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

On Progress in Romania under the Cooperation and Verification Mechanism

{SWD(2019) 393 final}

1. INTRODUCTION

The Cooperation and Verification Mechanism (CVM) was established at the accession of Romania to the European Union in 2007 as a transitional measure to facilitate Romania's continued efforts to reform its judiciary and step up the fight against corruption.¹ It represented a joint commitment of the Romanian State and of the EU. In line with the decision setting up the mechanism and as underlined by the Council, the CVM ends when all the benchmarks applying to Romania are satisfactorily met.²

The CVM has been working since 2007 to encourage and follow the reform process on these issues. In January 2017, the Commission undertook a comprehensive assessment of progress over the ten years of the mechanism.³ This perspective gave a clearer picture of the significant progress made since accession, and the Commission was able to set out twelve recommendations whose realisation would suffice to end the CVM process, and which could be met under this Commission's mandate. Ending the CVM would depend on fulfilling the recommendations in an irreversible way, but also on the condition that developments were not such as to clearly reverse the course of progress.

Since then, the Commission has carried out two assessments of progress on the implementation of the recommendations. In November 2017,⁴ the Commission noted progress on a number of the recommendations, but also that the reform momentum had been lost in the course of 2017. It warned about the risk of re-opening issues which the January 2017 report had considered as fulfilled. These concerns were echoed by the Council.⁵

In the November 2018 report,⁶ the Commission concluded that developments had reversed or called into question the irreversibility of progress. As a result, the twelve recommendations set out in the January 2017 report were no longer sufficient to close the CVM and eight additional recommendations had to be made. The report called on the key institutions of Romania to demonstrate a strong commitment to judicial independence and the fight against corruption as indispensable cornerstones, and to restore the capacity of national safeguards and checks and balances to act when there is a risk of a backwards step. Both the European Parliament and the Council supported this view. The European Parliament issued a resolution calling for cooperation and citing the risk to the rule of law.⁷ The Council conclusions of

¹ Following the conclusions of the Council of Ministers, 17 October 2006 (13339/06), the Mechanism had been established by a Commission Decision of 13 December 2006 (C(2006) 6569).

² Council Conclusions on the Cooperation and Verification Mechanism, 12 December 2017 - https://ec.europa.eu/info/sites/info/files/20171212-st15587_en.pdf. The four benchmarks applying to Romania are set out in the accompanying Technical Report page 1.

³ COM (2017) 44 - https://ec.europa.eu/info/files/progress-report-romania-2017-com-2017-44_en.

⁴ COM(2017) 751 - https://ec.europa.eu/info/files/progress-report-romania-2017-com-2017-751_en.

⁵ Council Conclusions on the Cooperation and Verification Mechanism, 12 December 2017 - https://ec.europa.eu/info/sites/info/files/20171212-st15587_en.pdf.

⁶ COM(2018) 851 final - https://ec.europa.eu/info/sites/info/files/progress-report-romania-2018-com-2018-com-2018-851_en.pdf

⁷ European Parliament non-legislative resolution on the rule of law in Romania of 13 November 2018, P8_TA-PROV(2018)0446. This called on the Romanian Parliament and Government to address the issues on the basis of a transparent and inclusive process and to cooperate with and to fully implement all recommendations of the European Commission, the Council of Europe's Group of States against Corruption (GRECO) and Venice Commission, and to refrain from any reform which would put at risk respect of the rule of law, including the independence of the judiciary.

December 2018 specifically called on Romania to implement the additional recommendations.⁸

This report takes stock of the situation since November 2018. In this period, the Commission has had to raise rule of law-related concerns a number of times, specifically voicing concerns on backtracking from the progress made in previous years. For much of this period, there was little or no willingness on the part of Romanian authorities to engage with the additional recommendations of November 2018 – or indeed with recommendations issued by the Venice Commission and the Council of Europe’s Group of States against Corruption.⁹ The efforts of those seeking to reverse the negative trend – which have included not only political voices, but also civil society and magistrates – have not been able to prevail. This led to fundamental doubts about whether the checks and balances recognised in the January 2017 report were working. In May 2019, the Commission addressed a letter to the Romanian authorities setting out how recent developments had further exacerbated the existing problems regarding the respect for the rule of law in general. It raised the prospect that if the situation did not improve, the Commission would have to take steps under the rule of law framework.¹⁰ In June 2019, in a meeting with President Juncker and First Vice-President Timmermans, the Romanian Prime Minister committed not to pursue the controversial judicial reforms and to immediately resume dialogue under the CVM in order to progress on judicial reforms and fight against corruption. This changed approach was also in tune with the results of a referendum in May 2019, called by the President of Romania, in which an overwhelming majority of Romanian citizens supported propositions to strengthen the safeguards against corruption and the arbitrary use of emergency ordinances.¹¹

As in previous years, this report is the result of a careful process of analysis by the Commission, drawing on close cooperation with Romanian institutions, as well as on the input of other Member States, and of civil society and other stakeholders.

2. GENERAL SITUATION

The January 2017 report noted that there were broader societal, legal and political factors which, although not within the scope of the CVM and not covered by its recommendations, ‘have a direct bearing on the ability to deliver reform and in particular have made it more difficult for Romania to show that reform has taken root on a permanent basis’. Points noted

⁸ The Council Conclusions of 12 December 2018 called on Romania ‘to restore the positive momentum on reforms and take prompt action, notably on the additional key recommendations set out by the Commission related to the independence of the judiciary and judicial reform, to the fight against corruption at all levels, as well as on other integrity issues highlighted in the report’ (https://ec.europa.eu/info/sites/info/files/2018-st15187_en.pdf).

⁹ In particular, Venice Commission opinions 924/2018 on the Justice laws amendments and 930/2018 on the Criminal Codes amendments. GRECO AdHocRep(2018) 2 on the Justice laws amendments. The Group of States against Corruption (GRECO) was established in 1999 by the Council of Europe to monitor compliance with the organisation’s anti-corruption standards.

¹⁰ The Rule of Law Framework was set out by the Commission in 2014 to prevent the emergence of a systemic threat to the rule of law, at which point an Article 7 TEU procedure would be required. It provides a staged process of dialogue with a Member State, structured with opinions and recommendations from the Commission. The scope of the Rule of Law Framework is broader than the CVM benchmarks and covers all aspects of the rule of law.

¹¹ The referendum on justice called by the President of Romania took place on 26 May with a participation rate of above 40%. Over 80% of electors voted in favour of banning amnesty and pardon for corruption offenses and 81% voted in favour of banning the adoption by the Government of emergency ordinances in the area of crimes, punishments and judiciary organisation, as well as with extending the right to challenge ordinances directly at the Constitutional Court.

included a legislative practice still to develop better regulation principles, a confrontational atmosphere between state actors, and the media environment. Subsequent reports have confirmed these factors as having a clear negative impact on the advance of judicial reform and the fight against corruption.

Developments since the last report have shown again that major legislative changes, also outside the justice domain, rushed through using urgency procedures with minimal consultation, have damaged both the quality of legislation and public confidence in policy-making. Judges and prosecutors have continued to face misleading coverage and unduly personal attacks in the media, with mechanisms for redress falling short, ultimately affecting the reputation and the credibility of the justice system as a whole. Different branches of the State have again been in conflict, and increasingly these divisions are played out in the Constitutional Court, further increasing tensions and showing that loyal cooperation falls short.

The debates on the cooperation agreements between the judicial institutions and the Romanian Intelligence Services ('secret protocols')¹² continue to be divisive. A decision by the Constitutional Court has paved the way for the courts to deal with ongoing and future cases, but there is still uncertainty about the actual impact. The Commission can only reiterate that the goal should be a framework where the intelligence services are under proper democratic oversight, where crimes can be effectively investigated and sanctioned in full respect of fundamental rights, and where the public can have confidence that judicial independence is secure. The Commission recalls its previous suggestion that expertise from other Member States could be valuable in building a stronger system for technical surveillance measures used by the prosecution and for the collaboration between the intelligence services and the prosecution essential for pursuing serious crime such as terrorism and cybercrime.¹³

The EU's approach to the rule of law, beyond the scope of the CVM, also influences the broader environment at EU level. Effective judicial protection by independent courts is required by Article 19(1) TEU as a concrete expression of the value of the rule of law, as confirmed by the European Court of Justice's recent case law. The Commission's Communication of July 2019¹⁴ sets out concrete actions to strengthen the Union's capacity to promote and uphold the rule of law, to prevent rule of law concerns from arising through the establishment of a rule of law review cycle to monitor developments in Member States, and to provide an effective response. The Political Guidelines for the next Commission have set out the intention to put in place a comprehensive rule of law mechanism with an EU-wide scope and objective reporting for all Member States.¹⁵ The deepening of such horizontal processes monitoring the rule of law in all Member States, and the perspective of their further evolution, underline the specific nature of the CVM as a monitoring process limited both in terms of the Member States concerned, and the issues covered. Such horizontal processes monitoring the rule of law in all Member States would serve to provide a basis for further EU support to reform in Romania, once the Commission assesses progress has been sufficient to meet the commitments made by the time of its accession to the EU. In the meantime, issues relevant to

¹² See 2018 progress report, p.2.

¹³ The operation of intelligence services is not a matter for the EU and falls outside the CVM benchmarks.

¹⁴ *Strengthening the rule of law within the Union - A blueprint for action*, COM/2019/343 final. This will complement the 2014 rule of law framework

¹⁵ *Political guidelines for the next Commission (2019-2024) - "A Union that strives for more: My agenda for Europe"* p. 14-15, see https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf.

the rule of law, but not within the scope of the CVM, would be addressed under the new mechanism.

3. ASSESSMENT OF PROGRESS ON THE FULFILMENT OF THE RECOMMENDATIONS

This section assesses progress on the 12 recommendations of January 2017 and on the eight additional recommendations of November 2018. The fulfilment of these additional recommendations remains essential to put the reform process back on track, redress the negative effects of the backtracking identified in November 2017 and November 2018 and resume progress towards the completion of the CVM.

3.1. Benchmark One: Judicial independence and Judicial reform

3.1.1. The November 2018 recommendations: putting the reform process back on track

Justice laws and legal guarantees for judicial independence

The November 2018 report noted that the amended Justice laws which entered in force in July and October 2018 could result in pressure on judges and prosecutors, and ultimately undermine the independence, efficiency and quality of the judiciary. Rather than addressing issues raised in previous CVM reports, the laws had introduced new risks, notably through the Special Section to investigate magistrates, as well as the disciplinary and liability regime. As a result, the Commission concluded that the laws represented a step backwards from the January 2017 assessment, and proposed a pause for consideration by freezing the entry into force of the changes.

The November 2018 report recommended to:

- *Suspend immediately the implementation of the Justice laws and subsequent Emergency Ordinances.*
- *Revise the Justice laws taking fully into account the recommendations under the CVM and issued by the Venice Commission and GRECO.*

These recommendations were not followed by the Romanian authorities, who also argued that the justice laws had legal effects which could not be halted.

The objective of the recommendation was to address the substance of the problems created by the laws, and subsequent steps exacerbated these problems. In addition to the three emergency ordinances adopted in September and October 2018, in early 2019 the Government adopted two further emergency ordinances modifying the justice laws.¹⁶ As in previous cases, the speed of adoption, lack of consultation and unclear rationale behind these emergency ordinances affected the legal certainty and predictability of the judicial process. Amendments to accelerate the setting up of the Special Section to investigate crimes committed by magistrates and extend its competence, or successive changes to the requirements and procedural rules to appoint prosecutors (including management) in the National Anti-corruption Directorate (DNA) further increased the concerns and the lack of trust in these amendments.¹⁷ In particular, some of the amendments appeared to have changed the law to serve the interests of specific persons.^{18,19} These emergency ordinances sparked very negative

¹⁶ Emergency Ordinances No.7/2019 of 20 February 2019 and No.12/2019 of 5 March 2019.

¹⁷ See also the Technical report for more details on the amendments.

¹⁸ Examples include: Increasing retroactively the seniority requirements for prosecutors, which barred certain persons from certain posts; lowering the requirements and modifying the appointment procedures for the

reactions, which contributed to the specific reaction of the public, in the referendum of 26 May 2019, to the amendment of laws in the field of justice via emergency ordinances.

The implementation of the amended justice laws in practice has also confirmed the concerns raised in the November report in terms of the damage to the judicial system. In particular, the operation of the Special Section for the investigation of offences committed by magistrates has confirmed the fear voiced both inside and outside Romania that the section could be used as an instrument of political pressure.²⁰ There are various examples where the Special Section exercised its powers to change the course of criminal investigations in a manner which raises serious doubts about its objectivity.²¹ These examples include cases where the Special Section launched investigations against judges and prosecutors who had opposed the current changes to the judicial system, as well as abrupt changes in the approach followed in pending cases, such as the withdrawal of appeals previously lodged by the DNA in high-level corruption cases.²² Management appointments to the Special Section have also been the cause of controversy. The result has been calls from many stakeholders in Romania that the Special Section should be disbanded.²³

The Venice Commission adopted an opinion on the emergency ordinances in June 2019,²⁴ confirming the additional concerns raised by the new amendments²⁵ and by the functioning of the Special Section. In two new reports of June 2019, GRECO raised similar concerns.²⁶

In July 2019, the Minister of Justice expressed a willingness to identify appropriate legislative solutions, in consultation with the judiciary and the Parliament, as part of a new process of structured consultation.²⁷ However, later statements from the Government leadership

management of the Special Section, which allowed certain persons to be appointed; and endorsement of nominations of top prosecutors by the Plenum of the Superior Council of Magistracy, which avoided a negative opinion from the prosecution section.

¹⁹ Venice Commission, Opinion 950/2019, para. 49.

²⁰ In this context it should also be mentioned that the Special Section registered a criminal investigation against several members of the Commission and of its staff following a complaint issued on 30 January 2019 accusing them of abuse in service, false communication of false information and the establishment of an organised crime criminal group in relation to the drafting of the November 2018 CVM report. That investigation also targeted the incumbent Prosecutor-General. The Commission recalls that in the territory of each Member State the members of the Commission and of its staff are immune from legal proceedings in respect of acts performed in their official capacity, by virtue of the Protocol on Privileges and Immunities attached to the Treaties. Despite the Romanian authorities thus lacking jurisdiction in these matters, the Special Section registered the case on 11 February and closed it only on 27 March invoking a lack of evidence. http://www.mpublic.ro/ro/content/c_28-03-2019-13-03

²¹ A key example concerned a criminal case against the former Chief Prosecutor of the National Anti-corruption Directorate while she was a candidate to be European Public Prosecutor. The timing of the opening of the criminal case and the calendar of summons seemed specifically designed to frustrate this candidacy, and a decision by the High Court of Cassation and Justice on the preventative measures applied qualified the case as unlawful. The fact that another case was registered involving the Prosecutor-General seemed to confirm the pattern of steps taken against senior magistrates critical of the Section.

²² See Technical Report for examples and details.

²³ This includes magistrates associations, civil society organisations, and opposition parties.

²⁴ Opinion on Emergency Ordinances Geo No. 7 And Geo No. 12 Amending The Laws Of Justice, CDL-AD(2019)014, 21-22 June 2019) - [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2019\)014-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)014-e)

²⁵ The opinion points to serious questions about the soundness and the rationale of some of the changes.

²⁶ GRECO AdHocRep(2019)1 and GRECO RC4(2019)11.

²⁷ A working group inside the Ministry of Justice, with the consultation of all judiciary bodies and professional associations of magistrates is working on an assessment. On 17 September 2019 the Minister of Justice announced that preliminary conclusions reached at working level do not support the functioning of the Special Section in its current form.

suggested that no changes would be proposed on the Special Section. Therefore the issues raised by the European Commission, the Venice Commission and GRECO have not resulted in further amendments.

Appointments within the judiciary and pressure on judicial institutions

Developments since November 2018 have confirmed the pertinence of the long-standing recommendation of the CVM to make the appointment process of top prosecutors more robust and independent. The 2018 CVM report had raised concerns notably on the ongoing dismissal/appointment procedures of the Chief Prosecutor of the National Anti-Corruption Directorate (DNA) and the Prosecutor General.

The November 2018 report recommended to:

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

There was initially no follow up to these recommendations. The then Minister of Justice maintained his choice of candidate for the post of Chief Prosecutor of the DNA. The President of Romania refused to appoint that candidate for a second time in January 2019. Since then the procedure is *de facto* suspended, the DNA being managed *ad interim*. The then Minister of Justice also pursued the dismissal procedure against the Prosecutor General, despite a negative opinion from the Superior Council of Magistracy. The President of Romania refused the dismissal in January 2019. However, as the post was up for renewal in May 2019, the Minister organised an appointment process in April. As had been the case for the procedure for the DNA chief prosecutor in July 2018, the Minister rejected all candidates as unfit, in spite of the fact that many were serving senior prosecutors, including the sitting Prosecutor General. As a result, the Prosecutor General decided to retire and this function is now also exercised *ad interim*.²⁸ The then Minister had launched a new appointment procedure for the Prosecutor General but this was cancelled by the new Minister of Justice, who took office in April 2019. The approach of the current Minister avoided a further deterioration of the situation and gave space to improve the procedure. This should be pursued as a matter of priority by the Romanian government, as the experience of recent years confirms the risk of political influence in the process to the detriment of the quality of appointments, and the need for a long-term, sustainable solution.

The Judicial Inspection plays a key role in ensuring public confidence in the independence, professionalism and integrity of the judiciary. After years of positive assessment, the November 2018 report had pointed to substantial concerns about the Inspection: a pattern of disciplinary proceedings against magistrates publicly opposing the direction of reform of the judiciary, leaks of documents – which were then used by politicians to attack judicial institutions – and the prolongation of the management team by the Government.

²⁸ On 2 October 2019, the Chief Prosecutor of the Directorate for investigating organised crime and terrorism (DIICOT) resigned following scandals in relation to ongoing investigations and political pressure. All top prosecutorial functions are now exercised *ad interim*.

The November 2018 report recommended

- *The Superior Council of Magistracy to appoint immediately an interim team for the management of the Judicial Inspection and within three months to appoint through a competition a new management team in the Inspection.*

The Superior Council of the Magistracy did not appoint a new interim management team and therefore the Chief Inspector remained *ad interim* until May 2019, when the Superior Council re-appointed the same Chief Inspector, despite the controversies. At the same time, since the last report, the pattern of disciplinary proceedings against magistrates,²⁹ including the heads of judicial institutions who oppose the reforms of the judiciary, have continued, as well as the leaking of documents.³⁰ The recommendation of November 2018 has therefore become overtaken by events, but the underlying concerns remain fully applicable.

Successive CVM reports have pointed to the pressure on magistrates and judicial institutions from public attacks from the political world and the media. Since the beginning of 2018, this has been compounded by the actions of the authorities responsible for disciplinary and criminal investigation of magistrates. The National Anti-Corruption Directorate has long been a particular focus of such pressure, as well as the office of the General Prosecutor. The period of reference also saw a sharp increase of pressure on the High Court of Cassation and Justice, which is competent for many high-level corruption trials. Two constitutional conflicts were launched by the Government against the High Court regarding its interpretation of procedural rules on the constitution of criminal judges panels.^{31,32} In addition, the Judicial Inspection filed a disciplinary complaint against its President and the judges section of the Superior Council called for her revocation. These combined steps seem to have the objective of pressurising the High Court and when the President announced her intention not to apply for a second term of office, she made clear that this was the reason.³³

The Superior Council has recently appointed a new High Court President. It will be particularly important that the High Court maintains the independence and high professionalism, including in the fight against high-level corruption, under the new leadership.

These developments confirm the assessment made by the Commission in the November 2018 report that the Superior Council of Magistracy is not fulfilling its role of providing effective checks and balances to defend the independence of judicial institutions under pressure. (see Recommendation 7).

²⁹ Examples of disciplinary investigation in relation to public statements critical of the ongoing reforms: <https://www.csm1909.ro/ViewFile.ashx?guid=2be852a5-365b-44e2-990d-47696231789a>[InfoCSM]; <https://www.csm1909.ro/ViewFile.ashx?guid=38b70eb6-641a-4794-9109-e6805dfd778e>[InfoCSM], <http://www.inspectiajudiciara.ro/Download.aspx?guid=7c561595-2efe-4ce4-abd7-3150b5d52274>[InfoCSM] http://portal.just.ro/36/SitePages/Dosar.aspx?id_dosar=20000000361685&id_inst=36 <https://cursdeguvernare.ro/asociatia-initiativa-pentru-justitie-inspectia-judiciara-incearca-sa-i-intimideze-pe-magistratii-care-lupta-pentru-apararea-independentei-justitiei.html>;

³⁰ A recent example concerns the report of the Judicial Inspection on the use of the arrangements of collaboration between the prosecution and the intelligence services for wiretapping. The report was leaked to the media before the Superior Council could analyse it.

³¹ These constitutional conflicts were referred to the Constitutional Court by the Government invoking a conflict between the Parliament (as lawmaker) and the High Court, on the grounds that the High Court had exceeded its constitutional powers in its interpretation of the law and substituted itself to the lawmaker.

³² Doubts have been expressed that it was for the Constitutional Court to rule on the legal interpretation given by the High Court.

³³ <https://www.mediafax.ro/social/tarcea-despre-refuzul-de-a-mai-candida-la-inalta-curte-m-a-facut-sa-imi-fie-dor-sa-traiesc-printre-oameni-cu-bun-simt-18218170>

Criminal Codes

In July 2018, the Romanian Parliament had adopted in an urgency procedure changes to the criminal code and criminal procedure code. These changes were heavily criticised, including by the European Commission and the Venice Commission.³⁴ A particular source of concern was the abrupt change in the balance between the rights of the accused, victims' rights and the duty of the State to pursue crimes effectively. The changes were clearly in conflict with the CVM recommendation to improve the stability of the codes and to amend them only to where this is specifically required by Constitutional Court decisions and transposition of EU Directives. Many changes appeared incompatible with EU law or international obligations of Romania. In October 2018, the Constitutional Court ruled that many of the changes were unconstitutional.

The November 2018 report recommended to:

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

These recommendations were not followed up. There was a pause, but no acknowledgement of the concerns, and this time was not used to deepen reflection and consultation. In April, the Parliament adopted modified amendments of the two codes, as well as the special law on corruption, using an urgent legislative procedure. Many amendments continued to raise concerns on the grounds of their impact on the capacity of law enforcement and the judiciary to investigate and sanction crimes in general, and corruption-related crimes in particular. The justification provided by the majority supporting the changes in Parliament was to maintain only those amendments which were not held unconstitutional by the Constitutional Court decisions of October 2018. The opposition parties and the President of Romania challenged these amendments before the Constitutional Court, and it ruled in July 2019 that the amendments as a whole are unconstitutional and not in line with its earlier decisions.³⁵

Whilst the intervention of the Constitutional Court has effectively brought an end to this legislative process and meant that the amendments will not come into force on grounds of constitutionality, the concerns of the European Commission and many other observers were grounded in the policy choices made in the amendments. It therefore remains a concern that the policy choice taken has not been explicitly renounced.³⁶

3.1.2. The January 2017 recommendations: Judicial independence and judicial reform

3.1.2.1 Judicial independence

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

³⁴ Venice Commission Opinion 930/2018

³⁵ The motivations of the rulings have not yet been published.

³⁶ In August 2019, the Parliament formally rejected a law on amnesty and pardon from February 2017, which had remained on the parliamentary table.

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

Appointments

In January 2017, the Commission reiterated its recommendation to put in place a system of transparent and merit-based appointments of top prosecutors, able to provide sufficient safeguards against politicisation. The November 2018 report concluded that the situation had deteriorated, and this trend has continued (see above).³⁷

The transparency of the procedure has been increased, notably with the publication of criteria for selection and evaluation by the Ministry of Justice. The current Minister of Justice has acknowledged the need for further improvements. However, the fact that there have been four changes in less than six months illustrates that useful improvements in the short term do not equate to a long-term solution. As previously set out in CVM reports, the problems are of such long standing that changes need to be found which are built on a consensus and embedded in law. The involvement of the Venice Commission remains the best way to find a balance between the involvement of the government and the judicial authorities which can command public confidence.

Codes of conduct

In the reporting period, criticism of the judicial system and individual magistrates in the media and from the Government and the Parliament representatives has continued to be particularly common.

A Code of Conduct for parliamentarians is in place since the end of 2017. The November 2018 report found that with a lack of explicit provisions on the respect for the independence of the judiciary, the Code was not yet performing this function. Since the November 2018 report, in certain cases sanctions have been imposed by the Chamber of Deputies for breaches of the Code, but these cases do not appear to relate to cases of criticism of the judiciary likely to undermine its independence.³⁸

The Commission had also suggested that it would be beneficial to have a ministerial code and in April 2019, the Government amended the ministerial code of conduct to include an explicit mention of the need to respect judicial independence. It is not yet clear whether this code is able to act as an effective tool of accountability.

3.1.2.2 Judicial reform

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

³⁷ COM(2018) 851 and SWD(2018) 551. See also the Venice Commission Opinion No. 924/2018 of 20 October 2018

³⁸ <http://www.cdep.ro/pls/dic/site2015.page?id=1046>

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

Code of Civil Procedures

Recommendation 3 covers the finalisation of the reform of the Code of Civil Procedures, which set up a council chamber stage in the civil procedure. In 2018, this reform was abandoned.³⁹ This means that a step designed to increase the efficiency of civil justice will no longer take place, but this should provide an opportunity for a period of stability in this branch of the judicial system.

The transparency and predictability of the legislative process for legislation on judicial reform and anti-corruption measures (for the Criminal Codes, see above)

The January 2017 report made clear that the *process* used to legislate was itself important. This has continued to raise concerns. The process of amending the justice laws by a series of emergency ordinances was strongly criticised by the Venice Commission,⁴⁰ due to the impact of the process on the quality of legislation, legal certainty, external checks on the Government, and the principle of separation of powers.⁴¹ Similarly, as noted above, the legislative process in Parliament of April 2019 amending the criminal code and criminal procedure code and the special law on corruption lasted only about one week.

This was a major point cited in the Commission's May 2019 letter expressing concerns of risks to the rule of law. This concern was also reflected in the May referendum, where there was strong public support for a more orderly process. The Prime Minister declared that the Government would follow the results and would abstain from adopting emergency ordinances in the area of justice. In September 2019, the Parliament also disbanded the Special Parliamentary Committee on systematisation, unification and ensuring legislative stability in the judiciary, which was responsible for some of the most abrupt procedures used.

Since the November 2018 report, legislative developments in relation to the legal framework for integrity have created similar concerns. Successive changes to integrity laws have significantly increased the lack of clarity and legal certainty (see Benchmark two).

³⁹ The amended laws entered into force in December 2018. Law 310/2018 17 December 2018 amending and supplementing Law 134/2010 on the Code of Civil Procedure.

⁴⁰ Venice Commission opinion 950/2019.

⁴¹ The opinion concludes: 'most alarmingly, the Government continues to make legislative amendments by emergency ordinances. While the Constitution clearly indicates that this should be an exceptional measure, legislation by the GEOs became a routine. Fundamental rules of the functioning of key State institutions are changed too quickly and too often, without preparation and consultations, which raises legitimate questions about the soundness of the outcomes and of the real motives behind some of those changes. The resulting legal texts are not clear. This practice weakens external checks on the Government, it is contrary to the principle of separation of powers and disturbs legal certainty.'

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

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

Respect for court decisions

The Romanian Government approved on 3 April 2019 a Memorandum on ‘measures to ensure the execution of judgments against a public debtor, in accordance with the case law of the European Court of Human Rights regarding non-execution or execution with delay of the judgments handed down against a public debtor’. This comes as a follow up to the ‘Săcăleanu vs. Romania’ group of cases from the European Court of Human Rights.⁴²

The proposals contained in the Memorandum, including the necessary regulatory measures, are now subject to an analysis by the Romanian authorities to prepare for their implementation. The Ministry of Justice and the Superior Council of Magistracy are in the last stages of the development of the ‘ECRIS’ IT application, which will be used to identify the number of definitive judgments in which public institutions are debtors or creditors.⁴³

Structural reforms to the judicial system

The Strategic Judicial Management has not been operating as intended during most of the period of reference.⁴⁴ Meetings restarted in September 2019, also backed up with new coordination mechanisms and efforts to build dialogue with the magistracy, professional associations and civil society.⁴⁵ Given the current challenges, it is essential that the Strategic Judicial Management develops into a forum able to address major strategic questions for the judicial system. It could in this way act as a way to restore trust between the key judicial and governmental institutions. The fact that fundamental changes in the functioning and the organisation of the justice system have been applied through emergency ordinances, rather than through consensual decisions from the Strategic Judicial Management, can only reduce the effectiveness and sustainability of those changes.⁴⁶

⁴² The Action plan of structural measures in relation to the Săcăleanu group of cases can be found at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806dda63>

⁴³ See Technical Report – Recommendation 5.

⁴⁴ The Strategic Judicial management includes the Minister of Justice, the Superior Council, the High Court and the Prosecutor General. It was established in 2016 as a forum to facilitate discussion and consensual decision-making on strategic orientations and resources for the judicial system. It also oversees the implementation of the Strategy for the development of the Judiciary.

⁴⁵ A meeting of the Strategic Management Council took place on 17 September. The current Minister of Justice plans to have meetings every six weeks. In parallel working groups and consultations have taken place on the Special Section to investigate offences committed by magistrates and the criminal codes.

⁴⁶ Such as the Emergency Ordinances on the justice laws adopted between September 2018 and March 2019.

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

The transparency and accountability of the Superior Council of the Magistracy

Whilst the Superior Council of the Magistracy reports that it continues to implement the priorities for its mandate,⁴⁷ the period since the November 2018 report has been marked by division and controversy in the Superior Council. In addition, it was often sidelined when essential decisions on the organisation and the functioning of the judiciary were taken by the Government or Parliament. Positions within the Superior Council on issues fundamental to the functioning of the Romanian justice system, such as the Special Section to investigate magistrates or key nominations and on defending the independence of justice, raise concerns about its institutional independence and authority. This has been further exacerbated by amendments to the justice laws which made it possible for decisions on key issues to be determined by only a few Superior Council members (see above). This is also evidenced by statements issued on behalf of the Superior Council but agreed by only part of its members. The pattern is also illustrated by a lack of support of the professional associations or concertation with magistrates in courts and prosecution offices. The Superior Council was divided on how to react to the recommendations of the European Commission, the Venice Commission and GRECO, and more generally on when to take action in defending the independence of justice, as the current Superior Council President and part of its members continue to defend the texts of the justice laws as they stand. The Superior Council has reacted to some complaints brought to its attention regarding the defence of the independence, reputation and impartiality of magistrates, but it seems of rather modest proportion in comparison to the extent of the problem. Where the Superior Council has cited a defence of the independence of the judiciary, it has sometimes raised issues of potential political partiality.⁴⁸

Progress has continued on Benchmark one in relation to recommendation 5 (execution of judgements) and recommendation 3 (only as regards the Code of Civil Procedure). Recommendations 1, 3 and 4 have not been implemented. Recommendations 2, 6 and 7 have seen no progress towards meaningful results. As for the additional recommendations of November 2018, the situation has deteriorated further, and a more recent positive approach has not borne fruit in terms of concrete measures to redress the situation. Concerns about risks to the effectiveness and independence of the judicial system have been confirmed. As a result, the Commission considers that Benchmark one cannot be considered as fulfilled and that the Romanian authorities need to take steps to address all the January 2017 and November 2018 recommendations.

⁴⁷ for the period 2017–2022

⁴⁸ For example statements condemning declarations of the President of the European Parliament criticising the preventive measures taken by the special section to investigate magistrates, which prevented the EPPO candidate to attend the hearing at the European Parliament; and of the President of Romania rejecting the proposal for Minister of Justice made by the Prime Minister in August 2019.

3.2. Benchmark Two: Integrity framework and the National Integrity Agency

Predictability and legal certainty regarding the integrity legal framework

Previous CVM reports had highlighted the continued challenges to the legal framework for integrity and the need for stability and clarity. In the last two and a half years five legislative proposals modifying the integrity laws have been adopted. Besides weakening certain provisions and the ability of the National Integrity Agency (ANI) to continue carrying out its work, this succession of amendments has further contributed to maintaining a fragmented legal landscape.

Two proposals entering into force in 2019 raise particular concerns. The first sets a prescription deadline of three years from the deeds that determine the existence of a state of conflict of interest or incompatibility. This firstly has a concrete impact on ongoing cases, with ANI expecting to have to close about 200 investigations by the end of this year. Secondly, it creates an inconsistency with other provisions of the integrity framework, with the result that it is now unclear whether a sanction can still be imposed following a final court decision if this (rather than the ANI report itself) comes after the end of the three year period. The second proposal amends the sanctioning regime regarding conflict of interests for local elected officials, introducing a new administrative sanctioning regime. This is less demanding than the current one and ANI considers that it does not allow for dissuasive sanctions. Sufficiently dissuasive sanctions for incompatibility and conflict of interests are an important element in the prevention of corruption. These two proposals increase the legal uncertainty as regards the applicable integrity regime and create a risk of backtracking on Benchmark two if 'dissuasive sanctions' can no longer be imposed (despite a final court decision).

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

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

The PREVENT system

The November 2018 report had considered this recommendation fulfilled. The PREVENT system remains fully operational and ANI reports positive results. More broadly, the track record of ANI remained steady on investigations of incompatibilities and administrative conflicts of interests.⁴⁹

Follow-up of court decisions concerning Members of the Parliament

The November 2018 report pointed at delays and apparent inconsistencies in the application of sanctions for Members of Parliament who were found to hold incompatible functions or to be in a state of conflict of interest by a final court decision rendered on the basis of a report from ANI. It highlighted a possible divergent interpretation of the rules (notably when the integrity incident in question came in a previous mandate or position). The report suggested a need for clarity on the rules on incompatibilities and conflict of interests in a way which

⁴⁹ See also Technical Report – Benchmark two

fulfils the CVM benchmark of securing ‘mandatory decisions on the basis of which dissuasive sanctions can be taken’. Since the November 2018 report, there were no new developments in this respect. In July 2019, the Minister of Justice suggested the organisation of a meeting with all authorities concerned to address this issue. This could be a constructive first step. The goal should be a durable solution providing the necessary clarity.

Recommendation 8 remains fulfilled. Progress on recommendation 9 requires the current lack of clarity on the rules to be resolved. The legislative developments on the integrity laws will have to be clarified in order to avoid the risk that dissuasive sanctions can no longer be applied following a final court decision, which would constitute backtracking on Benchmark two. Benchmark two is therefore not yet fulfilled.

3.3 Benchmark Three: Tackling High-level corruption

Sustainability of the National Anti-Corruption Directorate and irreversibility of the fight against corruption

Since the November 2018 report and despite very difficult circumstances, the judicial institutions involved in fighting high-level corruption have continued to investigate allegations and to sanction high-level offences of high-level corruption.

The November 2018 report noted a pattern of pressure on the key anti-corruption institutions, notably the National Anti-Corruption Directorate (DNA) and the High Court of Cassation and Justice, and growing concerns on their continued ability to fulfil their tasks, with an impact on the irreversibility of the fight against corruption. Although the track record remains strong, there are signs that the continued pressure on these institutions has had a detrimental impact.

The amended justice laws included abrupt changes in seniority requirements, with an impact on the capacity of the DNA to function. The effective treatment of high-level corruption cases has also been adversely affected by the transfer of responsibility for many cases to the Special Section, which is not only competent to investigate offences committed by magistrates, but also related offences by other persons. The risk identified in November 2018 that the Special Section could be used as a means to change the course of high-level corruption cases and to pressurise magistrates has materialised (see Benchmark one). With the interruption of the appointment procedure, the DNA remains without a Chief Prosecutor. Whilst its current *ad interim* leadership has successfully maintained its work, the temporary nature of *ad interim* appointments adds an element of uncertainty and vulnerability.

The sharp increase of pressure on the High Court (see Benchmark one) has also had an impact on the effectiveness of justice in high-level corruption cases. In particular, the High Court was referred to the Constitutional Court in two procedures of constitutional conflicts initiated by the Government in relation to its interpretation of the procedural rules on the constitution of the appeal panels of 5 judges and in relation to the composition of the 3-judge panels for first instance corruption trials. Although the Constitutional Court rulings do not apply to closed court cases, the follow-up of the ruling on the 5-judge panels has given rise to major uncertainty. In early 2019, consideration was given to adopting an emergency ordinance, which, if adopted, could have made it possible to reopen all high level corruption cases closed by a final High Court judgement handed down since 2014 by a 5-judge panel. Whilst domestic and international criticism of the proposal helped to prevent the adoption of such emergency ordinance, it would be important for the Romanian authorities to renounce the pursuit of the objectives of such a measure and to make clear that legislation affecting past cases is not needed, following the Constitutional Court rulings, reiterating their commitment to effectively combat corruption.

The Constitutional Court rulings directly impact ongoing high-level corruption cases, entailing delays and restarts of trials, and have allowed the re-opening of several final cases, under certain conditions. The full consequences are yet to unfold. This clear knock-on on the process of justice also raised broader doubts about the sustainability of the progress made so far by Romania in the fight against corruption – all the more so when coming at the same time as amendments on the criminal code and the criminal procedure code, which did not take into account the November 2018 recommendation on the need for compatibility with EU law and international anti-corruption instruments (see also Benchmark one).

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

Recommendation 10 concerns the accountability of the Parliament in its decisions on requests from the prosecution to authorise preventative measures such as searches or arrest and on requests to authorise the investigation of a member of Parliament when he/she is also or has been a Minister. The lack of explanation of decisions taken by the Parliament – as well as the number of occasions when Parliament did not allow investigation to proceed – led to concerns about the objectivity of these decisions.

On 5 June 2019, the Chamber of Deputies amended its rules of procedure regarding the prosecution of members or former members of the Government who are member of the Chamber of Deputies. In particular, reference was made specifically to the criteria set out in the Venice Commission’s report on the purpose and waiver of parliamentary immunity.⁵⁰ This change is to be welcomed and the Commission looks forward to its effective implementation, also in the light of the recommendation to involve the judicial authorities and civil society in the debate.

The Senate is encouraged to adopt similar rules. In early June, a request from the prosecution to lift the immunity of the Chair of the Senate was rejected. In September, the Senate rejected a request to start prosecution of a senator who was formerly Minister of Health.

The Commission reiterates its conclusion from November 2018 that the basis for the positive assessment reached in respect of Benchmark three in January 2017 has been reopened by Romania. Despite the fact that both DNA and the High Court of Cassation and Justice have continued to investigate and sanction high-level corruption and demonstrated professionalism in very difficult circumstances, the attacks on their activities, the successive changes to the applicable legal framework and the possible challenge to the authority of final judgement raise questions about the sustainability of Romania’s achievement in the fight against high level corruption. Therefore, recommendation 10, despite some recent positive developments, can no longer be deemed to suffice in order to close the Benchmark.

⁵⁰ CDL-AD (2014) 011

3.4 Benchmark Four: Tackling Corruption at all levels

Recommendation 11: Continue to implement the National Anti-corruption Strategy, respecting the deadlines set by the government in August 2016. The Minister of Justice should put in place a reporting system on the effective implementation of the National Anti-corruption Strategy (including statistics on integrity incidents in public administration, details of disciplinary procedures and sanctions and information on the structural measures applied in vulnerable areas).

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

National Anti-Corruption Strategy

The implementation of the National Anti-Corruption Strategy has continued at technical level. Corruption prevention measures such as the internal audits by each of the participating public institutions and the peer review evaluation missions planned in 2018 were put in motion, both in central institutions but also at local level (county councils and city halls). The inter-institutional cooperation platforms met in April 2019. The authorities also report continued corruption prevention measures and activities in central ministries and public institutions in vulnerable areas, including education, the interior ministry and finance. However, corruption prevention has not been seen to be an important political priority.

One of the objectives of the strategy is to improve performance in the fight against corruption by imposing criminal and administrative sanctions. Since the November 2018 report, the General Prosecution Service has maintained an effective prosecution of corruption offences not falling under DNA's remit.⁵¹ However, the pressure on these key institutions described above,⁵² and the legislative amendments in force or adopted by Parliament, have inevitably had a negative impact on the fight against corruption, not the least by giving a contradictory signal in terms of political support for continued action to prevent and sanction corruption. This includes the amendments to the criminal codes and to the integrity framework, with the risk of an impact at every level of public administration.

National Agency for the Management of Seized Assets

The National Agency for the Management of Seized Assets (ANABI) is now fully operational and has continued to develop its work, which it clearly sets out in its annual reports. This is positive example of where consideration of good practice in other Member States (Belgium, France, Italy and The Netherlands) and beyond has helped to shape a successful design.

On the basis of an analysis of Benchmark four, the Commission can reiterate its conclusion from November 2018 that more work is needed to progress towards completing the Benchmark. Corruption prevention is held back by political developments, which undermine the credibility of progress (recommendation 11). Concerning recommendation 12, the Commission confirms this recommendation is fulfilled.

⁵¹ Results of institutions are detailed in the Technical report.

⁵² See Benchmark one and Benchmark three.

4. CONCLUSION

Since the last report, the Commission has had to revert frequently to developments in Romania relating to judicial reform and the fight against corruption. On each of these occasions, the Commission has confirmed the backtracking from the progress made in previous years and set out in the November 2018 report.

The evolution of the situation in the first months of 2019 was a source of great concern. As a result, the Commission had to inform the Romanian authorities in May 2019 that if the necessary improvements were not made shortly, or if further negative steps were taken, the Commission would take steps under the rule of law framework, which foresees a dialogue to address rule of law concerns (and which can therefore go beyond the parameters of the CVM).

The Commission welcomed the fact that in June, the Romanian government expressed a wish to reset the approach, and effort has been invested in new consultation mechanisms and dialogue with the judiciary. The Commission looks forward to the competent Romanian authorities translating this commitment into concrete legislative and other measures. Progress will require tangible steps, legislative and administrative, to address the recommendations summarised in this report. The key institutions of Romania need to collectively demonstrate a strong commitment to judicial independence and the fight against corruption as indispensable cornerstones, and to ensure the capacity of national safeguards and checks and balances to act.

The Commission will continue to follow developments closely through the CVM. It regrets that Romania did not engage with the recommendations made in November 2018, which were fully in line with the positions of the other EU institutions. These recommendations need to be followed if the reform process is to be put back on track and the path resumed towards the conclusion of the CVM as set out in the January 2017 report. The Commission is confident that Romania could give a new momentum to fulfilling the objectives of the CVM and stands ready to help the Romanian authorities to this end.