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REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

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

{SWD(2015) 8 final}

1. INTRODUCTION

The Cooperation and Verification Mechanism (CVM) was set up at the accession of Romania to the European Union in 2007.[1] It was agreed that further work was needed in key areas to address shortcomings in judicial reform and, the fight against corruption. Since then CVM reports have charted the progress made by Romania and have sought to help focus the efforts of the Romanian authorities through specific recommendations.

The CVM has played an important role in the consolidation of the rule of law in Romania as a key facet of European integration. Monitoring and cooperating with the work of the Romanian authorities to promote reform has had a concrete impact on the pace and scale of reform. The Commission's conclusions and the methodology of the CVM have consistently enjoyed the strong support of the Council,[2] as well as benefiting from cooperation and input from many Member States.

This report summarises the steps taken over the past year and provides recommendations for the next steps. It is the result of a careful process of analysis by the Commission, drawing on inputs from the Romanian authorities, civil society and other stakeholders. The Commission was able to draw on the specific support of experts from the magistracy in other Member States to offer a practitioner's point of view. The quality of information provided by the Romanian authorities has improved substantially over time – itself an interesting reflection of progress in management of the reform process.

The 2014 CVM report noted progress in many areas, and highlighted the track record of the key anti-corruption institutions as an important step towards demonstrating sustainability. At the same time, it noted that political attacks on the fundamentals of reform showed that there was no consensus to pursue the objectives of the CVM. This report returns to both trends to assess the extent to which reform has taken root.

The importance of the CVM has been borne out by opinion polling of Romanians themselves. A Eurobarometer taken in the autumn of 2014 showed a strong consensus in Romanian society that judicial reform and the fight against corruption were important problems for Romania. The results also showed a substantial increase in those who see an improvement in recent years, and some confidence that this will continue. There is clear support for an EU role in addressing these issues, and for EU action to continue until Romania had reached a standard comparable to other Member States.[3]

Consistency in track record is one of the key ways to demonstrate sustainability in progress towards the CVM objectives, one of the conditions to show that a mechanism like the CVM would no longer be required. The Commission has paid particular attention to this aspect in its monitoring this year. Building strong and durable institutions is an important consideration in the targeting of EU funds to support the CVM objectives, including by effective prioritisation of Cohesion Policy under the thematic objective for enhancing institutional capacity and efficiency of public authorities. With more consistent ownership and effective prioritisation,

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1 Conclusions of the Council of Ministers, 17 October 2006 (13339/06); Commission Decision establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, 13 December 2006 (C (2006) 6569 final)

2 http://ec.europa.eu/cvm/key_documents_en.htm

3 Flash Eurobarometer 406

Romania can work together with EU partners[4] to maintain a momentum in reform over the coming year.

2. STATE OF PLAY OF THE REFORM PROCESS IN ROMANIA

2.1. *Judicial independence*

Appointments

The risk of political interference in senior appointments has been one of the major concerns with regard to judicial independence. CVM reports have underlined the importance of transparent and merit-based selection procedures.[5] In 2014, there were no appointments required of judges or prosecutors at the highest level. An important test case is coming now with the nomination of a new Chief Prosecutor for the Directorate for Investigation of Organised Crime and Terrorism (DIICOT), following the resignation of the Chief Prosecutor in November.[6] The procedure includes a strong political element in terms of the role it gives to the Minister of Justice.[7] The Superior Council of the Magistracy (SCM) is working on an amendment to the law to change this, and to align appointment of prosecutors on the procedures used for judges, in line with the guidance of the European Commission for Democracy through Law of the Council of Europe (Venice Commission):[8] if this were to be pursued, the next step would be for the government to propose this to Parliament. 2015 provides an important opportunity for Romania to fully commit to transparent and merit based nominations, in time for a number of important appointment procedures for senior positions in the judiciary expected in 2016.[9]

Respect for judges and the judicial process

Previous CVM reports have noted the prevalence of politically motivated attacks targeting judges and prosecutors in the media.[10] Whilst not reaching the scale of attacks of previous years (2012 in particular), this issue remained a problem in 2014, often linked to corruption cases involving influential public figures. Examples reported by the SCM included cases where the media had reported demonstrable untruths or accused magistrates (or their families) of corruption. There were also cases where the Constitutional Court received some strong criticism from certain public figures.[11]

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4 Some Member States provide technical assistance to Romania in CVM-relevant areas.

5 COM (2014) 37 final; COM (2013) 47 final; COM (2012) 410 final

6 The resigning Chief Prosecutor of DIICOT is indicted for corruption for deeds preceding her nomination in 2013. In January 2013, the Commission expressed concerns about the ongoing process and recommended that Romania ensures that the new leadership in the prosecution is chosen from a sufficient range of high quality candidates, who meet the criteria of professional expertise and integrity, after an open and transparent process. COM(2013) 47 final, p7.

7 This was the source of controversy in respect of appointments to the senior posts of the prosecution in 2012-13.

8 European standards as regards the independence of the judicial system from the Venice Commission point to the importance of avoiding too great a role for political figures in appointments to the prosecution.

9 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 2016. The President and Vice-President of the National Integrity Agency will also be appointed in April 2016.

10 COM(2013) 47 final, p.4; COM(2014) 37 final p.3.

11 For example after the ruling on data retention laws.

One of the roles of the SCM is to guarantee the independence of the judiciary. Since 2012, the SCM has a procedure in place, involving the Judicial Inspection, for defending the independence of justice and the professional reputation, independence and impartiality of magistrates. The number of requests to the SCM to trigger this procedure increased in 2014, compared to 2013 – though this could be attributed to the greater credibility of the system, rather than an increase in problems. Despite this increase, the Judicial Inspection was able to reduce the time needed for investigations, allowing the SCM to react faster to the attacks, even within one or two days. This offered a more effective rebuttal.

Whilst recognising the benefits of the procedure set up by the SCM, NGOs and representatives of magistrates' organisations have noted the difficulty in securing an equivalent coverage of SCM statements, as compared to the original accusation. There have been calls for the National Audiovisual Council to play a more active role in sanctioning the media for breaches in professional ethics. More proactively, steps have been taken by the judicial authorities to improve the information available to the media on developments in the justice system.[12]

It remains the case that there seem to be no agreed lines to define where political actions interfere with the judiciary and judicial decisions, still less sanctions for exceeding these limits. The 2014 CVM report included a recommendation to "ensure that the Code of Conduct for parliamentarians includes clear provisions so that parliamentarians and the parliamentary process should respect the independence of the judiciary".[13] Such provisions are not included in the Code (see repeated recommendation below).

The Constitutional Court and respect for court decisions

The Constitutional Court (CCR) has been instrumental in supporting the balance of powers and respect for fundamental rights in Romania, as well as resolving issues which the judicial process had not resolved. After the entry into force of the new Criminal Code and Code of Criminal Procedures, CCR rulings solved major stumbling blocks. Another important example concerned the law on incompatibility, resolving an issue which had been causing inconsistency in court judgements.[14]

Some of the CCR rulings have been challenging for the justice system, requiring adaptations to working methods. Others have required urgent amendment of the laws. The reaction of the judicial authorities and the Ministry of Justice has respected the required deadline. However, there are clear examples where Parliament has not immediately followed up on Constitutional Court rulings relevant to legislation or the rights and obligations of parliamentarians.[15]

As for respect for court decisions more generally, there seems to be an increasing acknowledgement and willingness from the justice system to take action to ensure that court decisions are followed up. But important problems remain,[16] and businesses and NGOs have pointed to non-respect of decisions by public authorities, who might be expected to set an example.

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12 Technical report section 1.1.2.

13 See notably COM(2014) 37 final, p. 13.

14 Technical report section 1.1.1

15 For example in the area of incompatibility decisions, there is still reluctance from some institutions, including the Parliament, in applying final decisions against their members. See below, in the Integrity section, and in the technical report.

16 See below with respect to confiscation.

Constitution

Discussions on a revision of the Constitution were taken forward at the start of 2014, with draft amendments being presented in February 2014. Many of them were ruled unconstitutional by the Constitutional Court and several serious problems were flagged by the Venice Commission.[17] If work resumes, this would be an opportunity for a fresh look at how the Constitution could be used to cement judicial independence.

The process of revision of the Constitution is relevant for the CVM as some amendments touch on justice and the functioning of the Superior Council of Magistracy. The stop-start process so far has been criticised for lacking in transparency, both in the timeframe and the consultation process. The involvement of the Venice Commission has however helped to focus the process, and the full participation of key institutions like the SCM would help to give confidence that any amendments would give full regard to the independence of the Judiciary.

Past CVM reports have touched on the recourse to Government Emergency Ordinances (GEO) as part of the legislative system within which laws on judicial reform and corruption have to be taken forward.[18] Two difficulties have been identified, including in discussions with the CCR. One is the frequent use of GEO, which limits the opportunities for consultation and has led to a lack of legislative clarity – with consequences for the unification of jurisprudence and practice.[19] The second is the opportunity to challenge GEO. The use of GEO can be challenged by the Ombudsman. Past CVM reports have noted the importance of this function in terms of the balance of powers and quality of the legislative process. The current Ombudsman, elected in April with the support of only one party[20], has expressed the view that the Ombudsman should not get involved in questions that concern the balance of powers between state authorities and focus essentially on individual rights issues. Whilst it is understandable that the Ombudsman has a margin of appreciation as to when to use his power to seize at an early stage the CCR on the constitutionality of emergency ordinances, this self-limitation effectively creates a gap, which in the current institutional setup of Romania cannot be filled by other actors.[21]

2.2. Judicial reform[22]

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17 The fact that Romanian authorities involved the Venice Commission as well as the European Commission in the constitutional reform process is a welcome development. The Venice Commission was also critical on the changes concerning the justice system, in particular shifting responsibility for investigating and prosecuting parliamentarians from the HCCJ. The Venice Commission also called for a more careful look at the status of prosecutors.

18 This has also been flagged by the Venice Commission.

19 More broadly, the "Strategy for strengthening the public administration" adopted by the Government in October 2014 should help to improve the quality of legislation.

20 The CVM report of July 2012 had noted: "The Romanian authorities need to ensure the independence of the Ombudsman, and to appoint an Ombudsman enjoying cross-party support, who will be able to effectively exercise its legal functions in full independence." (COM (2012)410), p.18.

21 For example, the August 2014 GEO on "political parties migration" was widely considered to raise constitutional issues. The CCR was not seized by the Ombudsman. The law was subsequently declared unconstitutional upon a referral by MPs at a later stage of the procedure, by which time it had already come into force.

22 The importance of judicial reform in Romania is also recognised in the context of the European Semester, through the Country Specific Recommendations adopted by the Council in July 2014 for Romania, calling for Romania to improve the quality and efficiency of the judicial system (2014/C 247/21).

New Codes

Previous CVM reports underlined the importance of the new legal Codes to the modernisation of the Romanian judicial system.[23] The implementation of the new Criminal and Criminal Procedures Codes in February 2014 was a major undertaking, and a test of the ability of the judicial system to adapt. The change was successfully achieved, with the key institutions working together to good effect: the Ministry of Justice, the High Court of Cassation and Justice (HCCJ), the SCM, the prosecution and the National Institute for the Magistracy (NIM). The Romanian magistracy proved able to adapt to the new codes without an interruption in its work. Some innovatory measures, such as a possibility for plea bargains, seem to have already been used to good effect.

Some complicated transitional issues did appear. In a number of cases, such as the application of the principle of the most favourable law, solutions were found. For some issues, the government adopted changes through emergency ordinances. For other issues, legislative proposals were made, but parliamentary procedures are still outstanding. Further adaptations will also be needed following rulings of the CCR. For example, the Court ruled in December that some provisions of the Codes regarding judicial control and the preliminary chambers were non-constitutional.[24] On judicial control, the Ministry of Justice acted to ensure continuity within the accepted time limit. On preliminary chambers, the HCCJ and the SCM immediately started working on practical solutions to allow for the presence of defence lawyers.

A further practical challenge will come with the entry into force of deferred provisions of the civil codes in 2016. However, there is evidence that the civil codes have succeeded in some of their objectives, notably with the decline in the length of trials (about one year and six months on the average). A similar evaluation of the impact of the criminal codes in expected in February 2015.

Strategy for the Development of the Judiciary 2015-2020

The Strategy for the Development of the Judiciary for the years 2015-2020 put forward by the Ministry of Justice was approved by the government on 23 December 2014. This document draws heavily on CVM recommendations, as well as on studies developed with the World Bank, in particular the *Functional Analysis of the Romanian judiciary*.[25] [26] Drawing on a series of underlying principles based on the rule of law, the strategy defines objectives for further reform in the period 2015-2020 to make the justice more efficient and accountable and to increase its quality. The strategy and its action plan should also be the basis for defining the priorities for EU funding in the area of justice. The approval process for the document was slow, with a first draft already ready in September 2013. Consultation took place in autumn and the Strategy and its action plan should be finalised by April 2015.

Experience suggests that such a strategy benefits from wide ownership and involvement by the key actors. However, the SCM seems to have been working primarily on various projects in parallel.

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23 COM(2014) 37 final

24 See technical report section 1.1.1.

25 http://www.just.ro/LinkClick.aspx?fileticket=h7Nit3q0%2FGk%3D&tabid=2880

26 The draft in public consultation is based on: Judicial Functional Review; CVM Reports and EC recommendations; Court Optimization; Inputs from MoJ specialized departments, Superior Council of Magistracy, Public Ministry, High Court of Cassation and Justice, National Trade Office, National Administration of Penitentiaries.

Budget and human resources

Despite the pressures on public finances, the Minister of Justice secured considerable increases in funding to facilitate reform. In 2014 the budget increased by 4% and the planned budget of 2015 includes another increase. This has helped to fund new positions in courts and prosecution offices, including 200 new auxiliary positions in courts and prosecutor offices.

The National School of Clerks, the National Institute of Magistracy and the SCM organised training and the competitions for the new posts, and the vacancies were filled in rapidly. Future needs identified include more court clerks, modernizing IT equipment and renovating court buildings, as well as supporting key institutions, such as the Judicial Inspection and the National School of Clerks. EU funding is expected to play a major role in supporting specific projects linked to reform.

Judicial efficiency

Workload is a recurrent problem within the judiciary. This has an impact on the quality of the judicial decisions and the user-friendliness of the judicial system. The Ministry of Justice and the SCM have put forward a number of legislative proposals to address the workload issue. One law (swiftly adopted by Parliament in October 2014) addressed duplication in the enforcement of court decisions, and is estimated to have relieved civil courts of about 300 000 cases. It has proved more difficult to find a consensus on closing small courts, and a law to give more freedom in dividing the roles of judges and court clerks seems to have stalled. Imaginative solutions, like peripatetic courts or breaking the parallelism between courts and prosecution offices, have been suggested as a way forward.

In May the SCM created a working group to define how to measure, analyse and improve the performance of all courts. This seems a valuable step in terms of providing the tools to manage the performance of the justice system, notably in the context of the overall justice strategy. It could usefully include measurement of how the justice system has followed up to ensure the enforcement of their decisions.

The SCM continues to sanction professional misconduct and disciplinary offences of magistrates. The Judicial Inspection has now established itself as the key body to investigate disciplinary offences. The number of disciplinary actions increased in 2014 in comparison to 2013, and decision making has been swifter.

Several opinion polls have shown an increased public trust in the judiciary in Romania, in particular in the institutions pursuing high-level corruption.[27] This is an important recognition of progress, but with this comes increased expectations. Lawyers, businessmen, and NGOs still report difficulties in their relationships with the courts.

Consistency of jurisprudence

Another essential element of judicial reform is the consistency of jurisprudence. The HCCJ has further developed its use of preliminary rulings and appeal in the interest of the law to unify jurisprudence. It has also pursued measures to improve the dissemination of court judgements. Similar practical steps have been seen in the prosecution and in the judicial leadership more widely. Thematic inspections conducted by the Judicial Inspection also contribute to consistent practice.

[27] Technical report section 1.4.8

Despite these efforts, a number of obstacles remain to consistency. The accountability of the magistracy if they decide to diverge from established practice or case-law still does not seem clear: the SCM had to make clear that the independence of the judiciary cannot be an excuse for non-unitary practice. There is also a responsibility on public administration to accept judgements reached on repetitive issues. This would limit the number of court cases and strengthen legal certainty by avoiding divergent decisions on identical issues.

There has been progress on the publication of court decisions. The Ministry of Justice finalised a project (financed through EU funds) of a portal consolidating existing legislation.[28] The HCCJ has an impressive website. The SCM has also signed a partnership to organise the publication of case law, to start in August 2015.

2.3. Integrity

The National Integrity Agency and the National Integrity Council

The National Integrity Agency (ANI) has continued to process a strong flow of cases in 2014.[29] A high percentage (70%) of ANI's decisions on incompatibilities and conflicts of interests are challenged in court, but about 90% of these cases have been confirmed by the courts. ANI's interpretations of the law have been confirmed in both the CCR and the HCCJ. It can therefore be seen as acting on a sound legal footing. In 2014, the HCCJ also helped by finding ways to accelerate incompatibility cases, despite other calls on its workload. This has helped to deliver certainty and to improve the dissuasive effect of the integrity laws.

However, whilst the borderline between judicial independence and inconsistency is a sensitive area, there were several examples this year of contradictory decisions from different courts (even at the appeal court level) providing different interpretations. This included interpretations which differed from the HCCJ itself.[30]

The follow up of ANI's decisions is perceived to be improving. However, there are still cases where a lack of implementation has forced ANI to send the file to the prosecution (not applying a final decision is a criminal offence) or issue fines.[31] This seems to imply a low level of public understanding of incompatibility rules as a means to prevent conflicts of interest. This is illustrated by the high number of elected officials who are found to be incompatible.[32] As the jurisprudence strengthens the recognition that incompatibility decisions must be enforced, other measures could also be used to ensure that the rules are well known.

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28 The database offers free access to Romanian legislation since 1989 in a user friendly format.

29 Technical Report Section 2.1.3. 638 cases were notified to ANI and 541 started ex-officio. ANI has finalised 514 reports in 2014. Compared to 2013, there has been an increase in cases of conflicts of interest and unjustified wealth, and a decrease of cases of incompatibilities.

30 One of the candidates in the May 2014 EP elections had been subject to an incompatibility decision. His eligibility to run was challenged by ANI, but the Court of Appeal ruled that he could run (although the issue in question was the question of the "same office", on which the HCCJ had already ruled). The Court of Appeal did not refer the case to the HCCJ, so there was no mechanism for the HCCJ to restore its own interpretation of this question.

31 For example, ANI had to fine members of a city council until they eventually applied an ANI decision on conflict of interests concerning one of their peers and removed him from office. ANI even had to consider taking similar steps against a Parliamentary committee.

32 See technical report section 2.1. 294 cases of incompatibility were established by ANI in 2014; 70% concern elected officials.

From a staffing and budget point of view, the situation of ANI has been stable in 2014. ANI has secured the resources to undertake an important new project in 2015. The "Prevent" IT system for ex-ante check of conflicts of interests in public procurement will be fully finalised in mid-2015 and should bring major benefits in avoiding conflict of interest in the first place. The system will cover procurement both with EU and national funds. The necessary implementing law should be adopted in Spring 2015, after consultation.

The National Integrity Council (NIC) has continued to fulfil its role as an oversight body, notably by intervening publicly as well as in front of the Parliament when required.[33] The current NIC's mandate expired in November 2014. The initial process for appointing a new NIC was subject to a number of controversies, including the nomination (in a first phase) of candidates who were themselves subject to ANI proceedings, casting doubts on the full commitment of authorities to support the integrity institutions and suggesting that the goal of integrity is not well understood.

The integrity framework: *Parliament*

The stability of the legal framework on integrity has remained a problematic issue. There have been attempts in Parliament to modify elements of the legal framework. Although none of these passed into law, there was no evidence that the implications for incompatibilities or corruption risks were assessed in advance, and consultation with ANI did not take place.[34] A particular issue concerns rules on incompatibilities affecting locally elected authorities, such as mayors, given their key role in public procurement. Whilst it is notable that there was no repeat of the Parliamentary vote of December 2013,[35] there remains a strong sense that there is no consensus in Parliament in favour of strong integrity laws.

A previous plan to codify all rules on integrity – which would have helped to improve their coherence and clarity – has been put on hold, the reason being concern that the legislative process would water down existing rules. This is a lost opportunity to remove any risk of ambiguity in the rules. It will also be important to cement in legislation the CCR rulings of 2014 confirming the constitutionality of provisions on incompatibilities.[36]

The follow up of ANI's decisions (when confirmed in court) by the Parliament remains inconsistent, in spite of hopes that reforms would bring greater automaticity. In one emblematic case, a solution was only found after the resignation of the Senator. In another case, the Chamber took many months to take a decision, in spite of arguments that the rules now made respect for a final court ruling to be automatic.[37] A new case of a Deputy who has been found incompatible is awaiting decision in the Parliament.

2.4 The fight against corruption

Tackling high-level corruption

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33 For example to guarantee ANI's independence in front of the Senate: http://www.integritate.eu/Comunicate.aspx?Action=1&Year=2014&Month=5&NewsId=1578&currentPage=3&M=NewsV2&PID=20

34 For example the way the legislative proposal amending the Law n° 51/2006 on community services or public interests was put forward.

35 In particular, the amendments to the Criminal Code adopted by Parliament in December 2013, declared unconstitutional by the Constitutional Court in January 2014, would have diluted the effectiveness of the integrity framework.

36 Notably on the issue of the "same public office" technical report section 1.1.1

37 The decision was some six months after the CCR ruling, but some 2 years after the HCCJ ruling.

Recent CVM reports[38] have been able to point to a growing track record in terms of effectively fighting high-level corruption cases, a trend which has been confirmed in 2014. This is the case both at prosecution level by the DNA[39] and at the trial stage by the HCCJ.[40] This is also a confirmation that there remains a major problem.[41] [42]

DNA activity in 2014 covered a wide range of high-level cases, in all strands of public offices and involving public figures in a variety of political parties. Indictments and ongoing investigations included serving and former Ministers, parliamentarians, mayors, judges and senior prosecutors.

HCCJ cases included final instance convictions of a former Prime Minister, former Ministers, Members of Parliament, mayors and magistrates. There have also been other important cases, involving influential business figures, concluded at Court of Appeal level. However, it remains the case that the majority of sentences are suspended in corruption cases (although this is less marked at the level of the HCCJ).

For most of 2014, DNA had little success in persuading Parliament to accede to requests from DNA for the lifting of immunity of Members of Parliament to allow for the opening of investigation and the application of preventive detention measures. This trend appears to have changed in late 2014, when the Parliament lifted the immunity of several parliamentarians investigated by DNA in a large corruption case. Parliament's response to DNA requests seems arbitrary and lacking objective criteria. In contrast, all requests sent to the President of Romania for lifting of immunities of Ministers were accepted.[43] There have however been no clear rules established to follow up the CVM recommendation to ensure swift application of the Constitutional rules on suspension of Ministers on indictment and to suspend parliamentarians subject to negative integrity rulings or corruption convictions.[44] The fact that Ministers continue in office after indictment on criminal charges, and parliamentarians with final convictions for corruption to stay in office, raises broader issues about the attitudes towards corruption in the Romanian political world.

The rejection of the amnesty law by the Parliament in November 2014 gave a positive signal in terms of opposing a law which would effectively result in exonerating individuals sentenced for corruption crimes. Nonetheless, the fact that only a week after this vote, the idea of a new draft law on collective amnesty was again floated in Parliament suggests that the debate has not been closed.

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38 COM(2014) 37 final, p. 9.

39 Technical Report Section 3.2.3. In 2014, DNA registered 4987 new cases, which is a very sharp increase compared to 2013. 246 cases were sent to trial, regarding 1167 defendants, 47 of these defendants were indicted with plea bargain agreements.

40 Technical Report Section 3.1. Between January 1 and December 31, 2014 the Penal Chamber settled, as first instance, 12 high-level corruption cases and the Panels of 5 judges settled, as final instance, 13 high-level corruption cases.

41 Also corroborated by perception studies, such as the Flash Eurobarometer 406, showing that at least nine out of ten respondents in Romania said that corruption (91%) was an important problem (stable since 2012).

42 This is also recognised in the Country Specific Recommendations addressed to Romania by the Council in 2014 (2014/C 247/21) and in the Anti-Corruption Report (COM(2014) 38 final).

43 Ministers, or ex-Ministers who are not Members of the Parliament at the same time.

44 COM(2013) 47 final, p.7.

The increase of activity also concerns cases of corruption within the magistracy, recognised as a particularly corrosive form of corruption.[45] According to DNA, this high figure does not reflect an increase of corruption within the magistracy (although the scale of the phenomenon constitutes a cause of concern), but rather an increase in the number of signals from the public.[46] Such cases are complex and a new special DNA unit has been established with this remit.

Tackling corruption at all levels

In recent years, CVM reports have found it difficult to identify a track record in tackling cases of corruption in society at large. However, 2014 saw some signs of progress. The Public Ministry has taken a number of concrete steps to improve the results of the prosecution in this area.[47] The Anti-Corruption General Directorate (DGA), both in support of the prosecution (DNA and general prosecution) and as an internal anti-corruption body within the Ministry of the Interior, has continued to play a significant role – though plans to extend its competence to other Ministries seem to have been blocked. However, the number of court decisions on corruption cases has decreased in 2014, and the fact that 80% of convicted persons receive a suspended sentence remains a high proportion.

The National Anticorruption Strategy 2012-2015[48] has evolved into an important framework for the public administration. The second round of evaluation, based on peer review, took place in 2014 at the level of local public administrations. The concept is based on GRECO and OECD practices. Institutions which are part of the NAS commit to observing a set of 13 legally binding preventive measures and submit themselves to peer review. This work is also supported by concrete preventive projects run by NGOs with the support of EU funds (notably in the Ministry of Health and in the Ministry of Regional Development). Whilst this work remains piecemeal and has to work hard to take root in administrations struggling with limited resources, there are a number of tangible success stories.

Risk assessment and internal controls are key areas for action. Some recent cases have shown substantial bribery cases which might have been identified earlier by careful scrutiny of the records, but which had to rely on a signal by a member of the public.[49] At a time of pressure on public spending, targeting of high-value areas of both tax and spending would be expected. Lessons might also be learnt in terms of who has to make declarations of assets, and how these are controlled.

Concerning asset recovery, and in particular the recovery of damages, the Romanian authorities have acknowledged that the system needs to be improved. Though one of the problems in this area is the need to improve data-gathering, the recovery rate secured by the National Agency for Fiscal Administration (ANAF) in the execution of court decisions is estimated at only 5-15% of the assets subject to a court order. This makes the sanctions less dissuasive, as well as perpetuating the loss to the victim (often the state in corruption cases) and providing another example of failure to implement court decisions. The decision by the

45 In 2014 23 judges (including four HCCJ judges) as well as 6 Chief prosecutors and 6 prosecutors have been indicted for corruption.

46 Reflecting a more general trend of increased public confidence in DNA and judiciary more widely.

47 Technical Report Section 4.1.

48 http://www.just.ro/LinkClick.aspx?fileticket=T3mlRnW1IsY%3D&tabid=2102

49 An example is a bribery case linked to disability payments, where the scale of disability payments in the locality was out of line with the size of the population.

Ministry of Justice to establish a new Agency to deal with management of seized assets is an opportunity to improve the situation.

Public procurement procedures, especially at local level, remain exposed to corruption and conflicts of interests – a fact widely acknowledged by Romanian integrity and law enforcement authorities. This has had consequences for the absorption of EU funds. However, it is also true that there are many other factors here – including the administrative capacity of public purchasers, the lack of stability and fragmentation of the legal framework, and the quality of competition in public procurement. Renewed structured dialogue between the Commission and Romania in the context of the implementation of the new public procurement directives, and of ex-ante conditionality for European Structural and Investment Funds should help to identify shortcomings, including risk areas for corruption and conflict of interest. The ex-ante check of public procurement designed by the National Integrity Agency seems to be a step in the right direction but would need to be accompanied by other actions to minimise the scope for conflict of interests, favouritism, fraud and corruption in public procurement.

3. CONCLUSION AND RECOMMENDATIONS

The Commission's 2014 CVM report was able to highlight a number of areas of progress, some of which showed a resilience which indicated signs of sustainability. This trend has continued over the past year. The action taken by the key judicial and integrity institutions to address high-level corruption has maintained an impressive momentum, and has carried through into increased confidence amongst Romanians about the judiciary in general, and the anti-corruption prosecution in particular. This trend has been supported by an increased professionalism in the judicial system as a whole, including a willingness to defend the independence of the judiciary in a more consistent way and a more proactive approach towards consistency of jurisprudence. There is now an opportunity to test out this progress at moments of particular sensitivity, notably as concerns senior appointments.

At the same time, there remains a strong sense that progress needs to be consolidated and to be further secured. Whilst the implementation of the Codes has shown the government and judiciary working together in a productive and pragmatic way, one year on, many legislative issues remain outstanding. There continues to be a surprising degree of inconsistency in some court decisions, which will always give rise to concern. Decisions in Parliament on whether to allow the prosecution to treat parliamentarians like other citizens still seem to lack objective criteria and a reliable timetable. Parliament has also provided examples of reluctance to apply final court or Constitutional Court decisions, also a more widespread problem. And whilst the recognition that general corruption needs to be tackled is certainly building inside government, the scale of the problem will need a more systematic approach.

The Commission welcomes the constructive cooperation it has had with the Romanian authorities over the past year. The consensus for reform, and the confidence that progress is taking root, are on an upward trend, which now needs to be maintained. The Commission looks forward to continuing to work closely with Romania to secure the CVM's objectives.

The Commission invites Romania to take action in the following area:

1. Judicial independence

- Ensure that the nomination of the new chief prosecutor of DIICOT takes place in accordance with a transparent and merit based procedure;

- Conduct a global review of appointment processes for senior positions in the magistracy, with a view to having clear and thorough procedures in place by December 2015, taking inspiration from the procedures used to appoint the President of the HCCJ;
- Ensure that the Code of Conduct for parliamentarians include clear provisions so that parliamentarians and the parliamentary process respect the independence of the judiciary;
- In discussions on the Constitution, maintain judicial independence and its role in checks and balances at the heart of the debate.

2. Judicial reform

- 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;
- Prepare an operational action plan to implement the judicial reform strategy, with clear deadlines and with the ownership of both the Ministry of Justice and the SCM, and with all key stakeholders having had the chance to have an input. Equip the judicial management with stronger information tools on the functioning of the justice system (such as statistical tools, case management, user surveys and staff surveys) for better informed decision making and to help demonstrate progress;
- Explore pragmatic solutions to maintain access to courts without keeping the current judicial map of small courts;
- Improve the follow-up of court judgments at all levels to ensure that rulings and financial penalties are properly implemented.

3. Integrity

- Look again at how to ensure that court decisions requiring the suspension from office of parliamentarians are automatically applied by Parliament;
- Implement the ex-ante check of conflict of interests in public procurement by ANI. Ensure closer contact between the prosecution and ANI so that potential offences linked to ANI cases are followed up;
- Explore ways to improve public acceptance and effective implementation of incompatibility rules and prevention of incompatibility.

4. Fight against corruption

- Improve the collection of statistics on effective asset recovery and ensure that the new Agency can improve the management of frozen assets and work together with ANAF to improve effective recovery rates. Other parts of the public administration should be clearly accountable for failure to pursue these issues;
- Step up both preventive and repressive actions against conflict of interests, favouritism, fraud and corruption in public procurement as well as giving particular attention to key areas, such as the judiciary;
- Use the National Anti-Corruption Strategy to better identify corruption-risk areas and design educative and preventive measures, with the support of NGOs and taking advantage of the opportunities presented by EU funds.
- Continue to improve the fight against low level corruption, both through prevention and dissuasive sanctions.