number of corruption signals by administrative authorities has also had an impact on the number of cases coming to the prosecution and the courts. An exception is the area of police, where GAD has referred a considerable number of cases. The General Prosecutor has asked local prosecution offices to develop local anti-corruption strategies, issued guidelines for the investigation of corruption cases and created a network of specialised prosecutors. These measures have improved the number of corruption cases pursued by the regular prosecution.<sup>67</sup>

The new national anti-corruption strategy offers an opportunity to make a step change in the commitment of all government agencies to implement pro-active policies to make corruption more difficult, and to identify problems when they arise. The best practice available in cases

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<sup>62</sup> In particular, they cooperated with the DNA in a number of important and complex investigations including concerning corruption in the issuing of driving licenses (2008) and within the border police (2010-11). Overall, since 2007, GAD has submitted over 1000 cases to DNA which so far led to 222 indictments for high-level corruption. During the same period GAD submitted over 6300 other corruption files to the prosecution which led to 836 indictments so far.

<sup>63</sup> Comprehensive anti-corruption activities have not yet been taken up in areas such as tax, customs but also regarding construction permits in local government.

<sup>64</sup> This will strengthen the detection of irregularities in health sector procurement, whilst a further important project to strengthen awareness of patients rights and to tackle the supply side of corruption in the health system is proposed. An anti-corruption project has also been launched by the Ministry of Regional Development and Tourism to develop analyse corruption vulnerabilities within the Ministry and its subordinated structures and to develop a detailed strategy.

<sup>65</sup> This month the Government approved the creation of an integrity unit within the National Agency for Fiscal Administration. Its structure, powers and resourcing has still to be determined.

<sup>66</sup> In the area of public procurement, the competent control authority ANRMAP forwarded only five signals to DNA since 2007. In 2011, ANRMAP forwarded only three signals on conflict of interest.

<sup>67</sup> See Technical Report pages 34 – 35.

like the Ministry of Administration and Interior could be extended to all sectors with high risk and important budgetary impact. The establishment of an independent telephone hotline to signal corruption offences across public service would also help to stimulate signals. But above all, anti-corruption actions must win trust of the public, and that will require a virtuous circle where the public can see that consequences follow when justified cases are raised.

### *Ombudsman*

The Ombudsman plays an important role in the fight against corruption in Romania. The Ombudsman is empowered to conduct investigations concerning alleged illegal acts of the administration. It is an independent body, which can act on the basis of an appeal by any person or on its own initiative. The Ombudsman is also entitled under Article 26(2) of Law 35/1997 to report to the parliament or to the prime-minister on "*grave cases of corruption*" he finds in the course of his investigations. The role of the Ombudsman is relevant to the CVM in particular to the fourth benchmark on preventing and fighting against corruption. The Ombudsman is also the only institution that can directly challenge Government Ordinances in front of the Constitutional Court.

The Commission notes that on 3 July 2012 the Parliament prematurely terminated the mandate of the Ombudsman. The Romanian authorities need to ensure the independence of the Ombudsman, and to appoint an Ombudsman enjoying cross-party support, who will be able to effectively exercise its legal functions in full independence.

### *Recovering the proceeds of crime*

Experience shows that pursuing corruption often comes down to pursuing the proceeds of corruption. So recovering the proceeds of crime and tackling money laundering are essential parts of any anti-corruption strategy. In 2011, Romania has established an asset recovery office<sup>68</sup> and 2012 saw a new law on extended confiscation. Since 2010 prosecution and police apply a standardised procedure to recover the proceeds of crime acting under a common order by the General Prosecutor and the Minister of the Interior. Training in this area has been made compulsory and a network of specialised prosecutors has been created.

However, this action is yet to bear fruit. Extended confiscation remains a new concept for police, prosecutors and judges. Concepts such as third-party confiscation seem to be readily challenged in court.<sup>69</sup> Despite positive jurisprudence, money laundering is still not prosecuted as a stand-alone offence.<sup>70</sup> Expert assessment suggests that the level of confiscations is unexpectedly low.<sup>71</sup> In addition, the lack of comprehensive statistical information in this area makes it difficult for the authorities to monitor progress.

### *Public procurement*

Weaknesses in the implementation of public procurement legislation are an important source of corruption and misuse of public funds. They also affect the effective use of EU funds and lower quality in the delivery of public goods. Audits and assessments by various Commission services have repeatedly identified systemic risks and shortcomings in this area, sometimes

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<sup>68</sup> The establishment of an asset recovery office responds to requirements in Council Decision 2007/845/JHA.

<sup>69</sup> There is not yet a common vision within the profession regarding third-party confiscation and a lack of jurisprudence. The Constitutional provision according to which the licit origin of property is presumed contributes to a cautious approach and non-unitary practice in this area.

<sup>70</sup> Jurisprudence has been established in one case and a legal opinion was issued by the General Prosecutor.

<sup>71</sup> Between 2007 and 2011, 42 convictions were achieved for money laundering offences.

resulting in interruptions in payments of EU funds. This is backed up by complaints received directly by the Commission.

Since accession, Romania has created an extensive institutional and legal framework to implement EU legislation in this area. However, a number of systematic shortcomings have not been sufficiently addressed. Inconsistencies are caused by factors including frequent changes of the legal framework<sup>72</sup> and an institutional set-up that lacks sufficient capacity, as well as the absence of key instruments for effective controls such as a comprehensive register of public tenders. The protection of public procurement against conflict of interest has been identified as a particular weakness by Commission audits and by the Romanian National Integrity Agency.<sup>73</sup> Romania has committed to implement through an overall action plan the findings of a comprehensive assessment of public procurement carried out by the Commission in 2011. Decisive action will be needed to remedy the shortcomings identified.

### **III. Next Steps**

The Commission's assessment shows the progress that Romania has made in the five years since its accession to the EU. This illustrates the positive role played by the CVM. The Commission considers that in the future Romania could attain the objectives of the CVM, provided it takes swift action to guarantee the rule of law, maintains the direction and steps up the implementation of reforms.

However, as set out in the introduction, recent events underline concerns about the irreversibility and sustainability of the reforms. Romania needs to ensure respect for the rule of law, including independent judicial review. The trust of Romania's partners in the EU will only be won back through proof that the rule of law is above party interests, that all sides show full respect for judicial review including at constitutional level, and that the reforms are irreversible. This needs legal steps – it also requires a political commitment to the rule of law that has been absent from recent decisions. The government has now committed to act swiftly to ensure respect for the rule of law in line with the recommendations listed below (see IV 1)

This reinforces the conclusion that the progress in implementation of the benchmarks which would be required for the Commission to decide to end the CVM is not yet present. Wider ownership of reform within all branches of government, as well as within the judiciary, and a stronger commitment to integrity and to the fight against corruption is necessary to satisfactorily fulfil its requirements. In particular, the Romanian authorities need to demonstrate that a sustainable and irreversible reform process has taken root in Romania and that the external intervention of the CVM is no longer needed. This is why recent steps by Government and in Parliament raise particular concerns.

The experience of the last five years shows that when convincing action is taken, it can bring results. Romania can already point to a positive direction in the reform process in institutions like DNA and ANI, and in targeted action like the acceleration of cases in the High Court. Recent events have seen the judiciary taking a more proactive stance in defence of judicial independence. Clearly, preserving such progress and maintaining momentum and institutional stability in such cases are the first building blocks in demonstrating sustainability. Moving swiftly from the successful phase of legislation to a determined phase of implementation will bring closer the moment when Romania will meet the requirements of the CVM. All Member States have both obligations and opportunities within the area of freedom, security and justice,

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<sup>72</sup> Technical Report, page 40.

<sup>73</sup> See footnote 56.

and the Commission looks forward to Romania completing the particular process of the CVM and addressing these issues on the same basis as other Member States.

Given current uncertainties, the Commission will adopt a further report under the CVM for Romania before the end of 2012. In this report, it will look at whether the concerns it expresses regarding the rule of law and the independence of the judiciary have been addressed and whether the democratic checks and balances have been restored. The Commission will monitor progress closely, with regular missions, as well as frequent dialogue with the Romanian authorities and with other Member States.

#### **IV. Recommendations**

The most important next step will be for the government and the key institutions of Romania to demonstrate their commitment to the indispensable foundation stones of the rule of law and judicial independence. This requires a number of urgent steps by the government and Parliament. Whilst the recommendations listed below include a number of specific reforms needed to maintain progress under the CVM, the current controversies described in the earlier part of the report raise important concerns on the progress achieved so far and pose important questions as to the sustainability and irreversibility of reforms already launched. Considering the exceptional nature of these recent developments, this report includes specific urgent recommendations to address the current situation notably under the section 1: Respect for the rule of law and the independence of the judiciary.

The Commission invited Romania to take immediate action in the following areas in order to resolve the current controversies:

##### **1. Respect for the rule of law and the independence of the judiciary**

- Repeal of Emergency Ordinance no 38/2012 and Emergency Ordinance no 41/2012 and ensure that Constitutional Court rulings on the quorum for a referendum and the scope of the Court's responsibilities are respected;
- Respect constitutional requirements in issuing emergency ordinances in the future;
- Implement all the decisions of the Constitutional Court
- Ensure the immediate publication of all acts in the Official Journal, including decisions of the Constitutional Court
- Require all political parties and government authorities to respect the independence of the judiciary; with a commitment to discipline any government or party member who undermines the credibility of judges or puts pressure on judicial institutions;
- Appoint an Ombudsman enjoying cross-party support, through a transparent and objective process, leading to the selection of a personality with uncontested authority, integrity, and independence;
- Introduce a transparent process for the nomination of the General Prosecutor and Chief Prosecutor the National Anti-Corruption Directorate. This should include open applications based on criteria of professional expertise, integrity and a track record of anti-corruption action. No nomination should be made under the acting Presidency;
- Avoid any presidential pardons during the acting Presidency;

- Refrain from appointing Ministers with integrity rulings against them; ministers in that situation should step down;
- Adopt clear procedures which require the resignation of Members of Parliament with final decisions on incompatibility and conflict of interest, or with final convictions for high-level corruption.

By his letters of 16 July and the updated annex of 17 July the Prime Minister of Romania confirmed to the President of the Commission that all of these requirements have or will be met.

Romania should also take action in the following areas:

## **2. Reform of the judicial system:**

- Adopt and implement a joint comprehensive plan to ensure implementation of all four codes, including all relevant aspects of, structural and procedural reform, human resource adjustment, and investment into judicial infrastructure.
- Restructure the court system and prosecution offices, rebalancing staff and workload, guided notably by the functional review of the Romanian judicial system and the project on optimal workload in courts currently funded by the World Bank.
- Create a monitoring group for judicial reform which involves all state powers, professional associations and civil society.

## **3. Accountability of the judicial system:**

- Agree a joint policy between the SCM and the Government to promote accountability and integrity within the judiciary through convincing disciplinary practice and jurisprudence, with clear milestones for implementation. Use the implementation of the new laws on disciplinary responsibility and promotion to the High Court to set an example for the judicial system as a whole.
- Ensure better coordination of legal, disciplinary and management instruments to protect the reputation of the judiciary in serious cases of misconduct, including decisions on individual rights, such as pensions.
- Strengthen the capacity and performance of the Judicial Inspection to both pursue judicial accountability through the follow-up of individual cases, and to promote judicial efficiency, consistency and good practice through regular reviews of practice at all levels of the judicial system.

## **4. Consistency and transparency of the judicial process**

- Develop a comprehensive approach to put in place the structures, procedures and practices needed to accelerate legal unification. Make legal unification a management priority for court presidents and consistency an important element within the appraisal and promotion system of judges. Ensure the full, on-line publication and continuous update of motivated court decisions.
- Further reform the High Court to allow stronger focus on legal unification.

## **5. Effectiveness of judicial action**

- Establish and implement across the court system clear best practice guidelines regarding sentencing, case management and the consideration of evidence in criminal trials, with a particular emphasis on areas where shortcomings have already been identified, such as in the complex trials involving economic crimes and public procurement.
- Introduce reforms to publish court motivations swiftly after decisions are pronounced, to suspend prescription periods upon the beginning of a judicial investigation, and to improve the quality and availability of court expertise.
- Continue the measures taken at the High Court to accelerate high level corruption trials, ensure that prescription periods are avoided, and introduce similar measures in other courts
- Continue to improve the consistency and dissuasiveness of penalties applied in high-level corruption cases in courts across Romania.
- Ensure that the results achieved by the Public Ministry are continued under new leadership.

## **6. Integrity**

- Ensure a convincing track record of prompt and dissuasive sanctions. Streamline the judicial review of the decisions of the National Integrity Agency (ANI) through improvements to judicial procedures and practice and through a review of ANI's legal framework, to speed up final decisions and improve their consistency and dissuasiveness.
- Improve the cooperation of judicial and other administrative authorities with ANI with a view to ensure effective exchange of signals and operational information in all three areas of ANI's activities. Cooperation with ANI should be a clear performance measure for the leadership of other administrative authorities.

## **7. Fight against corruption**

- Ensure that the results achieved by DNA are continued under new leadership.
- Implement the new National Anti-Corruption Strategy as designed and set up a comprehensive system of monitoring so that all agencies of government set targets and report annually, in a common and comparable format, on the prevention and sanctioning of corruption, fraud and conflict of interest. In line with the Strategy, establish clear procedural rules and best practice for decisions of Parliament to allow investigation, arrest and search of parliamentarians.
- Demonstrate a track record in the prosecution of money laundering as a stand-alone offence and deliver convincing results in the recovery of the proceeds of crime, through strengthening judicial practice and applying the new law on extended confiscation.

- Establish a clear coordination and monitoring mechanism between police, prosecution and administrative control authorities, with specific responsibility for ensuring effective cooperation and communication on corruption
- Improve results in the prevention and sanctioning of corruption, fraud and conflict of interest in public procurement across all sectors of government activity. In this context, Romania should provide proper follow-up to the recommendations of the external review of the public procurement system carried out on the initiative of the Commission.