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**COMMISSION STAFF WORKING DOCUMENT**

**ROMANIA : Technical Report**

*Accompanying the document*

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

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

{COM(2017) 44 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:<sup>1</sup>

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

**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

**DNA:** National Anti-Corruption Directorate

**HCCJ:** High Court of Cassation and Justice

**MoJ:** Ministry of Justice

**NAS:** National Anti-corruption Strategy

**NIC:** National Integrity Council

**NIM:** National Institute of Magistracy

**SCM:** Superior Council of Magistracy

**WIC:** Wealth Investigation Commissions

**References to "CVM reports"** refer to the Commission report and the accompanying Technical Report

**CVM report July 2012:** COM(2012) 410 and SWD(2012) 231 - *5 year assessment of progress*

**CVM report 2013:** COM(2013) 47– *report of progress July 2012 to December 2012*

**CVM report 2014:** COM(2014) 37 and SWD(2014) 37– *report of progress in 2013*

**CVM report 2015:** COM(2015) 35 and SWD(2015) 8– *report of progress in 2014*

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

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<sup>1</sup> Previous CVM reports can be consulted at: [http://ec.europa.eu/cvm/progress\\_reports\\_en.htm](http://ec.europa.eu/cvm/progress_reports_en.htm)

## 1. INTRODUCTION

This technical report sets out the information and the data which the Commission has used as the basis for its analysis under the Co-operation and Verification Mechanism (CVM). This information has been collected from a variety of sources. In the first place, the Commission has had the benefit of working closely with the Romanian government and key judicial and State bodies on CVM issues, which have provided detailed and focused reports, as well as in frequent face-to-face meetings.<sup>2,3</sup> The Commission services follow developments through a permanent presence in Romania.<sup>4</sup> Commission contacts with the Romanian administration across the full range of EU policies also help to inform this work. The Commission's work is also supported by independent experts from other Member States,<sup>5</sup> who participate in a fact-finding mission once a year that includes visits to institutions outside Bucharest.<sup>6</sup> The Commission also meets with non-governmental organisations active in the area of judicial reform and anti-corruption projects, with judges and prosecutors unions, and with representatives of the business community. This report remains the responsibility of the Commission services.

The Commission further draws on the various studies and reports that are available from international institutions and other independent observers in the field of judicial reform and the fight against corruption. Since the time when the CVM benchmarks were drafted, there have been major developments in ECHR case-law, international standards and best practices,<sup>7</sup> and comparative information on national justice systems in the EU<sup>8</sup>, which also help to give an objective and comparable measure of the development of the Romanian judicial system and fight against corruption.

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

The Commission also supports the efforts of Romania in achieving the CVM objectives through funding under the European Structural and Investment Funds. In the 2007-2013 period, Romania implemented a number of projects in the anti-corruption and judicial reform area. The total amount of funding from the European Social Fund (ESF) was EUR 16 million. The main beneficiaries were the Ministries of Public Administration, Justice, Education and Health. European Regional Development Funds (ERDF) were invested in actions relating to integrity control projects (including PREVENT –

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<sup>2</sup> In 2016, the Commission services had four fact-finding missions in Romania.

<sup>3</sup> In 2016 Commission representatives had meetings with the Ministers of Justice, Public Consultation and Civic Dialogue and Interior, officials from the Ministry of Justice, the National Agency for Fiscal Administration (ANAF), the Ministry of Regional Development and Public Administration (MRDAP), the Prime Minister Chancellery, the Ministry of Health and the Ministry of Education, the High Court of Cassation and Justice (HCCJ), the Superior Council of the Magistracy (SCM), the Prosecutor General, the National Anti-Corruption Directorate (DNA), the Directorate for Investigation of Organised Crime and Terrorism (DIICOT), the National Institute of the Magistracy (NIM), the Judicial Inspection, the National School of Clerks, judges and prosecutors from the courts of Bucharest and Brasov, the National Integrity Agency (ANI), the Permanent Electoral Authority, the national Agency for Public Procurement (ANAP), President and members of the Chamber of Deputies, Vice-President and members of the Senate, the Constitutional Court, a Presidential Advisor, the Bar association (National and Bucharest) and the Association of bailiffs.

<sup>4</sup> The Commission has a CVM resident adviser in Bucharest.

<sup>5</sup> In the period 2007-2016, judges, prosecutors and anti-corruption experts from BE, DE, EE, ES, FR, IRL, IT, NL, PL, SI, UK participated in CVM fact-finding missions in Bulgaria and Romania.

<sup>6</sup> In the period 2007 – 2016 fact finding missions took place in Bucharest, Brasov, Timisoara, Cluj, Constanta, and Iasi.

<sup>7</sup> The most important ones being the developments in ECHR case-law on fair trial rights, the UN Convention Against Corruption, Venice Commission Reports on European standards as regards the independence of the judicial system, and CEPEJ indicators.

<sup>8</sup> The EU Justice Scoreboard

see below)<sup>9</sup> and the capacity of public procurement agency, for a budget of about EUR 15 million. EU funds will be crucial for the implementation of the National Anti-Corruption Strategy and the Strategy for the Development of Justice, and the respective action plans finalised in 2016 have identified the areas that could be funded through EU funds. EU funds have also been allocated to support the Strategy on Public Procurement and the Strategy for the reform of Public Administration.

In the 2014-2020 period, the Administrative Capacity Programme (ESF) will provide funding of about EUR 103 million for judicial reform projects, including 35 million specifically for anti-corruption, and EUR 35 million to support improvements in public procurement. ERDF resources of up to EUR 15 million will be invested in capacity building and technical assistance in public procurement, in fraud prevention for Management Authorities and in the Fight Against Fraud Department (DLAF). Financing by EU funds also contributes to the stability of the objectives of the strategies as agreed with the Commission, some strategies being ex-ante conditionalities for using the Funds.

## 2. THE JUDICIAL PROCESS

*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*

Reform of the judicial system is one of the two overarching themes monitored under the CVM in Romania, focusing on establishing an independent, impartial, and efficient judicial system, strengthening the consistency of the judicial process, and improving the transparency and accountability of the judiciary.

### 2.1. Overview of developments under the CVM

Whilst difficult to measure precisely, there are some clear indicators that can be used to assess judicial independence. The prosecution and conviction of many prominent politicians in Romania is a sign that the underlying trend of judicial independence is positive. The same trend can be seen in opinion polling on perceived judicial independence and trust in the judiciary.<sup>10</sup> But as CVM reports have recorded, there has also been a reaction to this trend: political and media criticism of magistrates and judicial institutions has been frequent,<sup>11</sup> with attacks against the National Anti-corruption Directorate continuing to intensify in 2016. The risk is that such criticism undermines public confidence in the judicial system as a whole, especially when it comes from government or Parliament.<sup>12</sup>

The Superior Council of the Magistracy (SCM) plays a central role, as the Constitution establishes the SCM as main defender of the independence of Justice. In 2012 the Commission reported that "Over the last five years, the SCM has had an uphill task to establish public confidence, as it initially failed to recognise that protecting the reputation of the judiciary is part of its core functions. But decisions taken by the SCM in June 2012 to more proactively defend the independence of the judiciary and the rule of law are steps which show the SCM more ready to exercise its Constitutional role and address the issue of public confidence".<sup>13</sup> In the following years, CVM reports have highlighted that the SCM has increased the emphasis on defending the independence of justice and the reputation, independence and impartiality of magistrates, working more systematically and with growing confidence. The procedure in place since 2012, involving investigation of the facts by the Judicial Inspection (JI) and a

<sup>9</sup> IT system for ex-ante checks of conflicts of interest (see section 3.3)

<sup>10</sup> The 2016 EU Justice Scoreboard (COM 2016) 199 final, see graphs 48, 44 and 46. According to the European Commission's Eurobarometer surveys, between 2007 and 2016 the Romanians' trust in judiciary increased from 26% in 2007, up to 35% in the year 2016. The largest percentages were recorded in the year 2015 with 48% and in 2013 with 44%.

<sup>11</sup> COM(2012) 410 final, COM(2013) 47 final, COM(2014) 37 final, COM(2015) 35 final.

<sup>12</sup> Council of Europe Recommendation CM/Rec (2010)12 on judges: independence, efficiency and responsibilities, §18: *If commenting on the judges' decisions, the executive and legislative powers should avoid criticism that would undermine the independence of or public confidence in the judiciary.*

<sup>13</sup> CVM report July 2012

decision by the SCM plenum, also made public through press releases and information to media, is now well established.<sup>14</sup> The SCM considers that its actions in defence of the independence of justice have helped this issue to be taken more seriously by citizens and politicians. However, the difficulty in securing an equivalent level of coverage for the SCM press statements compared to the initial criticisms was noted in the 2015 and 2016 CVM reports.<sup>15</sup> Although the decisions of the SCM are always transmitted to the National Audio-Visual Council, this has not resulted in effective redress or corrections in the media that launched or relayed the attacks.<sup>16</sup> In January 2016, the Commission therefore recommended that the new SCM should determine if more could be done to provide appropriate support to individual magistrates facing criticism undermining judicial independence.

As highlighted already in many CVM reports, the space that such allegations receive in the public sphere and the uneven public reaction against them illustrate that the principles of judicial independence have not been fully internalised. Successive recommendations from the Commission that "the Code of Conduct for parliamentarians [should] include clear provisions so that parliamentarians and the parliamentary process respect the independence of the judiciary" have not been achieved.<sup>17</sup> A draft Code of Conduct was elaborated in Parliament in 2014 and will be reconsidered by the newly elected Parliament, but it did not include provisions on the respect of the independence of the judiciary.

The Constitutional Court has a key role in further development of the rule of law and the consolidation of an independent justice system. CVM reports have highlighted that notably since the constitutional crisis of 2012, many decisions of the Constitutional Court have contributed to upholding the independence of justice, in particular in terms of respect of court decisions, and have sought to provide solutions linked to the balance of powers and respect for fundamental rights that could not be solved by the justice system alone.<sup>18</sup>

The rigour of entry procedures into the magistracy has also been seen to have placed an important part in the independence, as well as the professionalism, of the magistracy.<sup>19</sup> In the period 2007-2012, nearly half of the new recruits entered the magistracy using provisions in the law allowing for extraordinary direct entrants, as opposed to the two-years training at the National Institute of Magistracy (NIM).<sup>20</sup> Following successive recommendations from the Commission, more robust appointment procedures based on open competitions to enter the magistracy or be promoted to the High Court of Cassation and Justice were put in place between 2007 and 2012, and the entry into profession training at the NIM has been generalised for all new entrants.<sup>21</sup> The 2016 CVM report noted that most magistrate positions, including leading positions in courts and prosecutors' offices, posts are filled through open competitions organized by the SCM and the NIM.

Throughout the years 2011 - 2016, the capacity and the organisation of the NIM continued to be reinforced with additional personnel and training staff, resources, including important external funding, while the training programmes continued to improve and adapt to the needs of the judiciary. In the period 2011-2016, an important part of the training curriculum focused on the new civil and criminal Codes. International training activities were also developed. Romania also participates actively in the European training programmes or other multi-national programmes. In 2015, more Romanian judges, prosecutors and lawyers than the average of all EU Member States participated in training on EU law

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<sup>14</sup> CVM reports 2014, 2015, 2016

<sup>15</sup> COM(2015) 35 final, p 4., CVM report 2016

<sup>16</sup> The National Audio-Visual Council has itself been the subject of criticism by NGOs and in Parliament: its President is also the subject of an ongoing DNA investigation.

<sup>17</sup> CVM reports 2014, 2015, 2016

<sup>18</sup> CVM reports 2013, 2014, 2015, 2016

<sup>19</sup> CVM report 2016

<sup>20</sup> CVM report July 2012, p11

<sup>21</sup> CVM report July 2012

or law of another EU Member State, surpassing the training targets set out in the Commission's Communication (2011) 551 on European judicial training.<sup>22</sup>

Concerning appointments in leadership positions of the key judicial institutions – the High Court of Cassation, the Public Ministry and the National Anti-Corruption Directorate, and the Superior Council of the Magistracy-, CVM reports have repeatedly emphasised the importance of transparent and merit-based selection procedures<sup>23</sup> as a way to provide robust leadership, avoid political interference in senior appointments and support judicial independence. The reports have noted a mixed track record in this regard.<sup>24</sup> The January 2016 CVM report noted that 2016 will see a series of appointments to key posts and both the process and the results would be a key test of the ability of the judicial system to maintain the reform process through a time of change.<sup>25,26</sup>

A central component of the judicial reform initiatives has been the modernisation of legislation. In 2009 Romania adopted new substantive Civil and Criminal Codes and in 2010 their accompanying procedural Codes, aiming to modernise the substantive law and to improve the efficiency and consistency of the judicial process. In 2011 the Civil Code entered into force and in 2013 the Code of Civil Procedures. The 2016 CVM report noted that the transition towards the application of new Code of Civil Procedure was coming to an end, with the large majority of cases in courts now falling under the new codes. This major reform is thus nearly finalised: however, the need to introduce logistical and structural changes in the courts has led to successive delays of certain provisions, with no clear plan to tackle the issue of how to update courts to the needs of the new Codes. The 2016 CVM report recommended that the Government and the SCM should set up a clear plan to ensure that the deadline of January 2017 for the implementation of the remaining provisions of the Code of Civil Procedures can be respected.

The new Criminal Code and Code of Criminal Procedures entered into force on 1<sup>st</sup> February 2014. Overall this major reform step has been seen as a success by the judiciary, as well as by civil society. CVM reports in 2015 and 2016 concluded that judicial institutions, judges and prosecutors, and court clerks, have shown professionalism and the capacity to make the reform work, while the Ministry of Justice has constantly supported the reforms through budget and resources allocations and adoption of necessary legal amendments. Since their entry into force a number of developments have called into question the stability of the Codes, and required adoption of urgent amendments, but these have been pending in Parliament for over two years.<sup>27</sup> Eventually, to ensure stability and legal certainty the Government adopted several Emergency Ordinances in 2016, but these still need to be adopted in Parliament.<sup>28</sup>

At the point of Romania's accession to the European Union, one persistent shortcoming identified was the inconsistency in court decisions. The major legislative reforms have all sought to strengthen the mechanisms for consistency. In 2010 the Small Reform Law refocused the competences of the High Court of Cassation and Justice (HCCJ) on cassation and consistent interpretation of the law, and streamlined the unification mechanism of *appeal in the interest of the law*. The Civil and Criminal Procedure Codes further consolidated the unification and cassation role of the HCCJ and introduced a new mechanism, *preliminary ruling*, for ensuring uniform interpretation before a final decision is taken. CVM reports have noted the increasing use and the effectiveness of the legal unification

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<sup>22</sup> European judicial training 2016 report

<sup>23</sup> COM (2015) 35 final; COM (2014) 37 final; COM (2013) 47 final; COM (2012) 410 final.

<sup>24</sup> CVM report July 2011, CVM report July 2012, CVM report 2013, CVM report 2014, CVM report 2015, CVM report 2016

<sup>25</sup> General Prosecutor and Chief Prosecutor of the DNA: May 2016, President of the High Court of Cassation and Justice: September 2016, Superior Council of Magistracy: elections in late 2016.

<sup>26</sup> The nomination procedure for the Chief Prosecutor of DIICOT also applies to all senior prosecutors, their deputies and includes the level of heads of sections in the Public Ministry and the DNA. In total, there were 15 prosecution posts to be chosen by the Minister of Justice in 2016.

<sup>27</sup> CVM reports 2015, 2016

<sup>28</sup> There are 7 Emergency ordinances pending in Parliament on the Civil and Criminal Codes (5 on the criminal codes)

mechanisms since the entry into force of the Civil and Criminal Procedure Codes.<sup>29</sup> Next to the legal mechanisms, at managerial level, the HCCJ, the National Institute of Magistracy (NIM), the SCM, the General Prosecution service and the Presidents of the Courts of Appeal have encouraged awareness and training of judges and prosecutors on the need for consistency, developed online tools and organised regular meetings at all court levels to discuss diverging interpretations, thereby supporting the legal work of the HCCJ, but also complementing it through developing common practice in the application of the procedural codes. CVM reports have highlighted that these management efforts intensified when the new codes entered into force and noted in 2016 signs of a cultural shift in favour of consistency within the judiciary.<sup>30</sup>

The availability and transparency of court decisions also contribute to consistency of decisions. While the 2012 report noted that access to court decisions remain an important impediment, with only part of the decisions of the HCCJ published online and the majority of decisions of lower courts not publically available, several steps have been taken to remedy this situation: first the HCCJ fully revamped its website in 2014 and now publishes all decisions (including past decisions) and second, the SCM developed together with the Bar Association a public on-line repository for all judicial decisions (ROLII), that started operating end of 2015.

Previous CVM reports have identified a number of obstacles to the consistency of court decisions. Some of these are issues which go beyond the scope of the CVM itself, such as of the quality of legislation<sup>31</sup> and the risks inherent in widespread recourse to instruments such as Government Executive Ordinances. Other factors relate directly to the functioning of the judicial system, such as the quality and delay of motivations of judicial decisions and workload issues.

Structural reforms to the administration of justice have been shown to have a direct impact on the effectiveness of justice. Issues like the efficiency of the system, its affordability, and the ease of access are all important factors in an effective justice system. The efficiency of the judicial process had been identified in 2007 as a major problem of the Romanian justice system. Problems such as judges in large courts facing problems in coping with a massive caseload, courts and prosecution offices which lack the critical mass to operate at the right level of professionalism, and shortages in terms of court clerks, offices, court rooms and IT facilities are well known. Structural reforms are a shared responsibility, with the main actors being the Superior Council of Magistracy and the Minister of Justice. In 2012, the CVM report noted that although important efforts had been made to increase the number of magistrates, work to implement structural reforms of the judicial system in the period 2007-2012 had been slow,<sup>32</sup> with little progress in rebalancing of workload between courts, in rationalising the territorial distribution of courts and prosecution offices,<sup>33</sup> and in the transfer of tasks from judges to court clerks.<sup>34</sup> The Functional Review of the judicial system prepared by the World Bank in 2013 provided for the first time a comprehensive overview of the functioning of the system and global recommendations on the reform steps. Another study in 2014 on the optimal volume of work to judges and court clerks complemented this work. On the basis of these studies and CVM recommendations, the judicial management – SCM, Ministry of Justice, Prosecutor General and HCCJ – have defined a comprehensive structural reform plan, *Strategy for the Development of the Judiciary 2015-2020*, setting out a vision for the judiciary and the key structural reform steps up to 2020, which was adopted by the Government in December 2014. In addition various management tools for monitoring the functioning of the courts and prosecution office and the human resource situation have been

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<sup>29</sup> CVM reports 2014, 2015, 2016

<sup>30</sup> CVM reports 2015, 2016

<sup>31</sup> In general the problem of quality of legislation does not apply to legislation prepared by the Ministry of Justice which, because of the stability and quality of its staff, has developed a strong judicial expertise and consistently applies public consultation and transparent law-making tools.

<sup>32</sup> CVM report July 2012

<sup>33</sup> A law adopted in 2011 closed three working courts and their accompanying prosecution office.

<sup>34</sup> A draft law has been pending in Parliament since 2011.

developed.<sup>35</sup> The detailed action plan for this Strategy was adopted in April 2016, and its implementation will be supported by EU funds and loans from the World Bank. When the measures will be fully implemented, it should bring major benefits to the users of the justice system, while those working within the system should experience better workload and working conditions.

The introduction of new legislation has also aimed at improving efficiency. The 2012 CVM report notes that the Small Reform Law adopted in 2010 helped to accelerate judicial proceedings and strengthen the efficiency of the prosecution. CVM reports in 2015 and 2016 further described how the entry into force of the new procedural codes in 2013 and 2014 helped to improve the effectiveness of the judicial process, although the full impact on efficiency is yet to be concluded.<sup>36</sup> The entry into force of the new codes was also supported by an important commitment of successive governments to support implementation of the Codes with increased resources.<sup>37</sup>

Respect and implementation of court decisions is an integral part of an effective judicial system.<sup>38</sup> Problems with the respect and implementation of court decisions by State institutions and public administration have been a consistent theme of CVM reports.<sup>39</sup> Whereas the problems of effective confiscation of criminal assets are being addressed through the development of the National Agency for Managing seized and confiscated assets (ANABI) agency (see Section 5), few steps were taken to address the respect of court decisions by the public administration, although it has also been recognised as a structural deficiency by the European Court of Human Rights (ECtHR)<sup>40</sup> and has a direct impact on the workload of the courts.<sup>41</sup>

Integrity, transparency and accountability within the judicial system were another major concern affecting the Romanian judicial system identified at the point of accession. These concerns were

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<sup>35</sup> This is an ongoing project set out in the CVM report 2016, p17: The SCM has continued the development of tools for monitoring and managing the activities of the courts: as well as the *ROLII* project (see above), *electronic case file application* has been introduced in some Courts of Appeal, also supported by the local Bar associations. The *EMAP portal* is used by the SCM for interconnection of information available in different courts and for managing various administrative and human resource activities, while the *STATIS* system monitors the activity of the courts in handling cases and is now installed in all courts.

<sup>36</sup> According to the latest data from the Romanian authorities, the rate of settlement of the files from the initial stock (civil and criminal) has risen from 69,2% in 2012 to 75, 9% in 2016. The rate of settlement of the new files has risen from 48.7% in 2012 to 62.2% in 2016, both at first instance and at tribunals. The increase is particularly visible in the rate of settlement of criminal cases with 87.44% at the courts of appeal, 107,30% at the tribunals and 89,77% at first instance courts. The 2016 EU Justice Scoreboard showed a similar trend of improvement of the overall efficiency of the courts since 2012. However, the first analysis by the SCM of the impact of the codes in 2015 showed some clear areas of vulnerabilities and where efficiency had rather decreased, an analysis further confirmed in the SCM Report on the status of justice 2015 published in April 2016.

<sup>37</sup> In the last 6 years the budget approved for the judiciary (Ministry of Justice, Public Ministry, SCM, HCCJ) increased as follows: 2011 – 676 million euros; 2012 – 714 million euros; 2013 – 820 million euros; 2014 – 1066 million euros; 2015 – 1008 million euros; 2016 – 942 million euros. Similarly there has been an important increase in the personnel allocated for the judiciary: the number of judges increased from 4482 in 2007 to 5066 in 2016, while the number of the filled-in position increased from 3968 in 2007 to 4499 in 2016. The number of prosecutors increased from 2854 in 2007 to 2961 in 2016, while the number of filled-in positions increased from 2240 in 2007 to 2653 in 2016.

<sup>38</sup> ECHR guidelines on article 6: [http://www.echr.coe.int/Documents/Guide\\_Art\\_6\\_ENG.pdf](http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf)

<sup>39</sup> CVM reports July 2012, 2013, 2014, 2015, 2016

<sup>40</sup> In 2014, The Department for execution of judgement from the Council of Europe has identified in several groups of ECtHR cases as a structural issue the failures or significant delays in execution of domestic court decisions by the public administration (*Sacaleanu and Strungariu groups*) and the failure of authorities to assist applicants to enforce final court decisions concerning private parties (*Ruianu group*). Romania has proposed an Action Plan to address issues under the *Sacaleanu* group of cases in December 2016. The Council of Europe Committee of Ministers will examine the status of implementation of the ECHR's judgments on non-enforcement of final court decisions in Romania by the Administration in March 2017 (1280<sup>th</sup> meeting, 7 – 9 March).

<sup>41</sup> CVM report 2016



closely related to the ability of the Superior Council of the Magistracy (SCM) and of the Judicial Inspection (JI) to ensure a transparent, accountable and effective judicial system, and to uphold the highest standards of integrity within the judiciary.

In line with recommendations set out in CVM reports, since 2007 the SCM has taken a number of measures to improve its institutional transparency and has strengthened the objectivity of management decisions within the Council (for example on appointments).<sup>42</sup> In 2014, the CVM report noted that the SCM is the central interface for the justice system towards Romanian citizens and other users of the system, and that it would be in line with the judicial strategy to see the SCM taking a more proactive role in increasing trust in the judicial system. The 2015 report highlighted that the interface which lawyers, businessmen, NGOs and citizens face in their dealings with courts could be improved, while the 2016 CVM report called for the new SCM to take office in 2017 to take clear measures for increased transparency and accountability.

Integrity within the judiciary is a particularly important test of the management of the magistracy. In March 2012 the SCM adopted a strategy for integrity within the judiciary, to increase transparency, improve access to the judicial system, enhance ethical and integrity rules, and improve the system of disciplinary liability. In the following years, CVM reports have noted increased steps by the SCM to highlight integrity, with several integrity projects including with international partners.

CVM reports have also noted an increase of corruption investigations initiated against magistrates, with a peak of cases in 2013, 2014 and 2015, attributed to an increase in whistleblowing. By the end of 2015, DNA reported that there had been a reduction in the number of complaints and new cases of corruption in the judiciary, and they considered that this was the positive result of a real decrease following a reduced tolerance for corruption within the system. The SCM needs to authorise the search and arrest of magistrates, and has admitted all cases since 2007. Since 2012, it has also applied a policy of suspending magistrates under criminal investigations, a policy which was later confirmed in a formal decision. In 2014, the “Law limiting special pensions for magistrates convicted of corruption” came into force. This provides that magistrates convicted of corruption will not receive the special pension normally enjoyed by the profession.

The SCM is also responsible for sanctioning professional misconduct and disciplinary offences by magistrates, notably on the grounds of bad behaviour, incompetence and serious negligence. The investigation of such cases rests with the Judicial Inspection. In the period 2007-2011, various measures had been taken to strengthen the Judicial Inspection and the disciplinary system for magistrates, but the July 2012 report noted that progress in addressing deficiencies of the Judicial Inspection was slow, and that the track record over the five years did not reveal significant change in the number or types of disciplinary sanctions applied to magistrates. CVM recommendations had pointed to the need to consider a more thorough reform of the Judicial Inspection and disciplinary system. In 2012, a new law introduced far reaching changes to the Judicial Inspection, strengthening the disciplinary system through enhancing the autonomy of the Inspection, expanding the range of disciplinary offences and sanctions, and closing loopholes that had undermined the effectiveness of the disciplinary system.<sup>43</sup> From 2013, CVM reports have noted an increase in the number and types of disciplinary actions initiated by the Judicial Inspection,<sup>44</sup> and highlighted its essential role in the transformation of the Romanian Judiciary. The accumulation of cases over the years has now allowed the Judicial Inspection to identify the main causes for disciplinary actions, to better define preventive measures. The reports of the Judicial Inspection are forwarded to the respective SCM sections, who decide on the sanctions. The decisions of the SCM can be appealed before the HCCJ. The 2016 CVM

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<sup>42</sup> CVM report July 2012: These have included efforts to strengthen communication, the progressive expansion of the institution’s website, and the online publication of its decisions, including disciplinary decisions (since 2010), and web streaming of Council sessions from 2011.

<sup>43</sup> CVM report July 2012

<sup>44</sup> CVM reports 2013, 2014, 2015, 2016.. In the period 2013 - 2016 there is a significant increase in both the number of notifications (2013: 5018, 2014 - 5546, 2015: 6034, 30th October 2016 - 5871) and the number of disciplinary actions (2013: 22, 2014 - 30, 2015: 45, 30th October 2016 - 38).

report noted that the chain of decisions seems to have become more predictable and consistent: in comparison to 2013, the SCM reports much less variations between SCM decisions and HCCJ appeals.

CVM reports since 2012 have also mentioned that the non-disciplinary inspections (horizontal inspections) of the Judicial Inspection contribute to identifying diverging practices in the administration of justice and structural shortcomings in the management of courts and the management of cases and provide recommendations for improvements.

In the Commission decision setting up the CVM in 2006, the lack of trust in applying and recognising judicial decisions taken in Romania in another Member State was identified as an important vulnerability for the judicial cooperation within the EU.<sup>45</sup> Today Romania participates actively in judicial cooperation in civil and criminal matters at EU level. Romania contributes proactively to the activities of European Judicial Network in civil and commercial matters. In criminal matters, Romania completed the transposition of the relevant EU instruments and is making use of them, e.g. in confiscation of criminal assets and the cooperation of Asset Recovery Offices or participation in joint investigation teams (JITs). Over the past ten years the number of both incoming and outgoing requests for mutual legal cooperation has tripled and has risen in complexity.<sup>46</sup> However, some obstacles to the judicial cooperation persist.<sup>47</sup> One concerns decisions in other Member States to execute European Arrest Warrants (EAW) or prisoner transfer decisions which would lead to the person being imprisoned in Romania. The CJEU ruled in spring 2016 that the execution of EAW must be deferred if there is a real risk of inhuman or degrading treatment because of the conditions of detention of the requested person in the issuing State.<sup>48</sup> The underlying reason is the prison conditions in Romania – an issue not itself within the scope of the CVM.

## **2.2. Judicial independence: recent developments**

Judicial independence is essential for the rule of law and the justice system to work, so that society can trust that the judiciary fulfils its task in an impartial and professional way. It is guaranteed not only through recognition in law but also through daily practice. Trust is endangered if there is interference in the judicial system, but also if court decisions are ignored. In addition, attacks on judicial institutions and on individual judges and prosecutors can have direct negative effects on the independence and the impartiality of the judiciary. Political interference in senior appointments is recognised as a key risk factor with regard to judicial independence.<sup>49</sup> The consolidation of the

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<sup>45</sup> Recital (7) stated that *If Romania should fail to address the benchmarks adequately, the Commission may apply safeguard measures based on articles 37 and 38 of the Act of Accession, including the suspension of Member States' obligation to recognise and execute, under the conditions laid down in Community law, Romanian judgments and judicial decisions, such as European arrest warrants.*

<sup>46</sup> Source [www.diicot.ro](http://www.diicot.ro); DIICOT, through its network of 15 territorial prosecutors' offices provides very actively in-depth expertise and training to the prosecutors and judges on the practical use of EU instruments on mutual legal assistance and mutual recognition of judicial decisions in criminal matters. Romania entered into strategic partnerships with judicial authorities in number of Member states ( and third countries).

<sup>47</sup> One example in civil matters concerns recognition and enforcement in Romania of judgements given in another Member State, in particular in family matters. In particular, Romania does not recognise guardianship judgments given in other Member States in respect of Romanian minors and requires a declaration of enforceability (exequatur) of such judgments in Romania. This issue arises, in particular, when guardians of Romanian minors request the issuing of passports for the minors concerned.

<sup>48</sup> Joined Cases Pál Aranyosi and Robert Căldăraru (C 404/15 and C 659/15 PPU), Judgment of 5 April 2016. The CJEU specified that the relevant judicial authorities should first come into dialogue with the aim to eliminate the risk of violation of fundamental rights of the particular requested person. Only, if the existence of that risk cannot be discounted within a reasonable period, the executing judicial authority must decide whether the surrender procedure should be brought to an end.

<sup>49</sup> The Venice Commission has drawn particular attention to the prosecution in this regard: *"It is important that the method of selection of the general prosecutor should be such as to gain the confidence of the public and*

independence of the justice system, and how institutions react to threats to independence, is therefore a key element to any assessment of the effectiveness of a judicial system.

#### *Checks and balances at work*

Throughout 2016, the judiciary (represented by the High Court of Cassation and Justice and the Superior Council of the Magistracy) and the Constitutional Court continued to support judicial independence as institutional actors contributing to the balance of power. Increasingly, this role has been shown through a public profile, notably through setting out the positions of the judicial institutions during parliamentary discussions on relevant legislation.

As set out above, the Constitutional Court (CCR) has a key role in the rule of law and in the consolidation of an independent justice system.<sup>50</sup> This trend has continued with a number of cases where the CCR has been called upon to assess decisions made in Parliament:

- In June, the CCR annulled a decision from the Senate to allow a partial renewal of the SCM members. The CCR ruled that the SCM mandate is of collegial nature and all members' mandates should end at the same time. The referral was brought by the Judges' Union.
- In July, the CCR annulled an amendment to the law on the Status of local elected officials adopted by Parliament in June which would have removed the termination of the mandate of local elected officials (including mayors and presidents of County Councils) sentenced for corruption if the execution of the sentence is suspended. The arguments of the CCR were that being sentenced by final court decision removes the presumption of innocence and therefore the conviction itself causes the loss of integrity which is fundamental for the legitimacy of the mandate. Excluding people for whom the execution of the sentence is suspended from the sanction of termination of the mandate would therefore create a privilege contrary to the constitutional principles of equality before the law. The referral was brought by the President of Romania.
- In October, the CCR annulled an amendment of the Statute of Deputies and Senators adopted in June in relation to provisions on conflicts of interest in hiring family members. The provisions had stated that prior to the adoption of the statute in 2013 there was no restriction on MPs hiring relatives. The amendments were adopted while a series of ANI cases on conflicts of interests of MPs for hiring relatives were making their way to court. (See section 3.X)

#### *Threats to the independence of the judiciary*

2016 saw an increase in criticism of magistrates and judicial institutions, in particular targeting the National Anti-Corruption Directorate (DNA). A pattern could be discerned where allegations were launched in public debate through social media, TV channels, or even official pages of State institutions<sup>51</sup>, which could then be multiplied through repetition by other media outlets. Many allegations were being voiced by high officials and public figures (e.g. former president of the state, president of the Senate, deputies, senators) and thus carrying more weight, which conflicts with norms of respect for judicial independence, and risks in terms of undermining public confidence in the judicial system as a whole.<sup>52</sup>

The allegations have included claims that the DNA acted abusively, following political orders and infringing the law. An example of personalised attacks came when the DNA Chief Prosecutor was accused of plagiarising her PhD thesis, in spite of the fact that a similar accusation had already been

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*the respect of the judiciary and the legal profession."* Report on European standards as regards the independence of the judicial system – Part II: The prosecution service, [CDL-AD\(2010\)040](#)

<sup>50</sup> COM(2015) 35 final, p4.

<sup>51</sup> One accusation appeared on the official website of the Senate in October 2016 accusing prosecutors to play electoral games by pursuing cases of politicians before the elections and encouraging all MPs to refuse any future request for lifting of immunity. <https://www.senat.ro/StiriSenatDetaliu.aspx?ID=DA135DD8-0EBC-47D6-9BC9-E351FA281581>

<sup>52</sup> Council of Europe Recommendation CM/Rec (2010)12 on judges: independence, efficiency and responsibilities, §18: *If commenting on the judges' decisions, the executive and legislative powers should avoid criticism that would undermine the independence of or public confidence in the judiciary.*

dismissed by a specialised education committee in 2012. This new accusation claiming that members of this committee were influenced in their decision was brought forward by a parliamentarian who was a defendant in several DNA cases. A new academic committee dismissed the accusation in December.

#### *The defence of judicial independence by the Superior Council of Magistracy*

One of the roles of the Superior Council of Magistracy (SCM) is to guarantee the independence of justice. When the SCM considers that the independence of justice may be affected, it notifies the Judicial Inspection on its own initiative. In 2016, the SCM took 20 decisions defending the independence of the justice system and 20 decisions defending the professional reputation, independence and impartiality of magistrates.<sup>53</sup> The large majority of the SCM decisions were reacting to statements against DNA prosecutors.

As mentioned in previous reports, few magistrates seek redress in court. Proceedings are long and uncertain – as an example, a case brought by the Chief Prosecutor of DNA against a TV station relating to allegations made in 2014, which was confirmed in a first instance decision in October 2015, is still pending on appeal. The January 2016 CVM report recommended that the new SCM should assess if more could be done to support individual magistrates facing criticism undermining judicial independence. There is little support from the SCM to back up a decision of the SCM on the substance with financial or legal help for magistrates in such situations (there are cases in other Member States where magistrates receive advice and financial support for launching an injunction or a criminal complaint)<sup>54</sup>, or to take on a case on its own behalf. The SCM has taken a first step, amending its protocol with the National Union of Romanian Bar Associations, giving the magistrates the possibility to benefit of free legal assistance when seeking redress in courts to defend their professional reputation. The agreement was signed in June 2016, though it is not clear whether magistrates have already made use of this possibility.

The SCM seeks to publicise its actions in this area through issuing press releases and has worked on increasing the impact of its decisions defending the independence of the judiciary by issuing more press releases immediately after the SCM plenum sessions, and by proactively notifying journalists directly before the plenum session and as soon as the press release has been published. However, as set out in past CVM reports, there is a difficulty in securing an equivalent level of coverage for the SCM press statements compared to the initial criticisms.<sup>55</sup>

Besides the SCM, it is notably rare that any State authority, politician, or media publically condemns such criticism of the justice system or individual magistrates on the grounds that it harms the independence of the justice system, even once established that the claim is untrue.<sup>56</sup>

#### *Appointments in leadership positions in the magistracy*

In line with international standards,<sup>57</sup> CVM reports have underlined the importance of transparent and merit-based selection procedures for the appointment of leading positions. In view of a number of important appointment procedures in 2016 (including the General Prosecutor, the DNA Chief Prosecutor and their deputies, as well as the President of the High Court of Cassation and Justice (HCCJ)) the Commission had recommended in its January 2016 report to "Ensure that clear and robust procedures are in place in time for the appointments to senior positions in the magistracy foreseen in

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<sup>53</sup> In total the SCM took 54 decisions among which 40 requests of defence were admitted. The average duration between admitting the notification and the decision was 31 days. In 2015, the SCM took 12 decisions defending the independence of justice and 7 decisions defending the professional reputation of magistrates.

<sup>54</sup> Example France recently renewed the procedure on defending the independence and reputation of magistrates and on the financial support provided by the Minister of Justice.

<sup>55</sup> COM(2015) 35 final, p 4.

<sup>56</sup> In 2016, the Minister of Justice publicly defended DNA Chief Prosecutor on one occasion and the President of Romania also expressed public concerns regarding the independence of justice.

<sup>57</sup> Council of Europe Recommendation CM/Rec(2010)12; Venice Commission report on European standards as regards the independence of the judicial system; Consultative Council of European Prosecutors, [Opinion No.9 \(2014\)](#) on European norms and principles concerning prosecutors.

2016. This would imply that several months before each procedure, the different steps and the criteria which will govern the decisions will be set out. Use a different approach for appointments below the top leadership of the prosecution services, with the newly-appointed Heads playing an important role in selecting their own team. Ensure transparency of all procedures" and further "Subsequently, a more robust and independent system of appointing top prosecutors should be settled in law, with the support of the Venice Commission". This year there were also elections for a new composition of the Superior Council of the Magistracy (SCM).

The current procedure established by law for appointing top prosecutors is as follows: the General Prosecutor of the High Court of Cassation and Justice, the Deputies, the Chief Prosecutor of DNA, the Deputies and the Heads of section in DNA, the Chief Prosecutor of DIICOT<sup>58</sup> and the Deputies are appointed by the President on the proposal of the Minister of Justice, with the approval of the Superior Council of Magistracy. All candidates need to have a minimum length of 10 years as judge or prosecutor. They are appointed for a period of three years, with the possibility to be reinvested once.<sup>59</sup>

The appointment process for the Prosecutor General started in February 2016, after the resignation of the previous Prosecutor General.<sup>60</sup> The Minister of Justice chose to follow an open procedure similar to that followed in 2015 for the appointment of the Chief Prosecutor of DIICOT.<sup>61</sup> In February, the Minister of Justice published the vacancy together with criteria to be fulfilled by the candidates. In March, The Minister of Justice chose a nomination from amongst four candidates, and communicated the motivation for the selection of the candidate, with integrity an important criteria. In the first phase of the procedure with selection of the candidate by the Minister of Justice, the candidates do not have to present a management plan and the dialogue with the Minister is not public. The SCM interviewed the candidate on the basis of the candidate's management plan and criteria established by the SCM for the appointment of prosecutors, the interview being broadcast, gave a positive opinion on the candidate, and the procedure was finalised through appointment by the President on 28 April 2016.

For the Chief Prosecutor of DNA, the Minister of Justice choose to follow the legal possibility for the incumbent to be reinvested, rather than an open procedure, on the basis of the quality of the work of the DNA Chief Prosecutor in her first mandate.<sup>62, 63</sup> On 25 February, the Minister of Justice publically announced that she would re-appoint Mrs Kovesi and made the proposal to the SCM on 9 March. The procedure in the SCM remains the same: public interview and presentation of management plan. The SCM endorsed the choice and the procedure was finalised in May 2016, with re-appointment by the President of Romania for a period of three years.

A similar procedure was applied for the appointment of the Deputy Chief Prosecutors in DNA. The incumbent deputies were re-appointed for a period of three years. Their re-appointment was put forward by the Minister of Justice, with the motivation that the good results of DNA were also a result of good teamwork of DNA management and that both candidates had proven the quality and professionalism of their work in their previous mandate. Consultation with the DNA Chief Prosecutor took place, in line with a CVM report recommendation.<sup>64</sup> A similar approach was taken for the appointment of the Deputy Chief Prosecutor in DIICOT.

The appointments of the Deputies of the Prosecutor General proved more complicated. Two deputies were suggested by the Prosecutor General in June, but the Minister of Justice first considered that the

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<sup>58</sup> Organised Crime and Terrorism Department

<sup>59</sup> art. 54. alin.1-2 din Legea nr. 303/2004

<sup>60</sup> Prosecutor General T. Nitu resigned on 2 February 2016, in connection with events which led DNA to start an investigation against him for complicity in abuse of service. He was subsequently indicted in the case.

<sup>61</sup> CVM report 2016

<sup>62</sup> As a Minister of justice, I take act of the DNA performance and to assume the function I have in applying the legal provisions by proposing to reinvest DNA Chief Prosecutor" <http://jurnalul.ro/stiri/justitie/raluca-pruna-propune-reinvestirea-laurei-codruta-kovesi-in-funtia-de-procuror-sef-708550.html>

<sup>63</sup> Such an assessment is consistent with many public statements from international observers, as well as with the appreciation of the DNA's track record in recent CVM reports and Council conclusions.

<sup>64</sup> COM(2016) 41, p.13

appointments should await the appointment of a new Minister in 2017 after the elections. This has the consequence that the two deputies were temporarily delegated in their functions.<sup>65</sup> In the second half of December, the appointment procedure was eventually started mid-December 2016. The Minister of Justice put forward the candidacies of the two deputies delegated by the Prosecutor General. They were interviewed by the SCM on 29 December 2016 and their appointment for a three year mandate was finalised on 30 December 2017.

These cases were not able to fulfil the recommendation for "clear and robust procedures .... several months before each procedure, [with] the different steps and the criteria which will govern the decisions ... set out". This approach would have set a clear precedent. However, it is also important to note that none of the appointed candidates raised issues of integrity and professionalism or controversies within the magistracy or civil society.

Successive CVM reports have highlighted some inherent weaknesses in the law on appointments of top prosecutors which can lead to doubts on the independence of the candidates.<sup>66</sup> Within Europe, there are different legal traditions with regard to the appointments of the leadership in the Prosecution. However, a 2010 Report from the Venice Commission on the independence of judges and prosecutors puts forward guiding principles which previous CVM reports have already highlighted:<sup>67</sup>

*34. It is important that the method of selection of the general prosecutor should be such as to gain the confidence of the public and the respect of the judiciary and the legal profession. **Therefore professional, non-political expertise should be involved in the selection process.** However, it is reasonable for a Government to wish to have some control over the appointment, because of the importance of the prosecution of crime in the orderly and efficient functioning of the state, and to be unwilling to give some other body, however distinguished, carte blanche in the selection process. It is suggested, therefore, that **consideration might be given to the creation of a commission of appointment comprised of persons who would be respected by the public and trusted by the Government.***

*37. It is important that the Prosecutor General should not be eligible for re-appointment, at least not by either the legislature or the executive. There is a potential risk that a prosecutor who is seeking re-appointment by a political body will behave in such a manner as to obtain the favour of that body or at least to be perceived as doing so. **A Prosecutor General should be appointed permanently or for a relatively long period without the possibility of renewal at the end of that period.** The period of office should not coincide with Parliament's term in office. That would ensure the greater stability of the prosecutor and make him or her independent of current political change.*

To encourage a long-term solution, the Commission recommended that the Minister of Justice and the SCM launch a debate on the issue in order to achieve a more robust and independent system of appointing top prosecutors being settled in law, with the support of the Venice Commission. The 2016 CVM report mentioned that the SCM has proposed to align the legal framework for nominating top prosecutors on the law governing the appointment of the President of the HCCJ,<sup>68</sup> as part of a broader package amending the laws on justice. (See also below)

In 2016, the Ministry of Justice created an advisory group for cooperation and consultation on the draft project of amending the laws on justice,<sup>69</sup> composed of representatives of magistrates from the

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<sup>65</sup> A similar situation occurred in 2015, when non-appointment of DNA section heads led to successive delegations (CVM report 2015 and 2016).

<sup>66</sup> A similar analysis was made in the 4th evaluation of the Group of states Against Corruption (GRECO) [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/Eval%20IV/GrecoEval4%282015%294\\_Romania\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/Eval%20IV/GrecoEval4%282015%294_Romania_EN.pdf)

<sup>67</sup> Bold from Venice Commission report. Report on European standards as regards the independence of the judicial system – Part II: The prosecution service, [CDL-AD\(2010\)040](#)

<sup>68</sup> As such this would remove the role of the Minister of Justice in choosing the candidate, except insofar as the Minister is a member of the SCM.

<sup>69</sup> Law no. 303/2004 on the statute of judges and prosecutors, Law no. 304/2004 regarding the Judiciary and Law no. 317/2004 on the Superior Council of Magistracy



HCCJ, the SCM, the Prosecution, and the National Institute of Magistracy, as well as from magistrates' associations. Consultations were launched for Courts of Appeal and to the Prosecutors' Offices attached to the Courts of Appeal, as well as meetings at different locations. This was followed by a public consultation. However, the intention of the Minister of Justice to present a consolidated package on the laws of justice to the Government before the elections could not be realised, so the work will need to be continued under the new government and the new SCM. The Venice Commission has not yet been consulted on the draft law.

In September 2016, a new *President of the HCCJ* was appointed (for a mandate of three years). The appointment procedure involving a selection process by the SCM and the appointment by the President of Romania was open and transparent. The process mirrored previous examples and appears well accepted, although there was only one candidate for the post – an existing Vice-President of the HCCJ. A similar process was applied for the appointment of the two Vice-Presidents.

The elections for the members of the *Superior Council of the Magistracy*, including appointing representatives of civil society, took place this year, following the end of the six year term of the Council.<sup>70</sup> The process started with a disagreement: In March 2016, the Romanian Senate had decided that the mandates of the SCM members were individual, so that each shall carry out a full term of six years when filling in a vacant position. Since over half of the members had taken over during the course of the SCM's mandate, this would have meant a minority being renewed. Following a referral to the Constitutional Court by one of the judges associations, the CCR annulled Senate's decision, ruling that the SCM mandate is of collegial nature and all mandates should end at the same time. The election process therefore included all posts.

In the organisation of the 2016 elections, shortcomings identified during past elections have been taken into account. The electoral procedure was organised according to a pre-established and public calendar published online and accessible on a dedicated website. The electoral campaign was mainly addressed to the magistrates entitled to vote and the candidates were able to present their programmes within the respective courts. The programme of the candidates was publically accessible on the same 2016 SCM elections website. The procedure started in June and elections were planned for the 27 October and, in case of a second convocation, on the 2nd November 2016. The lists were validated by an SCM plenary decision on the 6th October. On the 22nd November 2016, the SCM Plenum confirmed the legality of the election procedure and validated the list of elected members. After verifications with the National Council in charge of studying the archives of the Securitatie, the list was transmitted to the Senate, which validated the new Council end of December. The Senate has not yet appointed the two representatives of civil society. The new SCM will start working in January 2017.

There were a few initial controversies with some candidates during the summer but the elected candidates did not appear to raise controversies within civil society.

In order to improve and modernise the management of magistrates' careers, the Minister of Justice, on the basis of a SCM proposal, had also proposed further amendments to the package of laws on justice such as increasing the seniority required to be considered for promotion to a higher court. The draft proposal from the Minister of Justice also proposed to change the appointment procedures for the Judicial Inspection, with a shorter mandate and with a greater role for the SCM in the appointment of inspectors. It was not clear how such changes would affect the independence of the Inspection, underlined in previous CVM reports.

### **2.3. The new Codes**

Legal systems periodically need to update the Codes that are the basis of the judicial process in civil and criminal law. The demands of social change, developments in the interpretation of fundamental rights, economic change and European law can all call for a modernisation and simplification of legal Codes. This can help to improve the quality of justice, as well as the efficiency of the judicial process in rendering predictable and timely decisions. Such reforms could be expected to be needed relatively

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<sup>70</sup> The first SCM has been elected according to the law 317/2004 and set up in January 2005. Since then, the SCM was renewed twice.

rarely, so would normally be based on a strong consensus and be well prepared. They are a sensitive and complex undertaking, and as such are a challenge for government, legislators, the legal system and legal practitioners.

*Criminal codes: stability of the legal framework*

The new Criminal Code and Code of Criminal Procedures entered into force two years ago, on 1 February 2014. Overall this major reform is seen as a success by the judiciary, as well as by civil society. In the 2015 CVM report, the Commission recommended to "Finalise the necessary adjustments to the criminal codes as soon as possible, in consultation with the SCM, the HCCJ and the Prosecution. The goal should then be to secure a stable framework which does not need successive amendments." The 2016 CVM report called for the current phase in the reform of Romania's legal codes to be brought to a conclusion in Parliament, passing amendments to provide legal certainty which respect the opinion of the judicial institutions, as presented by the government. However, the question of the stability of the Codes remains.

Some amendment of such Codes is inevitable. In consultation with the judiciary, as early as spring 2014 the Government proposed amendments to address identified problems or to respond to Constitutional Court decisions. However, these amendments were not given priority attention in Parliament and were still pending at the time of the 2016 CVM report.

In early 2016, the government worked with Parliament to advance the discussions on the amendments to the Codes, but by the end of April, only two sets of amendments tabled as emergency ordinances in 2014, and complemented with amendments from Constitutional Court decisions of 2014 and 2015, had been adopted by the Parliament.<sup>71</sup>

In order to bring coherence to the situation, the government adopted a new emergency ordinance in May 2016. This brought together amendments to implement the CCR rulings (including on the opportunity principle), to transpose EU Directives in the field of criminal law (such as the right to information in criminal proceedings), and included all amendments from the Government pending in Parliament since 2014. The result was to provide legal stability, even though the emergency ordinance still needs to be approved by Parliament.

At the same time, referrals to the Constitutional Court concerning the provisions of the Criminal Codes continued (the Constitutional Court took more than 30 decisions since 2014 annulling provisions of the criminal Codes). In the course of 2016, the CCR took 12 decisions concerning the provisions of the new Criminal Code and Code of Criminal Procedures. A majority of these decisions aimed at reinforcing respect for fair trials and rights of the parties in line with ECtHR case-law. The Government sought to apply the CCR rulings through new emergency ordinances. Important examples included the CCR ruling to maintain the validity of the crime of *abuse of office*, in line with the UN anti-corruption convention.<sup>72</sup> Some exceptions of unconstitutionality had a major impact on the work of the judiciary. In February 2016, the CCR invalidated the principle of opportunity used by prosecutors to drop charges in the public interest (more than 130,000 cases had been resolved in this way in 2015).<sup>73</sup> Another key decision taken the same month concerned restricting the possibility to carry out technical surveillance measures in criminal investigations by authorities outside the prosecution or police services.<sup>74</sup> Prior to the CCR decision such surveillance measures based on a prosecutor's order and approved by a court were technically carried out by the intelligence services. Since the CCR decision would be immediately applicable, the latter risked creating a legal vacuum in terms of gathering evidence and prompted the Government to address the issue urgently by creating a new prosecution capacity through an emergency ordinance in March 2016.<sup>75</sup> As an emergency

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<sup>71</sup> GEO 3/2014 was adopted on 16 March 2016; GEO 82/2014 was adopted on 6 April 2016.

<sup>72</sup> CCR decision 405/2016

<sup>73</sup> CCR decision 23/2016

<sup>74</sup> CCR decision 51/2016

<sup>75</sup> GEO 6/2016



ordinance, the new provisions entered into effect immediately, however the law needs to be adopted in Parliament.

Further CCR decisions, notably concerning the competence of the HCCJ to judge extraordinary appeals, have required new amendments and a new emergency ordinance in October.<sup>76</sup> Whilst by the end of 2016, there had been some progress through the parliamentary process, with two ordinances having passed one of the chambers, the overall process remains slow. At the end of the legislatures, all ordinances was still pending in Parliament.

The 2016 CVM report also referred to the fact that a number of additional amendments to the Criminal code and Code for Criminal Procedures had been put forward by MPs, including some which triggered public debate and negative reactions from the judicial authorities, on the grounds that they would harm the fight against corruption and reduce the capacity of the prosecution and judges to investigate or sentence corruption crimes. Some of these amendments were put forward by MPs themselves under investigation or convicted for corruption. By the end of 2016, none of these amendments has been adopted, though some remain on the table of Parliament.

The Minister of Justice modified the law allowing a reduction of sentence for intellectual work undertaken in prison. A number of high-profile figures convicted for corruption have benefited from this law, amid accusations of plagiarism and ghost-writing of the works they produced.

#### *Respect of fair trial rights*

Respect of fair trial rights in line with ECHR case law is an essential element of the criminal codes and of criminal judicial proceedings. Trust in the respect of fair trial rights in another country are the basis for judicial cooperation in criminal matters. As mentioned in the 2016 CVM report, respect of fair trial rights in criminal proceedings has been an important issue of public debate, in particular in cases relating to the activity of the prosecution and the courts in corruption cases.

Respect of fair trial rights has also been an important theme in the rulings of the CCR and the HCCJ and in the statements of the SCM, the DNA and the judiciary in general. It is an important theme of the new Codes – introducing the "rights and liberty" judge who will examine and control the demands of the prosecution, in terms of search and arrests. Since the introduction of the new criminal codes, the CCR has ruled on several "open" issues or has annulled provisions, in view of re-enforcing respect for fair trials in line with ECHR case law: notably electronic surveillance measures to be enforced solely by law enforcement bodies, and safeguards when applying the opportunity principle. In all these cases, the judiciary has been quick to adapt and the Minister of Justice has reacted swiftly with legislative amendments.

The Commission CVM team visited the European Court of human Rights (ECtHR) and the Council of Europe Department for the Execution of judgements in June 2016, and was informed that so far applications to the ECtHR alleging a violation of fair trial rights by the prosecution services (in corruption cases) have not been admitted, that there was an improvement of the quality of the judgements of the Romanian High Court and the judicial system overall and that the Grand chamber ruled inadmissible a claim that the Romanian judicial system was dysfunctional. Regarding the type of cases, the CVM team was informed that the type of cases brought to the court has shifted. There are less new cases on the excessive length of civil proceedings or on ineffective criminal investigations, while the number of cases in relation with prison conditions has steadily increased.

The issue of respect of fair trial rights is often used as an argument in public debates to criticise the judiciary and advocate for changes in the (corruption) laws. For example, in autumn, an ECHR case against Romania regarding proceedings in a corruption case was cited in public debate as an example of abuse by the HCCJ. However, the case referred to an old procedural issue in the law,<sup>77</sup> for which Romania had already been condemned in other cases several years ago and for which a legal solution

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<sup>76</sup> CCR decision 540/2016; GEO 70/2016

<sup>77</sup> In the second phase of appeal, the law only provided for looking at evidence on paper.

has already been provided while HCCJ had adapted its practice even before the adoption of the new law.

#### *Civil codes: implementing the final provisions*

The new Civil Code entered into force on 1 October 2011. The new Code of Civil Procedure entered into force on 15 February 2013, with some provisions to become applicable on 1 of January 2016.<sup>78</sup> The transition towards the application of new Code of Civil Procedure is now coming to an end with the large majority of cases in courts now falling under the new code, but there is one major exception. The provisions which were to have entered into application in January 2016 were postponed to January 2017. These provisions refer to solving cases in council chamber, preparing files in appeal phase by the court that pronounced the ruling that is appealed, and changing the value ceiling for jurisdiction of cases. They therefore imply a logistical investment not only in terms of personnel but also in terms of buildings. Clarity on the extent of changes required and how to effect these changes has been elusive, so in January 2016 the Commission recommended that the government and the SCM should set up a clear plan to ensure that the deadline for the implementation of the remaining provisions of the Code of Civil Procedures could be respected.

This required an agreement between the SCM and the Government on the needs of the courts in terms of council rooms, though the HCCJ also recommended that the opportunity of the delay should also be used to conclude ongoing legal discussion on some of the remaining provisions. The realisation that the situation would not be resolved in time for the January 2017 deadline led to a decision in December 2016 to postpone the application of the remaining provisions of the Code for Civil Procedures for another two years, until 1 January 2019. However, work is also now under way on a needs assessment, to be concluded by 30 June 2017, so that works can be started immediately and concluded by the end of 2018.

## **2.4. Consistency of jurisprudence and predictability of the judicial process**

The consistency of jurisprudence has been used as a term to describe the need for consistent judicial decisions on similar cases taken by different courts and judges. This is important for the quality and predictability of the judicial process and the accountability of the judicial system towards the society it serves.<sup>79</sup> Inconsistency in judicial decisions also adversely affects public perceptions of the judicial system.<sup>80</sup> If the same judicial system, using the same legal instruments, results in very different decisions in similar cases, this causes uncertainty, and can even fuel suspicions of corruption.

Different factors contribute to the consistency of court decisions: legal mechanisms to resolve in consistencies, the organisation of the system in terms of management and procedures; the availability and transparency of court decisions; and the awareness and training of judges and prosecutors on the need for consistency. Broader issues of the quality of public administration and quality of legislation also play a role. In line with its constitutional role, the High Court of Cassation and Justice (HCCJ) has the main responsibility in the consistency of jurisprudence and interpretation of the laws. An increasing part of the HCCJ's work is dedicated to enforcing consistent interpretation and practice. The HCCJ fulfils this role through defined legal mechanisms and meetings with lower level courts.

#### *Legal consistency mechanisms*

As stated above, the HCCJ has two legal mechanisms at its disposal for consistency of jurisprudence and providing a consistent interpretation: the preliminary ruling and the appeal in the interest of the law. The "preliminary ruling procedure" allows for a court ruling in final instance to address questions to the High Court and request an interpretative ruling that is binding both for the court in question and

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<sup>78</sup> Articles XII, XIII, XVIII, XIX, of Law no.2 of 1st of February 2013.

<sup>79</sup> ECtHR has found that under certain conditions divergences in case-law lead to violation of Art.6 ECHR, §211-215 [http://www.echr.coe.int/Documents/Guide\\_Art\\_6\\_ENG.pdf](http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf)

<sup>80</sup> Practical guide to Art. 6 ECHR, civil limb, § 214, [http://www.echr.coe.int/Documents/Guide\\_Art\\_6\\_ENG.pdf](http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf)

for future cases. Appeals in the interest of the law can be used to resolve the interpretation of the law when facing inconsistent judgements.

The number of requests for preliminary rulings is steady. In criminal cases, there were 25 preliminary questions lodged and 24 settled in 2016, compared with 35 questions lodged and 33 settled in 2015. In civil matters, including administrative and tax matters, there were 82 questions lodged and 56 settled in 2016, compared with 51 questions lodged and 47 settled in 2014. This shows that the mechanisms are well established and used by judges in lower courts.<sup>81</sup>

The other unification mechanism, appeals in the interest of the law, continues to provide a substantial contribution to unification. In 2016, 20 appeals were lodged and 15 were settled in civil matters; 8 appeals were lodged and 6 were settled in criminal matters.

#### *Management action for consistency*

Regular meetings within court sections, with the Courts of Appeal, or between Courts of appeals, the NIM and the HCCJ take place regularly to discuss issues of diverging interpretations and practice. The January 2016 report also noted signs of a cultural shift in favour of consistency.<sup>82</sup> The consistency of court decisions and judicial practice is also part of the training of judges and prosecutors. In the prosecution, a special service for guidance and analysis also issues guidelines for unifying practice at prosecutorial level. The SCM has set up an online wiki for unifying jurisprudence, where courts can upload the results of its internal discussions, and a forum where judges throughout the country can discuss cases of non-unitary practice. A common interpretation can also emerge from these discussions. Through its thematic inspections in courts and prosecutors office, the Judicial Inspection also contributes to unification by making relevant recommendations when there are diverging practices or procedures.

#### *Publication of jurisprudence*

The availability of online open and searchable access to all court decisions remains one of the important means for magistrates and all parties to refer to similar cases and decisions. The HCCJ continues to publish its decisions on its website. It publishes summaries of key decisions as well as the full texts of all decisions.<sup>83</sup> The RoLII project (Romanian Institute for legal information) to publish all court decisions online became operational last year – in the first nine months of 2016, the system was accessed over 115,000 times, by 39,000 users. While some judges reported that they use RoLII regularly and successfully, in other cases there seemed to be a need for the tool to be further promoted, including to legal professions and the public administration.

#### *Obstacles to the consistency of jurisprudence*

Previous CVM reports have identified a number of obstacles to the consistency of jurisprudence. Some of these are broader issues, such as of the quality of legislation, such as the risks inherent in widespread recourse to instruments such as executive ordinances.<sup>84,85</sup> A planned reform of public administration,<sup>86</sup> with the support of EU funds, could help to promote a consistent approach by public administration towards the judicial system.

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<sup>81</sup> In meetings with Commission services, judges in Bucharest and Brasov confirmed the value of the procedures, rather calling for an expansion of their scope.

<sup>82</sup> The value of these meetings, and the cultural change, was recognised in meetings with judges in Bucharest and Brasov

<sup>83</sup> The database from the web-site of the High Court of Cassation and Justice currently includes 13.854 resumed relevant decisions and 348.085 integral text of the decisions (anonymised), including the decisions concerning preliminary ruling requests.

<sup>84</sup> COM (2015) 35 final, SWD(2015) 8 final, p14.

<sup>85</sup> For 2015, the Ombudsman reports raising 7 exceptions of unconstitutionality including 2 concerning Government Executive ordinances and filing 3 requests for appeals in the interest of the law.

<sup>86</sup> [http://www.mdrt.ro/userfiles/strategie\\_adm\\_publica.pdf](http://www.mdrt.ro/userfiles/strategie_adm_publica.pdf)

Whilst every case has its own specificities, the motivation of the decision can be used to explain cases where there is an apparent divergence from precedents or jurisprudence from higher courts.<sup>87</sup> This points to the importance of training in drafting motivations, as well as the need for sufficient time – judges, particularly in lower level courts, have commented to the Commission that they do not have sufficient time to write their decisions to good standards within the legal deadlines. This issue of efficiency is further developed below. In addition, judicial decisions are pronounced while motivation of the decisions follows one month later (when it is not delayed). This time discrepancy between decision and motivation can also impact negatively on the coherence and the quality of decisions, and can fuel speculation about the reasons for the decision and distrust or criticism of the judicial institutions.<sup>88</sup> The SCM reported that a pilot project to align judicial decisions and motivations is ongoing. The importance of the uniform application of the law and the uniform implementation of court decisions by the public administration has also been noted as a factor for consistency of court decisions.

## **2.5. Structural reforms**

Structural reforms to the administration of justice have been shown to have a direct impact on the effectiveness of justice. Issues like the efficiency of the system, its independence, its affordability, and the ease of access are all important factors in an effective justice system. This is true for citizens, but also for businesses, and justice is a key element in a successful business climate.

### *The Strategic framework*

An action plan for the Strategy for the Development of the Judiciary 2015-2020, with detailed planning of actions and responsible institutions and including a detailed budget and sources of funding, was adopted by the Government in April 2016. The financial envelope for the action plan is some EUR 509 million for four years (2016-2020). It will be funded through the national budget (54%), EU funds and the World Bank. The full implementation of the action plan will be essential for a sustainable improvement of the administration of justice and of the trust in the judiciary.

In 2016, important measures under the action plan were implemented. In September, the Strategic Management Council was established. The members are the Minister of Justice, the President of the SCM, the President of the HCCJ, and the Prosecutor General. The Council is responsible for setting up the general priorities of the judicial system, including the development and allocation of human and material resources, and will follow the implementation of the measures of the action plan. The expectation is that the Strategic Management Council will help address issues for which several institutions share part of the responsibility: budget, personnel, court clerks, buildings, and IT systems. Also worth mentioning are the actions taken by the SCM to strengthen integrity within the judiciary.

### *Resources*

The Minister of Justice has continued to support the reform of the justice system through securing budget for the justice system and providing additional posts, in total 630 additional positions: 342 positions of judges, and 168 positions of clerk for courts; 40 positions for DNA, 40 positions for DIICOT and 40 for the Public Ministry, in order to be able to develop in house capacity for electronic surveillance measures. The total Ministry of Justice budget for 2016 was of the order of EUR 693 million.

### *Management tools, efficiency and quality of the judicial process*

The SCM has continued the development of tools for monitoring and managing the activities of the courts and for managing various administrative and human resource activities. The *STATIS* system, monitoring the activity of the courts in handling cases, has been further extended and refined. The SCM publishes every six months the results of aggregated performance indicators, highlighting the

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<sup>87</sup> Divergence of case law among last instance courts or where a supreme court departs from its own case law can lead to a violation of Art 6 §1 ECtHR Guide on Art. 6, § 193

<sup>88</sup> Cases have happened of decisions in corruption cases not being understood as they appeared very severe; and as a result the judges have been severely criticised in the media.

strong points and weaker points, and the measures to remedy those. An analysis of the best performing courts is also made to highlight good examples and best practices. Cumulative analysis over several years will also provide an important policy tool for human resource management and justice administration policies in general.

The e-filing in courts and prosecution offices has also been worked on. In particular, a mechanism was created to deliver the indictments and the credit for guilty pleas from the prosecution office to the law courts through the electronic case management system (ECRIS). The SCM, the NIM and the National School of Clerks are working on standardised electronic models of decisions both in civil and criminal matters. *Balancing the workload*

The problem of workload imbalances is a long-standing CVM issue. There is joint working group looking at practical solutions such as changing territorial jurisdiction. For example, this year the SCM proposed to alter the geographical area covered by some courts. The issue of small prosecutor's offices is also a major concern for the Prosecutor General.

One problem which has an impact on the workload of courts is the issue of repetitive cases, mostly cases raised by citizens against the public administration, which seem to create an unnecessary burden. This has been raised in previous CVM reports and in the context of consistency of jurisprudence and implementation of court decisions, but it also has consequences in terms of efficiency. Identifying equivalent cases and relevant legal decisions can also be a support role for clerks with legal training; however, the draft law that would modernise the status of clerks and create a new category of clerks – judicial clerks who could take over administrative tasks from judges – remains before Parliament. The Minister of Justice has proposed to relaunch this debate. In parallel, the SCM has also finalised a project on the work of clerks in tandem with The Netherlands which has resulted in a series of recommendations, which the SCM is intending to apply in the Romanian courts.<sup>89</sup>

#### *Enforcement of court decisions by public administration*

*"The right to prompt implementation of a final and binding judicial decision is an integral part of the "right to a court" provided by Article 6.1 of the European Convention of Human Rights. Otherwise, the provisions of Article 6 § 1 would be deprived of all useful effect. This is of even greater importance in the context of administrative proceedings. The effective protection of the litigant and the restoration of legality therefore presuppose an obligation on the administrative authorities' part to comply with the judgment."*<sup>90</sup> *"The refusal of an authority to take account of a ruling given by a higher court – leading potentially to a series of judgments in the context of the same set of proceedings, repeatedly setting aside the decisions given – is also contrary to Article 6 § 1."*<sup>91</sup>

Problems of enforcement of court decisions by public administration or State institutions have been repeatedly flagged in CVM reports and recommendations, though statistics on effective enforcement are not available. The reports<sup>92</sup> have mentioned different issues:

- Reluctance of Parliament or other public authorities to enforce the legal sanction following final and irrevocable decisions in ANI cases.

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<sup>89</sup> The activities within the Project revealed serious systemic problems, namely an acute lack of human resources and excessive regulation, which leads to bureaucracy. Solutions suggested: to provide an optimal number of judges and clerks in order to allow a better judicial act, by keeping the number of judges and increasing the number of clerks, necessity to change primary and secondary legislation for an optimal management of the human resource, need of a more flexible legislation but also the entry into force of certain legal amendments which would allow the transfer of duties from judges to clerks and decentralisation for some of the managing authority regarding the human resource, goals achievable only if the SCM and the Ministry of Justice take the responsibility, according to their legal powers.

<sup>90</sup> Guide on Article 6 of the Convention – Right to a fair trial (civil limb)

<sup>91</sup> Ibid footnote 90

<sup>92</sup> CVM reports 2012, 2013, 2014, 2015, 2016.

- Delay in execution or no execution at all of final court decisions against the State, such as reimbursement of taxes, pension rights or stopping works when a court has ruled that a building permit is illegal.<sup>93</sup>
- Reluctance of public authorities to apply the result of a final court decision in one case to similar cases (including reluctance to apply the binding interpretations of the High Court of Cassation and Justice). As a result, courts have to deal with repetitive cases.<sup>94</sup>
- Difficulties or reluctance of the Agency for Fiscal Administration (ANAF) to enforce confiscation decisions in criminal cases. Estimates from the Ministry of Justice and the prosecution of effective recovery by the State have put the proportion as low as 5 to 10 % of the amounts confiscated in the final court decisions.

There are some signs of progress on the first and last points, through for example intensified cooperation between the National Integrity Agency and other public authorities, or through the new Asset Recovery Agency. On the other two little progress was reported in discussions with the Ministry of Justice.<sup>95</sup>

#### *Relationship with the Bar*

Discussions between Commission services and the National Bar of Romania and the Bar of Bucharest report an improvement in the institutional relations with the SCM, the courts and the Ministry of Justice, but also note that the day to day relations in court can remain difficult. Overall there does not seem to be a strong mutual desire to improve the relationship. A proposed amendment to the Law on the organisation of the legal profession has also increased tensions: this proposed to give immunity to lawyers, which the government considered would go beyond ECHR case-law and could serve as an obstacle to the prosecution of corruption. The draft law was approved by the Parliament in October, but was challenged before the Constitutional Court by the government and the President.

#### *Integrity within the judiciary*

Integrity within the judiciary is a particularly important test of the management of the magistracy, with consequences for the reputation of justice in general.

In 2016, DNA indicted 7 judges, and 8 prosecutors.<sup>96</sup> The Courts ruled final conviction decisions against 9 judges. DNA confirmed the trend of last year that there had now been a decrease in the number of complaints and new cases of corruption in the judiciary. The SCM approved preventive measures regarding magistrates, such as pre-trial detention, search and custody –the numbers show a slight decrease on 2015 – and suspended 14 judges and 16 prosecutors from duty.

In this respect, studies point to the importance that the judicial hierarchy is attentive to any risk of integrity for judges and prosecutors, and that magistrates receive proper guidance with regard to the rules on conflict of interest or incompatibilities. Ideally, such measures might also extend to judicial assistants and clerks. The fourth evaluation of GRECO also includes recommendations on proper guidance for judges and prosecutors and increased responsiveness from the SCM, the Judicial Inspection and judicial management in general to the risks of integrity within the judicial system.<sup>97</sup> A project completed last year recommended to appoint ethics counsellors in courts for practical advice to magistrates.<sup>98</sup> In May 2016, SCM established ethics counsellors for Courts of appeal and Tribunals

<sup>93</sup> This problem has been recognised as a structural problem in Romania by the European Court of Human Rights and there is a specific monitoring and follow-up by the Council of Ministers of the Council of Europe.

<sup>94</sup> Examples: environmental tax annulled by the ECJ. All citizens had to go individually to court to be reimbursed until the case was eventually solved by a government decision. Interpretations provided by the HCCJ on pension calculations following amendments of the law are not applied in other cases by the pension administration.

<sup>95</sup> See footnote 40

<sup>96</sup> 2 of them Chief Prosecutors and 1 General Prosecutor of a Court of Appeal

<sup>97</sup> Ibid footnote 66

<sup>98</sup> CVM report 2016.

and for the prosecution offices, including the National Anti-Corruption Directorate and Department for Investigation of Organised Crime and terrorism, later extended to the SCM itself, the National Institute of Magistracy, the National School of Clerks and the Judicial Inspection. These are also objectives of the national Anti-corruption Strategy for the judiciary. However, the decision sparked resistance within the judiciary as the ethics counsellor was perceived as a controller rather than an advisor. One of the judges' unions challenged the decision in court. The decision is now suspended until final settlement.

Every year, as part of their assets, incompatibilities or interests declarations, judges also have to declare that they do not have any activity for the Romanian Intelligence Services (SRI). These declarations are verified by the CSAT (Superior Council for Country Defence), ex-officio or upon a notification introduced by the CSM. In May 2015, following a request from the Romanian National Union of Judges (UNJR), CSM formally seized the CSAT to verify the declarations as allegations were aired as regards the existence of undercover SRI agents within the magistracy. The verifications recently finalised by the CSAT in January 2016 sparked controversy with respect to the procedure followed, the UNJR requesting a follow-up.

#### *Disciplinary action*

The SCM is responsible for sanctioning professional misconduct and disciplinary offences of magistrates, notably bad behaviour, incompetence and serious negligence. The investigation of such cases rests with the Judicial Inspection. Overall there have been fewer disciplinary actions and sanctions in 2016, compared to 2015. In 2016, from 6304 referrals on disciplinary offences registered, the Judicial Inspection took forward 52 disciplinary actions. The reports of the Judicial Inspection are forwarded to the respective SCM sections, who issued 28 decisions concerning judges (accepting 20 cases and rejecting 8) and 10 decisions regarding prosecutors (with 5 acceptances, 3 partially admitted and 2 rejections). The SCM applied 20 sanctions to judges and 8 to prosecutors. The sanctions applied are similar to last year (warning, decrease of monthly salary, suspension from office, exclusion from magistracy).

### **3. INTEGRITY FRAMEWORK AND THE NATIONAL INTEGRITY AGENCY**

*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.*

Romania now has a comprehensive framework for integrity for public officials, and an independent institution to help the application of these rules and to apply sanctions (which can be challenged in court). The integrity framework defines both situations of incompatibility with holding official positions, and situations of administrative conflict of interest. An important aspect of this work is seeking to ensure that conflicts of interest can be avoided in the first place, so it also contributes to corruption prevention.

Since the last CVM report, the National Integrity Agency (ANI) continued to deal with a high number of cases. It initiated a substantial number of new cases, which as in previous years illustrated continued integrity concerns in particular with respect to local politicians.<sup>99</sup> The legal framework on incompatibilities and the implementation of ANI reports, even when confirmed by court decisions, continued to be questioned. Ahead of local and general elections in 2016, ANI developed stronger prevention activities to promote respect of the integrity requirements for all candidates.

In the 2016 CVM report, the recommendations on integrity covered pursuing efforts towards consistency of jurisprudence of integrity decisions; ensuring that court decisions requiring the suspension from office of parliamentarians are automatically applied by Parliament; implementing the

<sup>99</sup> In 2016, 75% of 263 incompatibility cases, 82% of 123 administrative conflicts of interest cases and 59% of 51 criminal conflicts of interests cases concern mayors, deputy mayors, local councillors or county councillors.

ex-ante check of conflict of interests in public procurement through the Prevent programme; taking steps to ensure the respect of the rules on integrity in the organisation of elections; and more generally put an emphasis on upstream prevention of incompatibility and conflict of interest and on improving public acceptance and effective implementation of incompatibility rules.

### **3.1. Overview of developments under the CVM**

The law establishing the National Integrity Agency (ANI) was adopted in 2007, and strengthened by a Government Emergency Ordinance the same year. ANI was established as an independent administrative authority competent for verifying assets, incompatibilities and conflicts of interests of public and elected officials. However, in spring 2010 central elements of ANI's legal framework were declared unconstitutional by the Constitutional Court and in the absence of a legal framework, ANI ceased working for several months. New legislation was adopted, and law 176/2010 came into force in September 2010. Law 176/2010 now underpins ANI's activities.<sup>100</sup> It was also in 2010 that the Wealth Investigation Commissions were established to serve as a pre-judicial filter in unjustified wealth cases over EUR 10,000.

The adoption in 2010 of the ANI law 176/2010 was accompanied by difficult discussions in Parliament, covering issues beyond amendments required to comply with the Constitutional Court decision. This was symptomatic of a general questioning of ANI's legitimacy, through periodic proposals in Parliament to re-open the ANI law. These challenges became less frequent after 2013. However, the integrity legal framework itself, the set of laws defining the situations of conflicts of interests and incompatibilities for civil servants and elected or appointed officials, has continued to be challenged, resulting in some changes to remove activities from the scope of incompatibilities or conflicts of interest.<sup>101</sup>

In 2014, the Constitutional Court was called upon to rule on the question as to whether the general three-year election ban under the ANI law – which applies after someone is found incompatible, in conflict of interest or with undeclared assets – applied to all elected functions, and not just the function held when the transgression took place. The Constitutional Court upheld this position. However, this issue has been raised again in Parliament, though amendments to restrict the general election ban to the same function have not been adopted.<sup>102</sup>

The National Integrity Council (NIC) provides political oversight for ANI, guaranteeing its independence and monitoring its performance. Its members are appointed by the Senate from political parties, representatives of local government and civil society, representing key institutions and sectors covered by ANI's activities. Until the end of 2011, the relationship between the NIC and ANI was difficult and the Commission expressed concerns about whether the NIC was effectively exercising its role.<sup>103</sup> However, in recent years, CVM reports have noted the active role of the NIC in supporting ANI's ability to perform its tasks effectively. This has included arguing the case to maintain ANI's legal framework and calling for sufficient resources for ANI, including in Parliament, as well as taking a public stand when public institutions did not implement the sanctions required under the law (notably when ANI reports have been confirmed in court) and when ANI's leadership has been subject

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<sup>100</sup> CVM report July 2012

<sup>101</sup> CVM reports 2014, 2015, 2016, 2017. Recent examples: in 2015 a law was adopted allowing mayors and county representatives to participate in the board of Interregional Associations of public interest. In 2016, the Parliament adopted a new amendment to law 161/2003, eliminating incompatibilities for mayors or local elected officials to sit in boards of commercial companies that provide utility services. The law has now been challenged to the constitutional Court.

<sup>102</sup> 3 Proposals to amend ANI Law no. 176/2010 regarding integrity in exercising the public offices and dignities and 3 Proposals to amend Law nr. 161/2003 on certain measures to ensure transparency in the exercise of public dignities, of public offices and in the business environment, and prevent and sanction corruption. Some have progressed as far as being on the agenda of the plenum of the decisional chamber, but these proposals have not been adopted. As they are not rejected either, they will be pending for the new Parliament.

<sup>103</sup> CVM report July 2012



to political and media attack.<sup>104</sup> The NIC also successfully organised competitions for appointments of the ANI leadership.<sup>105</sup>

The track record of ANI in investigating unjustified wealth, incompatibilities and administrative conflicts of interest had a slow start, and was interrupted by the legal vacuum in 2010. However, the scale of its work then gradually increased, following several actions using targeted risk assessments and prioritisation on the most serious cases.<sup>106</sup> Between 2010 and 2016, ANI finalised 12,297 files, of which 2,167 files had specific findings. This track record significantly increased from 2013 on,<sup>107</sup> and has remained stable since then, in spite of the management upheaval caused by the resignation of the ANI President following the start of a criminal investigation into activity which preceded his term at the Agency.<sup>108</sup> In the same period, cooperation with judicial and administrative authorities significantly improved, so that the large majority of notifications to ANI are now external notifications.<sup>109</sup> Each year the reports of ANI concern officials and politicians from all ranks and parties.<sup>110</sup> A large majority of ANI reports are challenged in court, but the confirmation rate of ANI's reports by the courts is consistently above 80%. ANI communicates its activity by publishing on its web page press releases informing the public about its findings, and about definitive and irrevocable decisions.

A major challenge in integrity cases is the fact that situations of administrative conflicts of interest or incompatibilities are defined in many different laws, so that the whole legal setting is complicated, and can be ambiguous. There are many examples where this has led to decisions at first instance which were overturned on appeal. Already in 2012, the CVM report recommended that *the Government and ANI should work together to develop and propose legislation to improve the integrity framework*. This avenue has however not been pursued, and at different times both the Ministry of Justice and ANI have cited the reason as concern that parliamentary debates on a consolidated draft law would end up diluting the integrity framework (preferring to rely on jurisprudence to unify divergent interpretations). This concern has been reinforced by a number of amendments with this effect which have passed at least one chamber of parliament, on some occasions without debate or public consultation. Both ANI and the Minister of Justice have opposed a number of such amendments, others have been challenged by the President of Romania and referred to the Constitutional Court.<sup>111</sup> Changes to the law which were not agreed with ANI and the Government have however taken place (see footnote 101).

Since the early days of ANI, CVM reports have noted resistance to the implementation of ANI reports, even when confirmed by a court decision, and reluctance of the responsible institutions and authorities to apply the legal sanctions, which normally consist in either dismissal of public function or administrative fines. In 2012, the CVM report noted that *"For a number of years the Commission's reports have consistently flagged inadequate follow up to ANI's cases by other administrative and judicial authorities and made a series of recommendations in this regard."*<sup>112</sup> Since 2014, ANI has monitored more closely the follow-up of its reports and has issued administrative sanctions when the

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<sup>104</sup> CVM report July 2012, 2014, 2015, 2016

<sup>105</sup> CVM reports July 2012, 2014, 2015, 2016

<sup>106</sup> In the period 2008-2012, ANI has undertaken about 7000 verifications, issuing about 250 reports of incompatibility, 37 reports of administrative conflict of interest, 24 reports of suspected of unjustified assets and 239 referrals of possible criminal offences to prosecutors, with over 70% of these verifications having been started ex officio by the Agency. (CVM report July 2012)

<sup>107</sup> with 342 cases of incompatibilities, 80 cases of administrative conflict of interest, 16 cases of suspected of unjustified wealth and 45 referrals for possible criminal conflicts of interest in 2013 only (CVM report 2014)

<sup>108</sup> CVM reports 2014, 2015, 2016

<sup>109</sup> In 2010 there were about 90% ex-officio notification, in 2016 the proportion decreased to 38%.

<sup>110</sup> CVM reports 2012, 2013, 2014, 2015, 2016

<sup>111</sup> For example, a law adopted in June 2016 to allow Members of Parliament to hire relatives without being in conflict of interest. A number of such cases were pending before the Courts at the time. This amendment was challenged before the Constitutional Court and was annulled (Ref).

<sup>112</sup> CVM report 2012 (p22)

authorities have failed to act.<sup>113,114</sup> Successive CVM reports have highlighted that the implementation of ANI reports concerning Members of Parliament, even when confirmed by court decision, have been questioned.<sup>115</sup> A Constitutional Court decision on this issue, and the new Statute of Senators and Deputies adopted in 2013 – which clarified the procedure to be followed by the respective chamber in case of incompatibilities or conflicts of interest – have not succeeded in ending cases where the law has not been implemented or in accelerating the application of sanctions.<sup>116, 117</sup>

The objective of the rules on integrity is preventive: avoiding situations of conflicts of interests and lowering the risk for corruption in the first place. Starting from 2014, ANI has developed prevention activities in order to clarify the formalities to complete and submit asset and interest disclosures, as well as to explain the legal regime for incompatibilities and conflicts of interests. ANI's prevention activity was further developed and boosted in preparation of local and general elections in 2016. In addition, ANI developed a system of ex-ante detection of potential conflicts of interests in public procurement (PREVENT) to preclude awarding contracts when possible conflicts of interests are detected and remedial measures are not implemented. This will complement the ex-ante verifications of the National Agency for Public Procurement (ANAP). The law establishing PREVENT was passed by Parliament in October 2016.

The track record of ANI is also attested by the fact that it has been the subject of increasing attention from other countries interested in developing their own integrity framework.<sup>118</sup>

### **3.2. The National Integrity Agency in 2016**

#### *Institutional capacity*

The institutional capacity of ANI continues to be consolidated. By the end of 2016, ANI employed 111 persons, compared with 104 in 2015. There are 48 integrity inspectors, with an average caseload of 81 files. The position of Vice-President is still vacant as the procedure was delayed because of internal logistics within the National Integrity Council, but the competition has now been launched and should be finalised in February 2017.

ANI continues to report good cooperation with institutions dealing directly with its files: the Wealth Investigation Commissions, the High Court of Cassation and Justice (HCCJ), and the General Prosecution. ANI was also closely associated with the Ministry of Justice in the development of the National Anti-Corruption Strategy. ANI has also reported that there has been less external pressure on the Agency and its personnel.

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<sup>113</sup> The Agency is constantly monitoring the implementation of definitive and irrevocable court decisions regarding unjustified assets or conflict of interests and incompatibilities. After a court issues a definitive and irrevocable decision, it is communicated to the authorities provided by law with the competences of, as appropriate, asset confiscation, removal from public office, or applying other types of sanctions applying to persons for whom unjustified assets, incompatibility or conflict of interest has been established. In parallel, the Agency publishes on its website a press release to inform the public (including names in the case of persons with definitive and irrevocable decisions). If there are authorities or institutions that fail to apply the sanction agreed by the courts, the Agency can apply contravention fines. (ANI report 2014)

<sup>114</sup> Between 2010 and 2016, ANI applied Administrative 203 fines for non-disciplinary sanctions applied after the ascertaining act remained final.

<sup>115</sup> CVM reports 2013, 2014, 2015, 2016

<sup>116</sup> CVM report 2014, 2015, 2016

<sup>117</sup> ANI reports that since 2010, 51 cases of incompatibilities (22) and administrative conflicts of interests (29) regarding 50 deputies and senators remained definitive. On average the Parliament applied disciplinary sanctions approximately 8 months after the evaluation reports regarding deputies and senators remained definitive for incompatibility cases, and 6 months for conflict of interests cases. In 4 cases, no sanction was applied.

<sup>118</sup> Finland, France, Bulgaria, Spain (Region of Catalonia), Moldova.

### *Track record – conflict of interest, unjustified wealth, incompatibility*

In 2016, ANI's track record was stable compared to previous years. ANI finalised 1635 cases and found 263 cases of incompatibilities, 123 cases of administrative conflicts of interest, 51 cases of criminal conflicts of interest, and 25 cases of significant differences between income and assets. The cases include 94 mayors, 137 local counsellors, 89 deputy mayors and 5 Members of Parliament. ANI notified the prosecution of 19 cases where there was a sufficient suspicion of a criminal offence. The Agency has continued its communication policy of publishing all definitive and irrevocable decisions.<sup>119</sup>

A high proportion of ANI decisions are challenged in court, but the confirmation rate of ANI decisions in court remains above 80%. In 2016, 216 cases have remained definitive and irrevocable.<sup>120</sup> Successive CVM reports have pointed to the issue of the length of court proceedings in ANI cases, as sanctions can only be applied when the decision is final and irrevocable. Long delays (sometimes over two years) risk to defeat the prevention purpose of the integrity laws.<sup>121</sup> This situation has been attributed to the heavy workload of administrative sections, notably at the HCCJ.<sup>122</sup> The efforts of the Administrative Section in the HCCJ to accelerate ANI's cases seem to have borne fruit, as there has been a significant increase in the number of final decisions in incompatibility and administrative conflict of interest in 2016.

ANI reports an overall improvement in the implementation of final court decisions regarding unjustified assets or conflict of interests and incompatibilities, and attributes this to its policy of monitoring closely all final cases, notifying the relevant disciplinary authority and imposing fines if the authority does not apply the legal sanctions. In incompatibility cases, by 2015, 82 % of persons in incompatibility had their mandate terminated, or resigned/were dismissed from their function. By the end of 2016, this figure had increased to 86% of persons in incompatibility, while at the same time the number of final decisions has significantly increased. It seems thus that the sanction was applied for nearly all new final cases in 2016, which is an important improvement with regard to previous years.<sup>123</sup>

Although the 2012 CVM report had put forward mixed conclusions on the Wealth Investigation Commission (WIC), the 2014 CVM report noted a normalisation of the procedures between ANI and the WIC. By end of 2016, ANI reported that more than EUR 26 million had been identified in all cases of unjustified wealth, with EUR 3 million already transferred to the State budget and a further EUR 430,000 pending confiscation in relation with the 16 court cases won so far. The number of cases still before the WIC is nevertheless high and the overall procedure is slow, with more than half of the cases notified by ANI since 2010 still pending. Judges in the WIC would like to modernise the law and make it more efficient, for example by creating more committees to analyse the cases (who also have other tasks).

Regarding criminal conflicts of interest, ANI notified 51 cases to the General Prosecution in 2016, which continues to allocate these cases to experienced prosecutors in the Courts of Appeal.<sup>124</sup> In 2016, prosecution services solved more cases than in previous years: 378 cases of conflicts of interests. 48 cases were sent to court,<sup>125</sup> of which 13 were notified by ANI. A ten year summary provided by the General Prosecution services shows a stable track record of indictments since 2013, in contrast to only

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<sup>119</sup> <http://www.integritate.eu>

<sup>120</sup> 146 cases of incompatibility, 68 cases of administrative conflicts of interests and 2 cases of unjustified wealth. The courts also issue 9 convictions (with suspension) in criminal conflict of interest cases.

<sup>121</sup> CVM reports 2012, 2014, 2015, 2016

<sup>122</sup> Although the Administrative Section has significantly increased the number of solutions for ANI files this year, the judges have to deal with a very high workload with overall 7,000 cases in administrative matters, including some 700 ANI files.

<sup>123</sup> CVM report 2015

<sup>124</sup> The newly appointed Prosecutor General has also strong expertise in conflicts of interest.

<sup>125</sup> Concerning 54 defendants, including 17 mayors, 4 deputy mayors, 2 members of Parliament, 6 local counsellors, 1 hospital director.

a few cases brought to courts by the Public Ministry in the period 2007–2012. The number of cases solved by the Public Ministry has also risen after 2012, but so has the number of notifications, so that there is now a high number of pending cases.<sup>126</sup> The guidance service of the General Prosecutor's Office regularly draws up analyses of the typology of the conflicts of interest cases sent to trial.<sup>127</sup> These analyses help the prosecution to identify priority investigation areas.

### **3.3. Legal Framework and jurisprudence on incompatibilities**

The preventative impact of the integrity framework relies on the law being clear to everyone, and on predictable sanctions for incompatibilities and conflict of interest. In the past, there have been clear examples of inconsistent court decisions undermining its effectiveness.<sup>128</sup>

In the 2016 CVM report, the Commission recommended that efforts towards consistency of jurisprudence of integrity decisions should be pursued, with consolidated case-law to be made available to lower courts. The High Court of Cassation and Justice (HCCJ) plays a key role in setting jurisprudence in incompatibility cases, with hundreds of decisions on incompatibility and conflict of interests cases since 2008. The work of the Administrative Section of the HCCJ has been fed into a table of ANI case-law, organised by recurring types of incompatibilities and providing the solutions applied in those cases. This case-law table is updated every six months and is made available on the HCCJ website. Within the Section itself, when interpretation issues are identified, a discussion takes place and the interpretation is settled by the view of the majority. Lower courts report that they constantly refer to the uniform practice in the HCCJ on ANI cases and recognise the usefulness of their access to the case-law. ANI also makes the case-law available on its website and promotes it for prevention purposes.

In 2016, amendments to the integrity framework continued to be tabled in Parliament without prior debate on the public interest underlying the changes. In October 2016, the Parliament adopted a new amendment to law 161/2003, eliminating incompatibilities for mayors or local elected officials to sit in boards of commercial companies that provide utility services. The law has been challenged at the Constitutional Court. Other initiatives pending in Parliament would eliminate common incompatibility situations or restrict the three-year election ban.<sup>129</sup>

### **3.4. Integrity and the Romanian Parliament**

At the same time, problems continue in the implementation of the law in respect of ANI's decisions, even when confirmed by a clear court decision. The automaticity with which Parliament implements final court judgments which have upheld decisions of the National Integrity Agency (ANI) is an issue that has been regularly raised in previous CVM reports.<sup>130</sup>

Article 7 of the Statute of Senators and Deputies regulates how the Parliament should proceed when a member has been found incompatible. Although the termination of office is automatic on the date the decision of incompatibility becomes final and irrevocable,<sup>131</sup> other steps are needed to put this into

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<sup>126</sup> In 2007, there were 77 cases to be solved and 47 cases solved, while in 2015 there were 236 cases solved and 966 cases to be solved.

<sup>127</sup> For example: mayors or deputy mayors signing lease contracts for communal meadows to associations (whose members include their family members), which subsequently receive significant agricultural subsidies; local elected officials or public servants awarding contracts to companies they control.

<sup>128</sup> COM(2015) 35 final, SWD (2015) 8 final, CVM report 2016

<sup>129</sup> 3 Proposals to amend ANI Law no. 176/2010 regarding integrity in exercising the public offices and dignities and 3 Proposals to amend Law nr. 161/2003 on certain measures to ensure transparency in the exercise of public dignities, of public offices and in the business environment, and prevent and sanction corruption. Some have progressed as far as being on the agenda of the plenum of the decisional chamber, but these proposals have not been adopted. As they are not rejected either, they will be pending for the new Parliament.

<sup>130</sup> COM(2015)35 final

<sup>131</sup> Act No 96 of 21 April 2006 on the Statute of Deputies and Senators, Article 7 (2): *The termination of office of Deputies or Senators due to incompatibility occurs:....c) on the date of the final and irrevocable judgement dismissing the appeal against the National Integrity Agency report stating the incompatibility; d) on the expiry date of the term stipulated in Act No 176/2010 on the integrity in the exercise of public*

effect. The President of the Chamber has to take note of the termination of the mandate of the Deputy or the Senator, and puts the question to the vote of the plenary session of the Chamber where the place of the Deputy or Senator shall become vacant.<sup>132</sup>

In 2016 four incompatibility cases of Deputies became final and irrevocable.<sup>133</sup> In three cases out of four, the Chamber of Deputies revoked the mandate. In one case, this process took more than six months, though one case was concluded in less than a month. In one case, the Deputy was still a Member of Parliament when the 2012-2016 legislatures ended.<sup>134</sup> However, his candidacy to the 2016 parliamentary elections was rejected by the Central Electoral Bureau as subject to a three-year election ban (see below).

One of the cases reported in the January 2016 CVM report,<sup>135</sup> which was considered final by ANI as it had not been challenged in court within the legal deadlines, was eventually overturned in the Court of Appeal, which admitted the case in April 2016. The Deputy was reinstated in the Chamber of Deputies (in the previous legislatures). ANI appealed the decision and the case is now pending at the HCCJ.

In 2016, four cases of administrative conflict of interest of Deputies became final and irrevocable (though one case returned to court). Again decisions took several months, but in all four cases, the Parliament applied the disciplinary sanction – although in one case, it subsequently reversed its decision and the disciplinary sanction of temporary salary decrease was not applied.

On 21 December ANI notified the new Parliament on two cases concerning elected MPs.<sup>136</sup>

### 3.5. Ex ante checks and prevention activities

The electronic system PREVENT aims at automatically detecting potential situations of conflict of interests in public procurement, before the selection and contract award procedure. It will apply to all procedures, irrespective of the sources of funding. An essential element of PREVENT is that the contracting authorities are obliged to effectively fill in the integrity form, and failure to fill in the required information will automatically lead to the suspension of the procurement procedure. If the system detects a potential situation of conflict of interests, it issues a warning to the contracting authority so that corrective measures can be taken before awarding the contract.<sup>137</sup> The first step is an electronic check alone, but in a second step a more thorough verification of how the conflict of interest situation has been resolved can be triggered by the Agency. The system is designed to detect potential conflicts of interest as defined currently in the Romanian legislation, i.e. the existence of kinship to the third grade (parents, children, siblings), but it could potentially be extended to also cover third parties, consultants or sub-contractors. According to ANI, a very large share of situations of conflicts of interest (85 to 90%) involve concluding public contracts with companies linked to or owned by family members of local officials. The draft law establishing PREVENT was proposed by the Government in September 2015 and was adopted by Parliament and promulgated in October 2016. The system will

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*functions and dignities, [...], from the date of taking knowledge of the evaluation report of the National Integrity Agency, unless within that period the Deputy or Senator disputed the report at the administrative litigation court. Acknowledgement shall be done by signing the receipt of the National Integrity Agency report by the Deputy or Senator concerned or, if they refuse its receipt, by the announcement made by the President of the plenary session of the Chamber to which they belong.*

<sup>132</sup> Act No 96 of 21 April 2006 on the Statute of Deputies and Senators – Article 7 (4).

<sup>133</sup> An additional report became final in 2016 concerning Deputy OCHI ION, but he had already resigned from office on 01.09.2015, under judicial control, accused of bribe taking and abuse of office

<sup>134</sup> ANI website [www.integritate.eu/](http://www.integritate.eu/) and Chamber of Deputies website [www.cdep.ro](http://www.cdep.ro)

<sup>135</sup> CVM report 2016

<sup>136</sup> One case concerns incompatibility of an MP re-elected despite the three year election ban, and another case concerns an MP with an election ban following conflict of interest in the previous mandate.

<sup>137</sup> When such a situation arises, ANI issues a warning in SEAP (public procurement system). Following the warning the authorising officer of the contracting authority has to take measures and to report back to ANI of these measures. Failure to take the necessary measures and to report back to ANI triggers the administrative procedure for checking the conflicts of interest. The warning does not prevent the contracting authority to award the contract.

apply to all public procurement procedures run via the Electronic Public Procurement System (SEAP), involving both EU funds and national funds.

The priority for ANI is now to make the system operational. For this it is collaborating with the National Agency for Public Procurement (ANAP), the Ministry of Interior (responsible for population databases) and with the Ministry of Justice. ANI and ANAP will still need to develop solutions to cover all conflict of interest as defined by the new public procurement laws, as the new definition is broader than the one currently covered by ANI. Through the National Integrity Council, ANI could also develop collaboration with the Union of Notaries. It is planned that the system will become operational in summer 2017. ANI will organise training for the new system, complementing on the public procurement trainings planned by ANAP.

While PREVENT will be compulsory for all public procurement procedures, it will not be able detect all potential conflicts of interests. Therefore, the absence of an integrity alert does not exclude the responsibility and the active obligation of the contracting authorities to identify conflicts of interests, nor relieve the control bodies from further ex-ante and ex-post verifications.

Throughout 2016, ANI continued to expand its prevention activities. One important focus was on the elections (see below) but other activities are also being set up. One of them is a post-graduate anti-corruption and integrity programme “Public Integrity and Anti-corruption Public Policies” given by ANI at Babes-Bolyai University in Cluj-Napoca. The main objective of the programme is to train public servants in city halls, county councils and parliamentary offices on conflict of interests and incompatibilities, as well on filling in assets and interests' disclosures, assets evaluation, and the effectiveness of strategies and public policies in public integrity. In September 2016, ANI also launched an 18 month project with the Institute for Public Policies on "Mapping Risk Areas in Conflict of Interest in Romania", with a view to strengthening the administrative capacity of the integrity system for early identification of risk areas, and prevention of conflict of interest (targeting the most vulnerable areas, such as public procurement).

Public awareness is also an important part of prevention. ANI reports improvements in public acceptance of the integrity laws and of the role of the Agency. Compared to previous years, ANI receives many more notifications and complaints when administrations or persons do not follow the rules. This has led to cases of administrative bodies failing to comply with their legal obligations, and 154 fines were applied in 2016 (compared to less than 10 in 2015). ANI also reports an improvement in the willingness of institutions to proactively ask ANI how best to prevent integrity incidents.<sup>138</sup> ANI's website provides a large amount of practical information and was accessed by 50.000 users per month in 2016.

### **3.6. Respect of integrity rules in local and general elections**

In January 2016 the CVM report recommended to take steps to ensure the respect of the rules on integrity in the organisation of the local and general elections to take place in 2016. Ensuring integrity in elections is an essential element to fight corruption, in particular in public procurement, as well as one which sets an example for society at large. The specific issue for the CVM was the effective application of the integrity rules to candidates. Candidates have to submit asset and interest disclosures and persons subject to a final decision of incompatibility, conflict of interest or unjustified assets cannot stand within the three year election ban.

For the June 2016 local elections, ANI put in place a dedicated integrity website in mid-April as a practical way to help application of the rules, as well as to signal potential transgressions. The website had a single access point for all asset and interests declarations (around 520.000), a guide to identify recurring errors and most common incompatibilities, the list of all persons under a three-year election ban, a guide for filling in the assets and interests declaration forms on-line and an interface for submitting complaints or notifications concerning candidates. ANI also opened a hotline, with integrity inspectors providing help to candidates or local authorities concerning the asset and interests

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<sup>138</sup> Since 2012, over 4.600 point of view have been issued to Institutions and private persons seeking advice in integrity issues.

declarations. ANI reports that these measures were readily adopted by the candidates, that the website and hotline were broadly used and that they were notified very quickly whenever there were errors in assets declarations online. With the support of the Ministry of Internal Affairs, ANI organised a video conference with all prefects (responsible for the application of the law at the regional level) to explain the process.

ANI had also sent the list of about 230 persons under election ban to the local electoral bureaus and the Permanent Electoral Authority, though there did not appear to have been a formal response and some candidates were approved despite the election ban. After the elections ANI found out that 7 persons under the election ban were elected. By November, all of these people had either been removed from office or had resigned.

For the general elections, ANI put similar measures in place and had effective cooperation with the Permanent Electoral Authority and the Central Electoral Bureau. ANI sent information (including the list of persons under election bans), to those involved in the electoral process, and to political parties.<sup>139</sup> In addition, the Permanent Electoral Authority requested that the electoral bureaus should consult with ANI before validating candidates, to ensure that problems were detected at an early stage. There were two cases identified by the electoral bureaus of persons under election ban. In the first case, the electoral bureau contacted ANI to check and then rejected his candidacy, a decision which was upheld in court. In the other case, the electoral bureau also contacted ANI and then decided that the election ban only starts at the end of the person's current mandate, so that the interdiction should in principle take effect when new MPs are appointed.

There is also another case of a person under election ban that has been elected and problems with his candidacy had not been flagged before the elections.<sup>140</sup> ANI notified the Parliament on 21 December.

#### 4. TACKLING HIGH-LEVEL CORRUPTION

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

Corruption is a deep-seated societal problem with consequences for both governance and the economy. It is widely recognised as a major issue in Romania, as shown regularly in perception surveys<sup>141</sup> and most recently in a Eurobarometer on the CVM.<sup>142</sup> Civil society continues to play an important part in exposing corruption. For example, several initiatives from civil society in the run-up to the general elections involved listing all candidates sentenced for corruption, conflict of interest or found incompatible, indicted for corruption crimes or investigated for corruption or who made public statements or political initiatives threatening the rule of law.<sup>143</sup>

Romania has a comprehensive legal framework for combatting corruption crimes, and previous CVM reports have recognised that there are independent judicial institutions investigating, prosecuting and deciding upon high-level corruption cases. Since the last CVM report, the National Anti-corruption Directorate (DNA) has continued to investigate a high number of cases and send hundreds of defendants to trial; and the High Court of Cassation and Justice (HCCJ) and the Courts of Appeal have continued to rule final sentences in a still large number of high-level and medium level corruption cases and have continued to confiscate assets to recover the damage caused by the corruption offences.

<sup>139</sup> Electronic Asset and Interests Disclosure forms, filling in assets and interests disclosure guides, guides to incompatibilities and conflicts of interests, as well as the list of persons prohibited to occupy a public office or dignity for a period of 3 years.

<sup>140</sup> The final incompatibility court decision dates from 03.11.2016, and he had been revoked from Parliament on 28.11.2016 (source: website of Chamber of Deputies - [www.cdep.ro](http://www.cdep.ro)).

<sup>141</sup> Flash Eurobarometer 428: Businesses' attitudes towards corruption in the EU , available at <http://ec.europa.eu/COMMFrontOffice/PublicOpinion/index.cfm/Survey/getSurveyDetail/instruments/FLASH/surveyKy/2084> ;

<sup>142</sup> Flash Eurobarometer 445: The Cooperation and Verification Mechanism for Bulgaria and Romania, published on 25 January 2017

<sup>143</sup> <http://www.alegeriparlamentare2016.ro/>



These cases have involved, for example, Senators, Deputies, former ministers, generals, presidents of County Councils, mayors, judges and prosecutors,

Over the years the investigations of DNA suggest that the same patterns of corruption crimes recur from one year to another. In the presentation of the DNA annual report in 2016, the Chief Prosecutor highlighted that *"The cases under investigation show us that we haven't caught all the corrupt people. Our results prove that there are major vulnerabilities which endanger the good functioning of our society."*<sup>144</sup> *Corruption has dramatic effects and it manifests through the same repetitive actions. In the absence of clear measures for preventing and controlling this phenomenon, the typology of the investigated crimes and the mechanisms allowing them to be committed repeat themselves."*<sup>145</sup>

In the 2016 CVM report, the recommendations covered maintaining the effort of the judicial institutions addressing high-level corruption; ensuring that corruption laws apply equally to all and at all levels; and adopting objective criteria for deciding on and motivating lifting of immunity of Members of Parliament and ensuring that immunity is not used to avoid investigation and prosecution of corruption crimes.

#### **4.1. Overview of developments under the CVM**

CVM reports have been able to show a steadily growing track record in terms of investigating, prosecuting and adjudicating high-level corruption cases over the years, with a clear acceleration after 2011.<sup>146</sup> Since 2013, the track record of the institutions involved in fighting high-level corruption remained strong, with regular indictments and conclusion of cases concerning politicians and civil servants, magistrates and businessmen. To give an order of comparison, in 2007 DNA sent 167 cases to court against 415 defendants. There were 63 final conviction decisions against 109 defendants<sup>147</sup>. In 2015, DNA sent 357 cases to trial regarding 1258 defendants. There were 302 final conviction decisions against 973 defendants. DNA also finalises an increasing number of cases every year (more than 4500 in recent years, compared to 1,500 in 2007), while the number of new cases of complaints from citizens, businesses or public authorities also increased steadily and reached 10,000 in 2016. There is consistent evidence that the work of the DNA is appreciated by the general public.<sup>148</sup>

In 2007 many corruption cases were pending at first instance in the HCCJ and the pace of solving corruption cases was slow. The situation started to change in 2010–2011. This was the result of both management decisions in the HCCJ, which improved the case management of corruption cases, and legislation: the Small Reform Law in 2010 took away the suspension of a case when there was an objection of non-constitutionality. An increase in the number of high-level officials convicted for corruption started to be seen from 2010, but to begin with, virtually no decisions were reached in cases involving the most politically influential defendants. From 2012 on, there was an increase in the number of and pace of Court decisions against high ranking defendants, including the first final decisions against high ranking defendants, and the first prison sentences.<sup>149</sup> Since then, CVM reports have been able to record a constant pace of decisions on corruption cases at the HCCJ,<sup>150</sup> despite the

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<sup>144</sup> "There are sectors in public procurement where corruption is generalized. Many times, the awarding of contracts or the payments related to contracts are conditioned by receiving different sums of money disguised by fraudulent deals or fictitious agreements."

<sup>145</sup> <http://www.pna.ro/faces/comunicat.xhtml?id=7128>

<sup>146</sup> CVM reports 2007 - 2016

<sup>147</sup> CVM report 2012

<sup>148</sup> DNA surveys and other polling indicate 55,8% trust in 2014, 61% trust in 2015, 60% in April 2016, 55% after summer?

<sup>149</sup> CVM report 2012

<sup>150</sup> Between 2013 and 2016 the HCCJ solved:

- 44 first instance high-level corruption cases: 2013: 10 cases, 2014: 12 cases, 2015: 11 cases, 2016: 14 cases
- 48 final decisions on high-level corruption cases: 2013: 15 cases, 2014: 13 cases, 2015: 11 cases, 2016: 13 cases



increasing complexity of the cases (the result of, for example, a shift in competences after the entry into force of the new criminal Codes).<sup>151</sup>

The consistency and dissuasiveness of corruption sentences has been a recurrent theme in CVM reports and recommendations. Today the case-law of sentencing for high-level corruption is extensive, showing that the HCCJ but also the Appeal Courts have pronounced prison sentences at the upper end of the sentencing range to influential public figures found guilty of corruption, including judges and prosecutors. However, the overall dissuasive effect was reduced by the proportion of suspended sentences, though the proportion of sentences with execution in DNA cases has increased from one quarter to one third of cases from 2014 on while at the same time the number of final convictions also increased. NGOs and magistrates have drawn attention to cases where on the one hand, relatively minor corruption offences were punished by severe prison sentences, whilst on the other hand, some of high-level cases resulted in suspended sentences – with the effect that convicted politicians could continue to sit in Parliament or be re-elected (with no deprivation of civic rights).

The stability of the legal framework for fighting corruption has been a recurring theme. The 2012 CVM report noted "there have been a number of proposals to change the criminal and criminal procedural law on aspects related to corruption. Some of these attempts to weaken the framework were successful – such as the decriminalisation of certain bank fraud offences. Others have not succeeded, including recent proposals in Parliament to take elected and appointed officials out of the scope of corruption offences and to effectively decriminalise conflict of interest." In December 2013, a few months before the entry into force of the new Criminal Codes, Parliament adopted amendments to the old and new Criminal Codes weakening the provisions on the fight against corruption and taking away MPs from the category of people that can be investigated for corruption crimes. These amendments were annulled by the Constitutional Court in January 2014.<sup>152</sup> In 2015, new amendments to the Criminal Code and Code for Criminal Procedures still pending in Parliament questioned again the stability of the framework to fight corruption (See Section 2).

CVM reports and studies have highlighted that the investigation, prosecution and conviction of corruption have involved public figures and politicians of all levels and political parties.<sup>153</sup> There seems to be a clear link between the effectiveness of this work and widespread media and political reaction in terms of public criticism of individual magistrates and the justice system in general (see Section 2.1) and in terms of a resistance to explain refusals to lift parliamentary immunities to allow for investigation of preventative measures (see below).

## **4.2. Legal framework**

CVM reports have highlighted that the current legal framework for the fight against corruption is effective. In 2014, the Criminal Code addressed a number of outstanding recommendations raised by the Group of States against Corruption (GRECO),<sup>154</sup> while the new Criminal Procedure Code built on a smaller scale reform of 2011 and has enabled the prosecution and the courts to overcome a series of procedural obstacles that were exploited by some defendants to delay trials.

Section 2.2 describes how the issue of the stability of the new Criminal Code and Code for Criminal Procedures, a source of concern since their entry into force in 2014, has been partially addressed by the Government through Emergency Ordinances. However, it also describes how the stability of the legal framework for corruption has continued to be called into question by amendments triggering concerns from the judicial authorities on the grounds that they would reduce the capacity of the prosecution and judges to investigate or sentence corruption crimes.

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<sup>151</sup> CVM report 2016

<sup>152</sup> CVM report 2014

<sup>153</sup> CVM reports 2012, 2014, 2015

<sup>154</sup> CVM report 2016: Three GRECO recommendations on the incrimination of corruption crimes are only partially addressed. The Group of States Against corruption is a body of the Council of Europe, performing among others regular evaluations on the implementation of anti-corruption standards.

Two Constitutional Court (CCR) decisions in 2016 concerned the fight against corruption and the full legal consequences of the decisions on ongoing cases are still being determined as cases go through the courts. One decision invalidated technical surveillance measures ordered by prosecutors but enforced by the security services. As mentioned in Section 2.3, the Government has sought to bring solutions through an Emergency Ordinance by setting up this capacity in the prosecution. But there remains uncertainty about future court decisions relying on evidence collected through electronic surveillance measures administered before the Constitutional Court decision. Shortly after the CCR decision, the HCCJ ruled in one case to admit the evidence. This line seems to be followed by most courts; nevertheless DNA reports that this is not a universal approach.<sup>155</sup>

A second decision concerns the crime of abuse of office. The CCR decision upheld the constitutionality of the incrimination in line with international standards, and further clarified the interpretation of certain provisions in the Criminal Code. The full implications of the CCR decision will need to be worked out through specific cases in the courts, and DNA is waiting for this to become clear before sending new cases to court.

### **4.3. High Court of Cassation and Justice**

In the last ten years, corruption trials have been one of the most visible parts of the activity of the High Court of Cassation and Justice (HCCJ). As set out above, CVM reports have acknowledged that the HCCJ has maintained a constant track record in solving high-level corruption cases. This is a result of the Presidency of the HCCJ, the judges of the criminal section and the HCCJ as a whole adopting a managerial rigour to ensure that justice is delivered as swiftly as possible. This has happened in spite of an important strain on the resources of the HCCJ, particularly in terms of insufficient council rooms, offices and archive rooms.

In 2016 the Penal Chamber settled, at first instance, 14 high-level corruption cases and the panels of five judges settled, as final instance, 13 high-level corruption cases, with many cases involving a high number of witnesses and complex evidence. The HCCJ consistently reports attention for respect of procedural rights. However, as in the case of anti-corruption prosecutors, judges have been subject to public criticism, including on a personal level.

The main challenge for the judges of the HCCJ dealing with corruption cases lies in the increasing complexity of the corruption cases, as well as the dual role of judging and interpreting the new provisions of the new Criminal Codes and dealing with the consequences of the continued changes to the Codes.

### **4.4. The National Anti-Corruption Directorate**

The National Anti-corruption Directorate (DNA) investigates high and medium level corruption.<sup>156</sup> Because of its consistent non-partisan track record, DNA continues to enjoy a very high support in public opinion.<sup>157</sup> The high-level corruption cases are judged by the HCCJ and the Courts of Appeal.<sup>158</sup> For all other corruption cases investigated by DNA, the Tribunalele (tribunals) are the competent first instance court, unless assigned by law under the jurisdiction of a higher court.

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<sup>155</sup> This issue also affects the other specialised prosecution office for fight against organised crime and terrorism (DIICOT).

<sup>156</sup> The law establishes three criteria for medium and high level corruption: the amount of bribes or undue benefits exceeds €10,000; the damage caused exceeds €200,000; corruption offenses are committed (regardless of the amount) by people who occupy important positions such as Deputies, Senators, members of Government, State Secretaries, prosecutors and judges, officers, admirals, generals, mayors and deputy mayors, presidents or deputies of county councils, county councillors, prefects and sub-prefects.

<sup>157</sup> Polling of April 2016 shows 60% very high to high confidence in DNA <http://www.inscop.ro/wp-content/uploads/2016/04/INSCOP-raport-martie-2016-INCREDERE-INSTITUTII.pdf>

<sup>158</sup> According to the new Code of Criminal Procedures, the High Court of Cassation and Justice (HCCJ) is competent for first instance and appeal trials for offences committed by Senators, Deputies, Government members, judges of the Constitutional Court, members of the Superior Council of Magistracy, judges of the HCCJ and prosecutors of the Prosecutor's office attached to the HCCJ. In final instance, the HCCJ judges

### *Institutional capacity*

The number of DNA cases continues to increase. DNA registered even more new cases in 2016.<sup>159</sup> In 2015, DNA finalised 4500 cases but at the end of the year there were still 3500 cases pending. There is an obligation to deal with all cases: prosecutors cannot invoke the opportunity principle because there is a public interest in fighting corruption. The use of plea bargaining is limited by law, as it can only be used in cases involving small amounts of money. The result is that the workload per prosecutor is very high: about 100 cases per prosecutor (supported by two police officers).

The activity of the DNA offices outside the capital has continued to increase, with more investigations of important local figures. During a Commission visit to Brasov, the DNA local branch presented examples of cases involving illegal forest retrocessions and corruption of a judge, and they highlighted the challenges in tracing cash when investigating complex money laundry schemes. Other examples can be found in DNA Ploiesti, where prosecutors started investigations against the President of the local Permanent Electoral Authority and indicted a Deputy for bribery, buying influence, money laundering, and extortion. Such cases have also brought an increase in attacks on local DNA prosecutors. This situation makes recruitment particularly difficult outside Bucharest, in turn putting additional workload on the prosecutors in place when vacancies cannot be filled. DNA headquarters – where a strong team spirit and vocation seems to have helped in retaining its staff – has tried to help by seconding prosecutors or taking over some of the files.

The Constitutional Court decision of February 2016 to invalidate (electronic) surveillance measures ordered by prosecutors but implemented by the Romanian Security Services (SRI) required major changes in the work of DNA prosecutors (and all prosecution services). Whilst most DNA cases are not based solely on electronic surveillance evidence, this is an important source and DNA had to immediately re-organise its work and start to boost internal capacity. The Minister of Justice allocated 40 posts of judicial police officers to DNA (as well as 40 to DIICOT and 40 to the Public Ministry) to develop in-house capacity for wiretapping or surveillance measures. DNA already had a small team in place on which it could build; nevertheless development to full capacity will still take more time.<sup>160</sup>

2016 saw an important increase in political and media attacks on DNA and its prosecutors. As confirmed by the decisions of the Superior Council of Magistracy, these constitute attacks against the independence of justice and professional reputation of magistrates (see Section 2.1).

### *Track record*

DNA has maintained its results in terms of conducting investigations of high and medium level corruption cases. In 2016, 403 cases were sent to trial, involving 1271 defendants.<sup>161</sup> Amongst the high profile cases, DNA has indicted defendants for alleged corruption crimes one President of the Chamber of deputies, 12 Deputies and 6 Senators, 1 minister, 1 President and 1 general secretary of the Chamber of commerce and Industry of Romania, 1 Secretary General of the Senate, 2 State Secretaries, the President of the Insurances Supervision Commission, 1 President and Vice-President of the National Agency for Fiscal Administration, 1 President and 2 vice-presidents of the National Authority for Property Restitution, 1 vice-president of the Romanian Electoral Authority, 5 presidents and 2 vice-presidents of county councils, 3 prefects and 2 under prefects, 20 mayors and 6 vice-

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appeals against the Court of Appeals' decisions for offences committed (among others) by councillors, public notaries, bailiffs, public auditors, judges of Judicatorie, Tribunalele and Courts of Appeal and prosecutors from offices attached to these courts.

<sup>159</sup> DNA reports that 85 to 90 % of cases originate from citizens' complaints, 5 to 10% are ex-officio or complaints from other institutions and less than 5% of cases originate from notification of the intelligence services.

<sup>160</sup> This would also imply more posts for judicial police.

<sup>161</sup> 88 of these defendants were indicted with plea bargain agreements.

mayors, 44 directors of public agencies, authorities and state owned companies, 52 police officers. Seven judges and 8 prosecutors were indicted.<sup>162</sup>

In order to recover the damages caused by the offences or to ensure the confiscation of the proceeds of corruption crimes, DNA prosecutors ordered interim seizures measures in the cases sent to trial for money and goods worth about EUR 643 million. In two cases DNA prosecutors requested the court to order extended confiscation measures.

In 2016, 339 final conviction decisions were ruled in court against 879 defendants in the cases conducted by DNA.<sup>163</sup> Among those convicted were 2 senators and 8 deputies (including a former vice prime minister), 1 MEP, 1 minister, 1 state secretary, 6 generals and 1 commander, 5 presidents and 4 vice-presidents of county councils, 9 judges, 1 director of penitentiary, 9 mayors, 32 directors within public institutions and state owned companies and 81 police officers (including 1 deputy director general of the General Directorate of the Bucharest Municipality Police)<sup>164</sup>. The courts ruled 37 final acquittal decisions.

In the cases with final conviction decisions, the courts ruled the confiscation of the total sum of approximately EUR 36.7 million, including movable goods. The courts ordered the extended confiscation of EUR 29,500. Compensation ordered to civil parties amounted at EUR 189.4 million, with EUR 168.4 million (89%) of this for public authorities and state owned enterprises. DNA has started a closer monitoring of the follow-up of confiscation decisions and has as yet found no improvement in the effective amounts recovered. (See section 5.3)

#### **4.5. Sentences in (high-level) corruption cases**

Consistency and dissuasiveness of corruption sentences is a long standing theme in CVM reports. The High Court of Cassation and Justice (HCCJ) issued the first prison sentences against high ranking defendants in corruption cases in 2012. Over the years, the HCCJ has developed case-law concerning sentencing for high-level corruption which serves as an example for lower courts. In parallel, the HCCJ had also developed two studies on the individualisation of sentences for corruption offences and guideline for the individualisation of sentences for passive bribery, passive and active trading in influence, which judges and prosecutors have described as very useful.<sup>165</sup> In recent years, the HCCJ but also the Appeal Courts have decided corruption prison sentences at the upper end of the sentencing range for influential public figures. Convicted judges and prosecutors have systematically received severe sentences. DNA statistics show an increase of the length of penalties: until 2013 more than 70% of sentences were under 3 years, from 2014, 50% of sentences are below 3 years. In 2015, 31% of sentences are between 3 and 5 years and 17% are above 5 years.

Overall the proportion of sentences with execution in DNA cases increased from one quarter to one third of cases in 2014 and has remained about that level since. This means that there are approximately two-thirds of convictions for corruption where the sentences are suspended.<sup>166</sup> As noted in the 2014 CVM report, the overall level of suspended sentences seems to be higher in corruption cases than in other crimes.<sup>167</sup>

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<sup>162</sup> The approval of the Superior Council of Magistracy is necessary for search and arrest: it has been granted in all cases.

<sup>163</sup> 343 punishments with execution (39%), 505 punishments with suspension of execution (57%), 31 punishments with the postponing of enforcement of the punishment during the surveillance term (3%).

<sup>164</sup> Since several years, there seems to be a high number of police officers indicted and sentenced for corruption, also visible in the cases brought to trial by the non-specialised prosecution. (See section 5.5).

<sup>165</sup> CVM report 2014

<sup>166</sup> Only around a quarter of sentences given in 2007-09 were served in prison, while this rose to 40% of penalties in 2010-2011. In 2015, 36 % of cases were ruled with execution and 64% were ruled with suspension of execution (either - conditioned suspension of execution, or suspension of execution with surveillance, or postponing of enforcement during surveillance term). In 2016, 39% of cases were ruled with execution and 57% were ruled with suspension of execution (either conditioned suspension of execution, or suspension of execution with surveillance, or postponing of enforcement during surveillance term).

<sup>167</sup> SWD(2014) 37

The law foresees that, except for Members of Parliament in line with the Constitution, a convicted person loses his/her public function irrespective of whether the sentence is suspended. Discussions with magistrates suggest that they consider this a severe punishment in itself. Parliament passed a law in March 2016 which would have allowed local elected officials (mayors and county Presidents) to keep their mandate in case of a suspended sentence, but the amendment was annulled by the Constitutional Court following a referral by the President of Romania.<sup>168</sup> Prosecutors have an important role in launching an appeal when they believe that the sentence is not consistent with other cases or is too lenient. This practice is well established in DNA. In the Public Ministry, prosecutors receive guidance on whether to launch an appeal based on case-law in their respective Court of Appeal or from the Prosecution Office attached to the HCCJ.

An explanation of sentencing is included in the motivation of judges' decisions. The ability of these motivations to reassure that the decision is consistent or to help the prosecutor to decide whether to appeal the sentence is weakened by the lapse in time between a decision and the motivation.

Another question is the use of additional penalties of deprivation of the right to be elected or hold certain functions in serious corruption cases. When politicians are convicted but receive suspended sentences, they have been able to be re-elected in Parliament. This limits the deterrent effect of the sentence. However, this situation will change under the new Criminal Code. Under the old Code – still applicable to most ongoing high-level corruption cases (by application of the most favourable law principle) – if judges decide on a suspended prison sentence, they are obliged to also suspend other measures affecting the right to hold a public office. Under the new Code, the law stipulates the ban to exercise the right to hold a public office as a penalty for certain corruption offences, and a suspended sentence does not prevent the application of additional penalties affecting the right to be elected or hold a public office.

#### **4.6. Parliament and the fight against high-level corruption**

The parliamentary procedures for the lifting of immunity with respect to starting investigations, search, arrest and detention measure has been an issue raised in CVM reports since 2009.<sup>169</sup>

As in previous years, 2016 also saw examples of apparent inconsistencies in the response given to requests from the prosecution to lift the immunities of MPs. During 2016, DNA prosecutors made six requests to the Parliament for pre-trial detention on corruption grounds (regarding six Deputies and one Senator) and half of them were rejected.<sup>170</sup> Six requests were also made for approval to start investigations on corruption grounds, concerning MPs who are also Ministers or former Ministers and one was rejected.<sup>171</sup> In one case, the refusal of lifting of immunity sparked demonstrations from civil society outside Parliament and the Senator concerned decided to resign. In contrast, all requests for the approval to start investigation on former ministers who are not MPs were admitted by the President of Romania.

The criteria on which requests are accepted or rejected by Parliament remain unclear and are not communicated to the public or the prosecution. In the January 2016 report the Commission recommended that the Parliament should *adopt objective criteria for deciding on and motivating lifting of immunity of members of parliament and ensure that immunity is not used to avoid investigation and prosecution of corruption crimes.*

There were no concrete proposals from the Parliament on this recommendation. This has however been the subject of reflection in Parliament. Parliamentarians have pointed to divergent opinions on having objective criteria, or whether it is possible to find objective criteria.<sup>172</sup> One avenue they have

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<sup>168</sup> Decision number 536 of 6 July 2016

<sup>169</sup> COM(2015)38 final, COM(2014) 37 final, COM(2013) 47 final, 2012, 2011, 2010, 2009

<sup>170</sup> 3 were admitted (1 by the Senate, 2 by the Chamber of Deputies); 3 were denied (3 by the Chamber of Deputies).

<sup>171</sup> 3 were admitted (1 by the Chamber of Deputies, 2 by the Senate); 1 was denied by the Senate and 1 request became void after the resignation of the Senator. 1 request at the Chamber of deputies is still pending.

<sup>172</sup> In discussions with Commission services.

considered is to remove the "inviolability" of MPs altogether from the Constitution.<sup>173</sup> Another point discussed is whether decisions could be motivated, given that the procedure is a secret vote. The recommendation of the Commission is based on the recommendations from the Venice Commission report on the scope and lifting of parliamentary immunities,<sup>174</sup> stating that (1) *if the request to lift immunity is based on sincere and serious grounds, and if there is no reason to suspect fumes persecutionis, then there should be a strong presumption in favour of lifting inviolability*; (2) *rules on parliamentary inviolability should always include procedures prescribing how this may be lifted. Such procedures should be comprehensive, clear and predictable, and the procedure should be transparent and known to the public. At the same time, such procedures should not be made to resemble judicial proceedings, and under no circumstances should they assess the question of guilt, which is for the courts alone to decide.*

The Venice Commission report recommends specific criteria for lifting or maintaining inviolability which would make the procedures more clear and predictable.

A second issue concerns the immunity of MPs who are former ministers. The Venice Commission report recommends that inviolability is strictly limited in time, and does not extend beyond a person's mandate. The fact that in Romania former, as well as current, ministers keep a strong functional immunity protecting them from being prosecuted in respect of offences committed while they were in office creates situations where people appear above the law.<sup>175</sup> The requests for starting investigation of former ministers who are not MPs are granted by the President of Romania. All Presidents have accepted all requests since 2007. However, the requests for starting investigation of former ministers who are MPs are granted by the chamber of parliament to whom they belong. One third of the latter requests have been refused.<sup>176</sup> The result is that offences committed while in ministerial office have in practice had a different treatment according to whether the individuals are subsequently elected MPs – as well as the fact that in some cases, it has not been possible to prosecute the MPs concerned whilst other defendants in the same corruption case have been sentenced to prison.

A third issue that has been raised previously is that a parliamentarian convicted of corruption, but with a suspended sentence, can continue to sit in Parliament as before.<sup>177</sup> In the aftermath of the Presidential elections of 2014, there were proposals from two main political parties in spring 2015 to modify the party status sanctioning members that are involved in corruption proceedings. But this remains an issue of internal party practice rather than the law.

## 5. TACKLING CORRUPTION AT ALL LEVELS

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

The fourth CVM benchmark concerns further measures by the Romanian authorities to prevent and fight against corruption, in particular within local government. Medium and low-level corruption is widely perceived to be a problem in Romania.<sup>178</sup> It affects everyday life of all social classes, with

<sup>173</sup> A Venice Commission report on the scope and lifting of parliamentary immunities CDL-AD(2014)011 of 14 May 2014 distinguishes between two main categories of parliamentary immunity: "non-liability", meaning immunity against any judicial proceedings for votes, opinions and remarks related to the exercise of parliamentary office; "inviolability", meaning special legal protection for parliamentarians accused of breaking the law, typically against arrest, detention and prosecution, without the consent of the chamber to which they belong.

<sup>174</sup> Ibid 35

<sup>175</sup> This is regulated in the Law on Ministerial Responsibility of 1999. In 20XX the Constitutional Court ruled that the Constitutional provisions on liability of ministers would also apply to former ministers.

<sup>176</sup> Since 2007, DNA made 38 requests for starting criminal investigations. 14 requests to the President of Romania were all admitted. 21 requests to the Parliament, 6 were denied.

<sup>177</sup> COM(2015) 35 final, p10; SWD(2015) 8 final, p26; COM(2012)

<sup>178</sup> Trends from Eurobarometer polling on corruption from 2005 until 2015 show that while general perceptions on corruption in Romania remain very high with above 90% of respondents considering that corruption is a

clear consequences for Romania's economic and social development. Some cases are on a large scale, both financially (but without necessarily involving high ranking politicians or office holders) and in terms of the numbers of those affected. Corruption represents a reputational risk for the country and, as other forms of corruption, acts as a deterrent for foreign investment.

As mentioned in earlier CVM reports, there is also an increasing recognition by public institutions of the negative consequences of corruption. There are sectors in public procurement where corruption is generalised, and the National Anti-Corruption Directorate has drawn attention to the trend that the same crimes are committed from one year to the next, indicating that loopholes are not closed and preventive measures not efficient enough.<sup>179</sup> As set out in previous CVM reports, the fight against general corruption relies on a mix of robust prevention measures, education to change the perception that bribes or "informal payments" are the only way to obtain a service, and effective controls, as well as dissuasive and enforced sanctions.

The fight against corruption and implementation of preventive measures were major priorities of the government in power during 2016. Previously, CVM reports had noted an absence of political will to address low-level corruption, but a number of steps were taken in 2016. These included the application and promotion of transparency rules in State and public institutions, and the adoption of an ambitious and comprehensive corruption prevention strategy.

### **5.1. Overview of developments under the CVM**

CVM reports have consistently noted that progress in corruption prevention has been less marked than in terms of law enforcement. In July 2012, the CVM report concluded "Looking back over the past years at the actual impact of the overall anti-corruption measures taken, there is a clear imbalance between repressive and preventive measures. The main focus of the anti-corruption drive so far has been on law enforcement. While the criminal law side is crucial in setting a clear regime which will help to encourage a change of mentality, a successful anti-corruption policy cannot succeed without effective and coherent preventive mechanisms. In this context, in the last five years the progress made in the effectiveness of internal control mechanisms is rather limited and inconsistent, with considerable variations in the results reached from one sector to the other and major gaps in internal control bodies and procedures."

The National Anti-Corruption Strategy (NAS) is the core instrument of corruption prevention by public administration at national and local level. Since 2005, the anti-corruption efforts of the Romanian authorities have been guided by national anti-corruption strategies. According to an independent study which reported in 2011 on the impact of the 2005-2007 and the 2008-2010 anti-corruption strategies, these strategies had been implemented to a large extent, but with questions about the real impact.<sup>180</sup>

In 2012, Romania adopted a new national anti-corruption strategy 2012-2015, which was preceded by a wide consultation process involving civil society, as well as drawing on the recommendations of the independent assessment of the previous strategies. The NAS 2012-2015, coordinated by the Ministry of Justice, continued to develop through activities related to monitoring implementation, notably through peer reviews also involving NGOs.<sup>181</sup> By 2013, a mixed picture could be seen. On the one hand, there were no common approach to risk assessment, different rules and standards applied in the different institutions and uncooperative institutions were not sanctioned. On the other hand, participation of local authorities had progressed and a round of thematic evaluations conducted at central and local level in 2014 showed that municipalities had developed good practices.<sup>182</sup> An evaluation and general review of NAS 2012-2015 in 2015 showed that it had started to produce

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major problem or widespread in Romania, the personal experience of corruption (*were you asked to pay a bribe in the last 12 months?*) diminished significantly.

<sup>179</sup> DNA annual report.

<sup>180</sup> CVM report 2012

<sup>181</sup> CVM report 2014.

<sup>182</sup> CVM report 2015

positive results but that progress was slow and the application of prevention measures ineffective, while overall political will from the top of the institutions to implement corruption prevention measures was insufficient. At the beginning of 2016, the Ministry of Justice launched inter-institutional consultations and public debates to assess the impact of the NAS and an external evaluation took place using experts selected by the OECD. The experts' findings echoed those of the Commission in January 2016, and the experts could not conclude that there was already evidence that corruption is decreasing. On this basis, in August 2016 the Government adopted a new anti-corruption strategy for 2016–2020.

General corruption cases are investigated both by the National Anti-corruption Directorate (DNA) (medium-level) and by the General Prosecution (low-level).<sup>183</sup> There is not always a clear separation between high-level, medium-level and low-level corruption. Isolated cases of small bribes may appear as low level corruption but, taken together with other similar cases in the same administration, might bring up patterns of well-organised schemes feeding into high-level corruption. The General Prosecution and the DNA collaborate, so that cases initiated as low-level corruption are later transferred to DNA if it appears during the investigation that these fall within DNA competence. In a considerable number of those cases, the DNA competence only became clear after the prosecutors had already taken the investigation a long way.

According to the statistics of the Office of the Prosecutor General, in the last ten years, the number of corruption cases resolved by the Public Ministry cases has not significantly grown, although the number of notifications has increased steadily. Since 2007, there has been a general decrease to 2011. From 2012, the number of cases solved gradually increased again. However, the number of persons indicted for corruption offences increased significantly, from 248 in 2007 to 812 in 2015. Between 2007 and 2011, the incrimination of conflict of interest by the Public Ministry proved to be ineffective. In 2013, measures similar to those used for corruption cases were applied to conflicts of interest, while cases that had been closed were reviewed. The number of cases solved and persons indicted improved significantly.

The progress in prosecution of corruption by the Public Ministry can be attributed in part to management changes introduced by the Prosecutor General. These included the establishment in 2008 of a network of prosecutors specialised on corruption cases, as well as anti-corruption strategies in all offices. The Public Ministry also conducted an assessment of the indictments issued in corruption cases.<sup>184</sup> To underline the priority given to the fight against corruption, since 2010, the Prosecutor-General has organised every year regional and national competitions concerning the fight against corruption, gathering prosecutors from courts around the country, at which relevant cases and good practices are presented. The priority given to the fight against corruption has been maintained across the mandate of different Prosecutors General.

The CVM report of July 2012 noted the pioneering role of the General Anti-Corruption Directorate (DGA) within the Ministry of Administration and Interior in applying anti-corruption measures at regional and local level. DGA is competent to apply both preventive and, as judicial police, repressive measures against corruption within the police, as well as other structures within the Ministry of Interior. The report further noted increasing results in investigating prosecution cases within the Ministry of Interior.<sup>185</sup> Subsequent CVM reports have mentioned continued results for DGA and its collaboration with the Public Ministry in the fight against corruption. Aside from their corruption investigations, DGA has also been developing preventive activities such as awareness raising, training activities and cooperation with NGOs. DGA has also developed risk assessments and analysis of

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<sup>183</sup> See previous section for DNA's competence.

<sup>184</sup> CVM report 2012.

<sup>185</sup> Between 2007 and 2011, GDA submitted 1,047 notifications to the DNA. This represents approximately 20% of the overall notifications received by DNA from law enforcement, prosecutors' offices and public institutions. As a result of GAD notifications, DNA have issued indictments in 222 cases, whilst GAD also submitted 6,388 files to the public prosecutors' offices (other than DNA), leading to 836 indictments. In the courts GAD investigations have led to 538 final decisions against 717 defendants.



corruption cases to identify patterns and structural corrective measures in vulnerable areas, which were also disseminated in the Public Ministry. The high number of cases of corruption in the police at all levels reported by the Public Ministry and DNA in the last three years nevertheless raise questions on whether the structural prevention measures within the Ministry of Interior and local police are sufficiently effective.

Effective confiscation and asset recovery is a key element in the dissuasion of corruption and in illustrating an effective anti-corruption regime to the public. The improvement of the confiscation and asset recovery is therefore a long standing recommendation in CVM reports.

In the period 2007-2011, the General Prosecutor's Office reported seizing assets worth approximately EUR 587 million, with EUR 234 million frozen in 2011 alone, nearly seven times more than in 2007. The improvement in the seizing of assets by the prosecution services resulted from measures taken by the General Prosecutor to encourage a more proactive approach in financial investigations. Prosecution services developed expertise in financial investigations while a Fiscal Antifraud General Directorate (FAGD) was set up within ANAF to provide specialised technical support to prosecutors in carrying out criminal investigations, in cases concerning economic and financial crimes.<sup>186</sup> However, these seizures did not translate into a convincing track record of confiscations: in 2011 courts ruled the confiscation of just EUR 4.75 million, of which only EUR 340,000 was actually confiscated. New legal provisions were adopted to improve the management of seized assets and a new law on extended confiscation was approved by Parliament in 2012. After 2012, DNA statistics show a significant increase of seizures by prosecution, but also in compensations and confiscations ruled in final court decisions. In 2015 alone, DNA seized EUR 493 million, and the courts ruled compensation amounting to EUR 190 million and confiscation of EUR 30 million. However, CVM reports in 2015 and 2016 continued to note that the estimates of the effective recovery rate to ensure that decisions of the courts accrue to the public purse remain very low, about 10%.<sup>187</sup>

The Government tabled a draft law in June 2015 to set up an agency to manage seized assets, to improve effective recovery, as well as to redistribute part of the sums for social re-use. The law was approved by the Parliament and promulgated in December 2015, and the Agency (ANABI) should be operational by end 2016 (see below). It will also take over the competencies of the Asset Recovery Office (ARO) from the Ministry of Justice.<sup>188</sup> ARO was established in 2011 to be responsible for operative exchange of data with other asset recovery authorities in the EU and CARIN<sup>189</sup> Member States, the identification and dissemination of good practices and the promotion of public policies in the criminal field.

Since 2010, CVM reports have detailed persistent shortcomings in public procurement, notably relating to the capacity and the degree of expertise of staff dealing with public procurement procedures, at both national and local level, the lack of stability and fragmentation of the legal framework, the institutional structures in place and the quality of competition in public procurement. The combination of these factors makes the system vulnerable to corruption and conflicts of interest.<sup>190</sup> The 2012 CVM report further noted that the control mechanism do not work properly, as evidenced by very low number of notifications from the responsible institutions to the prosecution. Together with the Commission, several evaluations and action plans have been carried out since 2011,

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<sup>186</sup> CVM reports 2014, 2012

<sup>187</sup> A comprehensive report on the recovery of damages and confiscation of the proceeds of crime during 2013-2015 was carried out by civil society in 2016. <http://www.justitiecurata.ro/portfolio-view/recuperarea-prejudiciului-si-confiscarea-bunurilor-dobandite-prin-infractiuni/>, which covered the 2013-2015 timeframe. The report focused on 3 key aspects: (1) analysis of the capacity of the criminal prosecution bodies to impose efficient precautionary measures; (2) analysis of the practice of courts of law, including their use of new legal institutions like extended confiscation; and (3) assessment of issues encountered during the enforcement of confiscation orders and the interest shown by institutions in bringing civil proceedings and recovering assets.

<sup>188</sup> CVM report 2016

<sup>189</sup> Camden Asset Recovery Inter-Agency Network, Established in 2004 and including States which are not in EU.

<sup>190</sup> CVM report 2016, 2015, 2013

but with limited results.<sup>191</sup> The 2016 CVM report noted that in 2015, a strategy and action plan to structurally improve the public procurement system and adapt it to the new EU rules was adopted, as well as setting up a new agency for ex-ante controls. The strategy – initially planned to be implemented by the end of 2016 but seriously delayed, as some of the actions will not be completed until 2019 – includes addressing the risks of integrity and corruption. Its implementation would be a significant step towards tackling public procurement as a major risk area for corruption.<sup>192</sup>

CVM reports have consistently recognised the importance of civil society in documenting and highlighting corruption problems and in providing support and expertise to concrete anti-corruption projects. NGOs such as Expert Forum, Freedom House, Funky Citizens and the Romanian Centre for European Policies (CRPE) have played a key role in taking forward policy and implementing change in areas including corruption prevention, as well as in analysing problems like public procurement or the low level of asset recovery. The impact has been particularly effective when government authorities have engaged with civil society.

## **5.2. National Anti-Corruption Strategy 2016-2020**

In January 2016, the Commission recommended to use EU funds to the full in spreading effective prevention measures against low-level corruption, through the National Anti-Corruption Strategy and through general reforms to public administration.

The National Anti-Corruption Strategy (NAS) 2016-2020 was adopted on 10 August 2016. The new strategy builds upon the results achieved in the implementation of the NAS 2012-2015, while aiming to improve underperforming areas. The new strategic document also relies on the conclusions and recommendations of the independent impact assessment of the NAS 2012-2015 carried out by a team of international experts selected by the OECD.

The NAS 2016 -2020 drew on an extensive and lengthy consultation process, public debates and technical meetings. In drafting the document, the Ministry of Justice held a series of meetings with representatives of central and local public institutions, of independent authorities and anti-corruption institutions, of business organisations and civil society (February-July 2016). These meetings were attended by approximately 90 public institutions, non-governmental organizations, business associations, as well as state-owned and private companies. The general public was also invited to present ideas for anti-corruption measures through an online platform.

The main goal of the new strategy is to set in place a better corruption prevention policy and promote integrity in the public sector through transparency of decision-making and budget allocation, emphasis on managerial responsibility for instilling and maintaining a culture of integrity within public organisations based on a strict legal and institutional framework to prevent and combat corruption in Romania. As such it plays an important role in general administrative reform of central and local public institutions.<sup>193</sup>

The main priorities of the NAS 2016-2020 are:

- Developing a culture of transparency of decision making, including transparency and predictability of budgetary allocations, and including local public administration;
- Increasing institutional integrity: strengthening preventive mechanisms such as ethics counsellors, post-employment prohibitions and whistle-blower protection, and the accountability of management for integrity failures;

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<sup>191</sup> CVM report 2012, 2013, 2014

<sup>192</sup> CVM report 2016

<sup>193</sup> The government has been attentive that the NAS correlates with complementary sectoral strategies such as the Strategy for Public Service Reform, the Strategy for Strengthening Public Administration, the Strategy for the Development of Justice as a Public Service, the National Strategy for Public Procurement, the National Strategy for Competitiveness and the National Strategy for the Digital Agenda.

- Strengthening integrity and reducing corruption risks in priority sectors such as healthcare, education, politics (MPs and parties), judiciary, public procurement, business, local governments;
- Increasing awareness and understanding of the integrity standards by public service employees and beneficiaries of public services;
- Consolidating performance in combating corruption through criminal and administrative means (notably DNA and ANI);
- Increasing the recovery of proceeds of crime.

The NAS 2016-2020 continues the decentralised approach of the previous strategy: each institution has to develop its own integrity plan and policies, including state-owned companies. A Technical Secretariat in the Ministry of Justice provides expertise, guidance and methodological support. For local authorities, the Ministry of Justice will continue its partnership with the Ministry of Regional Development and Public Administration.

The Minister of Justice is responsible for the implementation and coordination of the strategy, with an annual implementation report to Parliament. The five cooperation platforms developed under the NAS 2012-2015 will be maintained to support the monitoring process: covering independent authorities and anti-corruption institutions; central public administration; local public administration; business; and civil society. The platforms will be convened every six months or more frequently if required. The capacity of the Technical Secretariat has been increased, with 10 new posts (17 in total), and re-organised as a Directorate for crime prevention. The Technical Secretariat will have an essential role in maintaining the momentum of the NAS, but its place within the government also puts the onus on political will, and on monitoring by civil society. The budget for implementing new measures in the strategy is estimated at EUR 100 million partially funded through EU funds.<sup>194</sup>

The implementation of the strategy started shortly after adoption; the integrity plans should be finalised in the first six month after the adoption of the strategy. The public institutions at central and local level have also initiated the formal procedures to adhere to the strategy. A particular novelty is the inclusion of state-owned companies and the National Health Insurance body in the NAS.

The strategy has a comprehensive monitoring mechanism, including creation of an index of institutional integrity for vulnerable sectors, based on integrity incidents and self-assessments, as well as thematic peer-review missions. All institutions report twice a year to the Ministry of Justice, which itself issues an annual report. The Ministry of Justice will start by establishing a baseline situation for each indicator in 2017 (based on period September 2016 – August 2017). The strategy also defines output indicators and risks; but it is not clear whether there is also a regular analysis of the effective impact in terms of increasing transparency or reducing corruption. At the end of the strategy, Romania will carry out an external evaluation.

Civil society has been closely associated in the preparations of the NAS 2016-2020 and is also actively participating in implementation. For example, the Centre for Legal Resources (CRJ) has worked on the statute of the ethic counsellors, and Expert Forum, Freedom House and the Romanian Centre for European Policy are running a project focused on corruption and state-owned enterprises.<sup>195</sup> Other EU-funded projects have reported on corruption in the public sector, including in public procurement.<sup>196</sup>

<sup>194</sup> In addition, the implementation of the transparency and anti-corruption measures also require that every public institution with an average number of employees of 50 allocates, on average, an annual budget of about 900,000 RON per institution (about 200,000 euro).

<sup>195</sup> The project concerns Romania, Bulgaria, Italy and the Czech Republic. Its aim is to provide a strategic and comparative analysis of "clientelism" and corruption in state-owned enterprises. It includes looking at better safeguards against conflicts of interest and integrity criteria in the evaluations of managers. This work is part of a multinational consortium.

<sup>196</sup> Examples are: NGO Freedom House project on corruption in public procurement that brings together judges, prosecutors and civil servants and collaborates with the media to empowering local media to report

Amongst the initiatives under the umbrella of the NAS 2016-2020 is the work of the Anti-Corruption General Directorate within the Ministry of Internal Affairs. A project in partnership with the National Institute of Magistracy seeks to bring together over 30 Institutions to see how better inter-institutional cooperation can increase the efficiency of measures to prevent and counter corruption in public administration, including public procurement and management of EU funded projects.<sup>197</sup> Another project is organising awareness raising and education campaigns about corruption for students and pupils.

The effectiveness of the implementation of the NAS 2016-2020 is also heavily dependent on the implementation of broader reforms, in particular reform of the public administration in terms of transparency, integrity and the depoliticisation of appointments. Training on ethics and integrity for public servants and ethic counsellors is ongoing. However it appears that the implementation of other reforms and the adoption of the new laws required have been slower than expected.

### **5.3. Prosecution and trials of low-level corruption in 2016**

In 2016, the General Prosecution finalised more than 2333 cases of low-level corruption. 366 cases, involving 662 defendants, were sent to court (302 bills of indictment and 64 plea bargains) for alleged crimes of bribe-taking, bribe-giving, influence peddling and buying influence.<sup>198</sup> The defendants sent to trial included 105 police workers, 17 doctors, 14 professors, 27 mayors and a number of local public servants. Provisional arrest measures were taken in relation to 79 defendants (109 in 2015), 41 of them for bribe-taking, 18 for bribe-giving, and 17 for influence peddling. In the same period, 197 final decisions were ruled in court for cases of corruption and conflict of interest, sentencing 242 defendants, compared to 242 final decisions in the same period of 2015. In April 2016, the Control and Guidance Service of the Prosecution finalised a control report assessing the verification of the implementation of the local anticorruption strategies, the activity carried out by prosecutors in cases dealing with offenses of corruption, and conflict of interests and the activity of professional training of specialized prosecutors. The control had a far-reaching character and looked at all prosecution units. Several management measures were taken so as to make the activity of the prosecution units more efficient.

Corruption is an important priority in the Prosecution's institutional strategy for 2016-2020, including strengthening the fight against corruption in public administration and speeding up investigation of corruption offenses, conflict of interests, and other crimes with a deep impact on public resources and standards of living. The results on conflict of interest cases are presented in section 2.3.

In the course of 2016, the Control and Guidance Service of the Prosecution disseminated to all prosecutors an *analysis of cases dealing with offenses of conflict of interests*, providing an analysis of the criminal methods used to defraud public procurement procedures, and recommendations for improving prosecution and asset freezing in conflict of interest cases. The Prosecution were also involved with the development of the new Agency for asset forfeiture in order to assist prosecutors in identifying and seizing the assets, improve monitoring and analysis, conduct targeted controls, and complete an inventory of all movable and immovable assets subject to provisional measures.

This year, the Prosecution also undertook a number of important developments to improve managerial efficiency. It signed a protocol with the Mediation Council to develop better collaboration and inform litigants on possibilities to use mediation.

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on local procurement problems; [www.Anticorrpu.eu](http://www.Anticorrpu.eu), a project financed by EU through the seventh framework programme.

<sup>197</sup> Financed through the Internal Security Fund of the European Union. Training will be offered to the personnel involved in public procurement and the management of EU funds

<sup>198</sup> By comparison, in the same period of 2015, 2321 cases were completed, 344 of them by bills of indictment and plea bargains, the court being notified in relation to 903 defendants

#### **5.4. Confiscation of criminal assets and set-up of the National Agency for the management of seized assets (ANABI)**

In January 2016, the Commission had recommended ensuring that the new Asset Recovery Agency is set up with strong leadership, sufficient resources and the support of all other institutions to improve effective recovery. Other parts of the public administration should be clearly accountable for failure to pursue these issues.

##### *Results in Confiscation and asset recovery in 2016*

The amounts seized by final court orders in DNA cases are about EUR 30 million. The Commission did not receive information from the Public Ministry on the amounts seized during the investigations or the amounts confiscated by final court decisions, nor information on the sums effectively recovered by the State. The information of seizing and confiscation is now collected by the National Agency for the Management of seized assets (ANABI) and first results will be presented in its annual report due in February 2017.

The National Agency of Fiscal Administration (ANAF) is responsible for final recovery and is collaborating closely with ANABI to improve collection and statistics of the situation.

Whereas ANAF is doubling efforts to make an inventory and recover the confiscated assets, with a new directorate general in charge of recovering confiscated assets, their action is not always well perceived by the State authorities themselves. For example in January 2016, ANAF's attempt to apply a final court decision to evacuate and sell a building following a confiscation order over 18 months earlier sparked strong political and media reactions, as the building was still being used by TV stations. Some argued that press freedom was being endangered, with doubts also voiced by senior political figures. The Superior Council of the Magistracy concluded that such statements endangered the independence of justice while the DNA Chief Prosecutor reiterated the principle that any final court decision must be enforced, as a fundamental principle of the rule of law. ANAF was also supported by the national trade union of civil servants.

##### *Developments on the National Agency for the Management of Seized Assets (ANABI)*

ANABI will be responsible for managing frozen assets and for cooperation between institutions to ensure the effective recovery by the State of the confiscated assets decided by the courts. The law setting up the Agency was promulgated in December 2015. It should be fully operational within one year from its establishment, so throughout 2016, the government and the Minister of Justice adopted various decisions covering its institutional set-up, internal functioning and inter-institutional collaboration, as well as on how to undertake its responsibilities concerning the social re-use of the amounts recovered from selling confiscated assets. The director of ANABI was appointed and the Coordination Council supervising the Agency became operational. The Council elected as President of the Council the representative of the Superior Council of the Magistracy. The recruitment of personnel is ongoing (35 positions in 2016), with 15 additional posts attributed to the Agency for 2017.

The ongoing activities of the Agency are the completion of a national inventory of spaces for storing seized assets and a national inventory of seized assets. In November 2016, the Ministry of justice and ANABI launched the project "*Support for achieving the National Anticorruption Strategy objectives by increasing the efficiency of the asset recovery and management*". The project's objective is the creation, within the Agency, of a national integrated electronic system of criminal assets. This would be a centralised database to help the institutions concerned with criminal assets, by including information on the assets in respect of which measures were ordered by the prosecution, courts and enforcement bodies. The project, implemented in partnership with the Basel Institute on Governance, should be finalised in 2018.

ANABI will publish its first annual report in February 2017. The report should provide data from all institutions involved in the seizing and confiscation of assets: the Public Ministry, courts, ANAF and other competent institutions.

ANABI also took over the activity of the Asset Recovery Office (ARO) related to exchange of data and information at the EU and international levels. In October 2016, the Minister of Justice and

ANABI organised with the support of the European Commission the regular Platform meeting of asset recovery offices, back to back with the 6th Pan-European high level conference on asset recovery. The event brought together up to 100 experts in the field of recovery of the proceeds of crime, from the 28 EU Member States as well as from Albania, Switzerland, Luxembourg, Ukraine, Serbia. During the event, the work and expertise of the Romanian institutions could be presented.

## 5.5. Tackling corruption in different sectors

### *Healthcare*

Corruption in the Romanian health care system has been recognised as a particular problem and one faced by many Romanian citizens. The main problems relate to public procurement in hospitals, insurance fraud and false reimbursements, bribery for issuance of medical certificates giving access to special benefits and the widespread practice of informal payments to medical professionals. Corruption in the health care system came in the spotlight this year with several scandals relating to public procurement practices in public hospitals or schemes of fake sickness or retirement certificates. The level of corruption in the healthcare has a direct impact on the quality of public health services and directly affects access to healthcare in Romania, and in some cases patients have died as a result. One particular dramatic case which came to light following reports by independent investigation journalists<sup>199</sup> concerned a relatively small company, which was awarded numerous public contracts to supply disinfectants to more than 350 hospitals across Romania, including two of Bucharest's biggest emergency hospitals. The disinfectant sold was heavily overpriced and diluted, causing patients to die from nosocomial infections. There is also an investigation under way concerning the allegation that hospital directors received kickbacks from the company for the contracts awarded, a practice some consider to be widespread in the Romanian health sector.<sup>200</sup>

In December, the Minister of Health and the President of the National Agency for Public Procurement (ANAP) estimated that about 25%-30% of the public procurement contracts made by direct purchase in Romanian hospitals are suspicious, as a common practice of fraud is the "*salami slicing*" approach, with a large contract being divided into smaller contracts, in order to avoid open calls for tender.<sup>201</sup>

Following the disinfectants scandal, DNA initiated a number of other cases against hospital managers for bribe-taking in the award of procurement contracts.<sup>202</sup> Corruption in healthcare is also a priority for the Public Ministry. Previous CVM reports mentioned prosecutions for issuing fake sickness certificates. The dissemination of best practices in conducting investigations into such cases inside the Public Ministry, in particular through the regional and national anti-corruption competitions for prosecutors, was a starting point for other similar prosecutions. In 2016, a case<sup>203</sup> from Bihor County denouncing a scheme of early retirements on medical grounds obtained the first prize at the national anti-corruption competition. As a result of this case, the public budget saved 9 million EUR per year<sup>204</sup> on pensions. Other cases involved fictive confinements in psychiatric hospitals, in order for patients to

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<sup>199</sup> [www.Tolo.ro](http://www.Tolo.ro)

<sup>200</sup> DNA Chief Prosecutor declared that the amount of bribes in this sector is higher than in others, e.g. when usually the bribe amounts to 10% of the contract, in Healthcare it is about 20%. This bribe usually goes to public procurement's decision-makers within the awarding authority. Speech at the Annual DNA report on 25 February 2016 and in May 23rd – 24th 2016, at the Working Group on "*Corruption in the healthcare system – prevention and investigation. Experience, good practices and challenges*"

<sup>201</sup> Declaration of Minister of Health "*Every week, since I have been Health minister, I have Okayed sending a potential corruption case to the prosecutor's office, DNA or other investigation body. I discovered a system strangled by groups of interests, a cobweb choking the country, while on the web, here and there, the feudal spiders are making a business out of the patients' life and their health. In order to clean the system, we turned on the light to bring transparency at all levels.*"

<sup>202</sup> DNA carried out investigations in 26 cases of corruption in the healthcare system in 2016

<sup>203</sup> This a typical example, as mentioned in the past CVM report, of successful cases started by the Prosecutor general's offices and transferred afterwards to the DNA.

<sup>204</sup> 60 million are allocated yearly from the State Budget in Bihor County to the payment of medical based retirements.



obtain free medicines and early retirement decisions<sup>205</sup> and forged clinical trials, the latter part of a cross-border case with impact on several EU Member States.

In order to address the multifaceted issue of corruption in healthcare, the Ministry of Health has taken a series of measures to better monitor the budget and expenses of hospitals, improve transparency and strengthen internal controls, with more targeted verifications leading in 2016 to a series of cases being sent to prosecution services. A comprehensive set of measures are detailed in the National Anti-Corruption Strategy (NAS), such as creating a mechanism with clear criteria to prioritise budgetary allocations and assess the decisions of the Health Ministry and of the National Health Insurance Fund (NHIF), instilling more transparency and publicity (e.g. on expenses and on public procurement contracts but also sponsorships and asset and interests declarations), increasing the accountability of hospital managers and ensuring they are recruited through open competition<sup>206</sup> and changes to the hospital ethics councils law. The Government had adopted an emergency ordinance in November (79/2016) which modifies the selection of hospital managers to ensure they are selected by open competition and extends the coverage of conflict of interest provisions for a wider category of hospital management staff. This ordinance was rejected in the Senate in January 2017, but still needs to pass through the Chamber of Deputies.

In addition, a cooperation Protocol has been signed between the Ministry of Health, Ministry of Interior Affairs, the General Prosecution and DNA targeting preventive measures against corruption acts in the health system. The Health Minister launched in December 2016 a special telephone line where patients, doctors or witnesses of corruption cases in any medical unit can report potential breaches, including public procurement suspicions.<sup>207</sup> The system is managed by the General Anti-Corruption Directorate (DGA)<sup>208</sup> and receives also the patients' notifications registered through the new monitoring mechanism of the patients' satisfaction. DGA will provide data analysis and reports, case studies and other relevant material to the Ministry of Health.

The use of the electronic health card that registers all consultations and prescriptions has become mandatory since end of 2015. This tool should reduce the opportunities for social insurance fraud. Technical failures which held up its use were reported throughout 2016, but appeared to have been solved by the end of the year.

As part of the measures to support the health system, a salary increase of 25% for the staff within the National Health Insurance Body was approved end of December 2016.

### Education

The reputation of the Romanian education system continued to be affected in 2016 by corruption cases involving University professors<sup>209</sup> and scandals affecting plagiarism in PhD theses of high-level officials, raising questions about the way diplomas had been obtained (procedures and duly performed verifications). *Romania curata*<sup>210</sup> made public a list of 10 Universities not complying with the obligation to publish asset declarations for academic and management staff.

Education is another priority area of the New NAS 2016-2020. Measures planned include reorganising the National Council of Ethics and the Ethics and University Management Council; adopting a code of

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<sup>205</sup> Medicines that were sold afterwards for money and without prescription. This was the example of a case from Valcea County, Drăgășani Psychiatric Hospital.

<sup>206</sup> Including special commissions selected according to objective criteria.

<sup>207</sup> On 9 December 2016, "Any Romanian will be able to notify corruption cases in the healthcare system on the phone" said Health Minister Vlad Voiculescu. "There are 150 corruption cases pending at the DNA, but we cannot rely only on prosecutors to solve all our problems. That's why we are also counting on the patients and on the medical staff to help us keep the light on and to signal corruption cases".

<sup>208</sup> This is the same Green free line used by the DGA for all corruption reports, 0800 806 806. Citizens can also disclose corruption cases in the healthcare system directly to the Health Ministry by email at [presa@ms.ro](mailto:presa@ms.ro)

<sup>209</sup> DNA cases concerning Dean, Rector and other management Faculty function at Iasi, Oradea University and academic staff in Constanta University

<sup>210</sup> <http://www.romaniacurata.ro/ce-universitati-incalca-legea-1762010-si-ascund-declaratiile-de-avere-ale-rectorilor/>

ethics for pre-university education; adopting a national transparent framework based on performance criteria, to ensure the integrity of job competitions for inspectors and principals; and a deterrent system to curb plagiarism. As a first measure, the rules for appointing school principals were amended in 2016 to take away politicisation of the appointments. The first open competition was organised in autumn 2016 and 7,000 candidates took part. However a ministerial decision of January 2017 issued a derogation for sitting principals who failed the exam or did not participate to be nominated. The education sector also benefited from a 15% salary increase.

The NGO Romanian Academic Society, in partnership with the National Alliance of Students Organisations and Swiss Students Federation launched the "Public Romanian Universities Integrity programme" in November 2016 and assesses integrity of universities in Romania.

### *Police*

Integrity in the police has been a constant preoccupation. In the last years both DNA and the Public Ministry results constantly report a high number of cases of corruption in the police at all levels;<sup>211</sup> a situation which is particularly problematic as the Public Ministry and DIICOT have to rely heavily on the police for investigations (DNA has a dedicated judicial police within its organisation). A priority for both DIICOT and the Prosecutor General is to develop an internal judicial police. In 2016, DNA indicted 52 police officers, and final conviction court decisions were pronounced against 81 police officers (including a Deputy General Director of the Bucharest Municipality Police); while the Public Ministry indicted 105 police workers. If the largest share concerns traffic police,<sup>212</sup> several cases have revealed complex networks and corruption practices.<sup>213,214</sup>

Within the Ministry of Interior, the General Anti-corruption Directorate is responsible for investigation of corruption suspicions and for developing structural measures to prevent repetition of the same cases. In autumn 2016, the Minister of Interior took a series of measures to reform the intelligence and protection service within the Ministry. Part of the personnel will be re-allocated to the DGA to work on corruption issues. One of the weaknesses remains the politicisation of the appointments within the management of the police.

### *Public procurement*

In January 2016, the Commission recommended implementation of the new public procurement strategy and action plan, to ensure a robust anti-corruption framework in terms of the legal framework, institutional arrangements, and administrative capacity, as well as applying the measures to prevent and detect conflicts of interests, and showing that transgressions are followed up in full.

The integrity of the public procurement system is one of the priorities of the public procurement strategy, and the measures to tackle corruption entail a combination of institutional capacity building, streamlining of legislation, and actions to enhance competition and transparency in all phases of the

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<sup>211</sup> See DNA and Public Ministry results over several years.

<sup>212</sup> DNA indicted or investigated Chief Police Inspectors from Suceava, Vaslui, Prahova, Neamţ (where 14, - half of the Traffic Bureau of Piatra –Neamţ city have been arrested), Teleorman and Bihor counties for repetitives deeds and in Bucharest in November 2016 several police officers for hiding their own fellow traffic accident; In 2015, 42 police officers from the whole country were indicted by DNA; In addition, several cases concerning bribe taken by police officers conducted by DGA judiciary police working under the authority of Prosecutors attached to Mures, Giurgiu and Prahova.

<sup>213</sup> Other fruitful cases involving police officers revealed networks where perpetrators were often helped by the police to steal goods from public or private storing or forests (Harbour of Constanta (in 2015 a case involving steal of gasoline and in 2016 steal of iron), In Brasov county, stealing of wood in a proportion of 15m3/day.

<sup>214</sup> In 2011, a first case regarding bribe for driving licences was concluded in 44 indictments of police officers together with auto-instructors. However, since, the practice did not disappear, only the modus operandi became more sophisticated, with additional precautionary measures. In 2016, a case discovered that the new practice established implied the payment of the bribe by the student through the instructor, to a different specific instructor who acted as a "collector". Some intermediaries were former police officers. In July 2016, the indictment act covered 42 persons, with the plea bargain was used in 20 cases. This complex case required the work of 13 Prosecutors, as well as undercover agents.



procedure. The implementation of the public procurement strategy and action plan progressed in 2016.<sup>215</sup> In May 2016 the new public procurement laws transposing the EU Directives entered into force and all necessary secondary legislation was adopted by the end of 2016. The previous fragmentation of the legal framework had left important space for corruption practices and the new more stable and predictable legal framework should limit the possibility for corruption. The web-based guidelines which should help the contracting authorities step by step during the procurement process are however still under development and should be fully completed by 2019.

In addition to the legislative actions, the creation of the National Agency for Public Procurement (ANAP) in 2015 as single institution responsible for public procurement is seen as providing more robust and efficient corruption control and preventive institutional mechanisms. As part of the institutional reform, an Inter-Ministerial Committee for Public Procurement was set up in 2016, aiming at ensuring the overall coherence of the public procurement system. The Committee's role is to validate public procurement policies developed at Government level and to provide strategic systemic guidance. Fighting corruption in public procurement is expected to be high on the agenda of the committee and cooperation with institutions such as DNA, ANI, and DLAF would play an important role.

With regard to concrete measures aiming to prevent conflicts of interest and corruption in public procurement, several actions were taken forward, notably the law on the PREVENT system for ex-ante checks of conflicts of interests (See section 3.5). However several measures are still outstanding, such as:

- The reinforcement of internal control systems, the independence of preventive financial controllers in the exercise of their functions and the capacity to detect conflicts of interest of contracting authorities. New Government rules need to be adopted. A project with the European Investment Bank for technical assistance has recently been signed;
- The development of detailed web-based guidelines, help-desk, professionalization of procurement officers, development of centralised purchasing bodies and consortia of contracting authorities are meant to reinforce the administrative capacity of the contracting authorities and their capacity to withstand corruption and tackle conflicts of interests;
- Establishing effective cooperation and information exchange mechanisms between the investigation bodies;
- Building on the 2014 Directives to provide for a new, more comprehensive definition of conflict of interests;
- Roll-out of the randomised risk-based ex-ante control of public procurement procedures;
- Systematic publication in the e-procurement system of all contract modifications;
- Use of "integrity pacts".

The last three measures are also part of the National Anti-Corruption Strategy, illustrating the effective articulation between the measures of the public procurement strategy and the National Anticorruption Strategy.

At the end of November, a seminar<sup>216</sup> on public procurement case law was organised by the National Council for Solving Complaints (CNSC)<sup>217</sup> and the Bucharest Court of Appeal bringing together judges, representatives from public key institutions, Ministries and the Public Ministry.

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<sup>215</sup> The analysis of the progress in the implementation of the public procurement Strategy is part of a wider Commission exercise in relation to ex-ante conditions for the implementation of EFSI funds in the 2014-2020 period. Here the emphasis is on anti-corruption measures.

<sup>216</sup> With the support of the National Institute of Magistracy (NIM); A similar seminar good practices and public procurement case law was held in Pitesti in early November 2016

Civil society is regularly involved in projects to support corruption prevention in public procurement. NGO Freedom House Romania ran such a project including training<sup>218</sup> and real-time monitoring of public procurement procedures with a dedicated group of journalists throughout the country.<sup>219</sup>

#### *Management of EU funds*

Fraud against EU funds lays in the remit of the DNA. Statistics from DNA show a steady increase in the number of cases and the amount of damages identified.

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Cases sent to trial	11	26	32	23	29	45	54	57	52	65
Persons sent to trial	18	51	77	46	62	95	124	131	149	146
Damages (million lei)	1.7	1.6	3.2	7.5	8.7	22.6	71	239	70	112

This increased effectiveness is also confirmed by the European Anti-Fraud Office (OLAF), with more effective follow-up on OLAF judicial recommendations. The cooperation between OLAF and DNA have allowed complex investigations linked to EU co-financed programmes to be concluded successfully.

In cooperation with Transparency International and funded by EU funds, integrity pacts have been launched in June 2016, to safeguard EU funds against fraud and corruption, and as a tool to increase transparency and accountability, enhance trust in authorities and government contracting, contribute to a good reputation of contracting authorities, bring cost savings and improve competition through better procurement. However, the implementation of the pilots for the selected integrity pacts pilots has been delayed due to a slow start of preparation and implementation of the projects.

<sup>217</sup> CNSC is an administrative judicial body dealing with complaints in public procurement. The CNSC portal was continuously developed in the last three years and is now recognised as a useful tool for public procurement practitioners <http://portal.cnsr.ro/>

<sup>218</sup> Through 5 multidisciplinary trainings, a debate and two workshops regarding the new procurement laws, aimed at civil servants, as well as judges and prosecutors from Romania and Bulgaria, and contributing to the clarification of certain conflicting or ambiguous aspects of the public procurement law

<sup>219</sup> This monitoring resulted in a number of journalistic investigations focused on Romanian public spending, published on the website of the Initiative for a Clean Justice (<http://www.justitiecurata.ro/category/investigatii/>).