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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(2018) 551 final}

1. INTRODUCTION

In January 2017 the Commission undertook a comprehensive assessment of the progress made by Romania over the ten years since the establishment of the Cooperation and Verification Mechanism (CVM) in 2007.¹ On the basis of this longer term perspective and the significant progress made over the ten years to January 2017, the Commission outlined twelve key recommendations that, if followed up, would end the CVM process, in line with the objective set by President Juncker to conclude the CVM process under this Commission's mandate. The January 2017 recommendations were therefore considered as sufficient to close the CVM – except if developments were to clearly reverse the course of progress. It was also highlighted that the speed of the process would depend on how quickly Romania will be able to fulfil the recommendations in an irreversible way. In particular, the recommendations focused on the responsibility and accountability required from the Romanian authorities and on building internal safeguards to ensure the irreversibility of results – to demonstrate that ongoing projects would be continued, even without the CVM. As underlined by the Council, the CVM will end when all four benchmarks applying to Romania are satisfactorily met.²

In the November 2017 report,³ the Commission noted progress on a number of the recommendations set out in the January 2017 report, “in particular recommendation 8, which has been satisfactorily implemented, and, subject to practical application, recommendations 2, 7 and 12. While progress in meeting some recommendations was advancing well, the reform momentum in course of 2017 was lost overall, slowing down the fulfilment of the remaining recommendations, and with the risk of re-opening issues which the January 2017 report had considered as fulfilled. Challenges to and questioning judicial independence have also been a persistent source of concern.” This was echoed by the Council in its conclusions, calling on Romania “to focus its efforts on further consolidating progress, to avoid taking any steps backwards, and to fully address the concerns and all the recommendations set out by the Commission in its report.”⁴

This report takes stock of the situation since November 2017. A series of steps by Romania since the January 2017 report have required the Commission to look again at the basis for its overall assessment, also taking into account the fact that the Venice Commission has recently issued two opinions on the Romanian legislative changes. Therefore, in addition to assessing progress on the recommendations, this report also sets out where developments have reversed the course of progress on issues which the Commission considered positively in January 2017. This concerns progress on Benchmark One (Judicial independence and Judicial Reform) and Benchmark Three (Tackling High-level corruption). As a result, the twelve recommendations of the January 2017 report are no longer sufficient to close the CVM and to this end additional recommendations are set out in this report.

¹ COM (2017) 44 - https://ec.europa.eu/info/files/progress-report-romania-2017-com-2017-44_en. 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) 751 - https://ec.europa.eu/info/files/progress-report-romania-2017-com-2017-751_en.

⁴ Council Conclusions on the Cooperation and Verification Mechanism, 12 December 2017 - https://ec.europa.eu/info/sites/info/files/20171212-st15587_en.pdf

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 the input of civil society and other stakeholders, including other Member States.

2. GENERAL SITUATION

The January 2017 report noted that there were 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 included a legislative practice still to develop better regulation principles, confrontation between state actors, and a difficult media environment.

Whilst these broader factors are beyond the direct CVM's scope, they clearly have an impact on the advance of judicial reform and the fight against corruption. None of these factors has seen an improvement since the January 2017 report. Major legislative changes have been rushed through using urgency procedures with minimal consultation. Judges and prosecutors have continued to face personal attacks in the media, with mechanisms for redress falling short. Different branches of the State have been in conflict and involved in various proceedings before the Constitutional Court. It is also the case that civil society, highlighted by the report as playing a key role in reform, has found itself a target for increased pressure. The situation has provoked a series of public demonstrations where the authorities' response has sparked further controversy. At the same time, a free and pluralistic media plays an important role in holding the actions of those in power to account, for example in bringing potential cases of corruption to light. It should be clear that the entry into force of the General Data Protection Regulation is accompanied by an obligation on Member States to ensure that freedom of expression and information in relation to the media is protected.

One of such broader factors has been publicly-debated claims that cooperation agreements between the judicial institutions, notably the prosecution, and the Romanian Intelligence Services were the source of systemic abuse, in particular in corruption cases. Those classified agreements have been cited as the reason for sudden legislative changes and heavy criticism of the magistracy. The operation of the intelligence services is not a matter for the EU and falls outside the CVM benchmarks. It is the role of the courts to establish whether or not specific allegations of abuses are substantiated and an open and impartial investigation would be needed to establish whether there were systemic failures such as illegal gathering of evidence or illegal influence on magistrates, and whether the existing legal safeguards need to be strengthened. It is clearly important to ensure a framework where the intelligence services are under proper supervision, where crimes can be effectively investigated and sanctioned while fully respecting fundamental rights, and where the public can have confidence that judicial independence is secure. Expertise from other Member States could be valuable in building a stronger system for 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.

3. ASSESSMENT OF PROGRESS ON THE FULFILMENT OF THE RECOMMENDATIONS SET OUT IN THE JANUARY 2017 REPORT

3.1. Benchmark One: Judicial independence and Judicial reform

Before looking at the specific recommendations, this section looks at developments in two areas which have required the Commission to look again at the basis for the assessment in January 2017.

Justice laws and legal guarantees for judicial independence

The three Justice laws, dating back to 2004, regulate the status of judges and prosecutors, the organisation and functioning of the courts and prosecution offices, and the Superior Council of the Magistracy. The Justice laws were an essential basis for the positive assessment of the progress of Romania in the CVM in January 2017. The November 2017 report had already underlined the need for the Government and the Parliament to ensure an open, transparent and constructive legislative process, in which judicial independence and the opinion of the judiciary is valued and given due account.⁵ The report also recalled the importance of drawing on the opinion of the Venice Commission, as the best way to ensure the sustainability of reform and to fulfil the CVM benchmarks.

The amended Justice laws are now in force.⁶ They contain a number of measures weakening the legal guarantees for judicial independence which are likely to undermine the effective independence of judges and prosecutors, and hence public confidence in the judiciary. This has been the focus of the negative reactions from the judiciary and civil society. Key problematic provisions include in particular: the establishment of a special prosecution section for investigating offences committed by magistrates, new provisions on material liability of magistrates for their decisions, a new early retirement scheme,⁷ restrictions on the freedom of expression for magistrates⁸ and extended grounds for revoking members of the Superior Council of Magistracy.^{9,10}

None of these changes correspond to CVM recommendations. The one recommendation which specifically called for legislative change within the scope of the Justice laws concerned the appointment procedure for top prosecutors.¹¹ This has not been implemented, and the cumulative impacts of legislative changes rather weaken the checks and balances underlying the operational independence of prosecutors, further strengthening the role of the Minister of

⁵ The Council of Europe Consultative Council of European Judges (CCJE) recommended in past opinions that “the judiciary should be consulted and play an active part in the preparation of any legislation concerning their status and the functioning of the judicial system”. “The position of the judiciary and its relation with the other powers of state in a modern democracy”, Opinion No 18 (2015).

⁶ Law 207/2018 amending and completing Law 304/2004 on the judicial organisation entered into force on 20 July, Law 234/2018 for amending and completing Law no. 317/2004 on the Superior Council of Magistracy entered into force on 11 October, Law 242/2018 amending and completing Law no. 303/2004 on the statute of judges and prosecutors entered into force on 15 October.

⁷ Emergency Ordinance 92/2018 of 15 October 2018 delays for one year the entry into force of the early retirement scheme, but does not abandon it as recommended by the Venice Commission opinion.

⁸ This provision should also be seen in combination with restrictions on the freedom to receive and impart information on criminal proceedings in the amendments of the Criminal Procedure Code.

⁹ Emergency Ordinance 92/2018 introduces further changes in the revocation procedure.

¹⁰ These provisions are described in more detail in the accompanying technical report.

¹¹ See recommendation 1 below.

Justice.¹² The amendments also raise questions as regards the capacity of the prosecution to continue the fight against high-level corruption with the same degree of independence.

The risk that these elements – independently but also in terms of their cumulative effect – could result in pressure on judges and prosecutors, and ultimately undermine the independence as well as the efficiency and quality of the judiciary, has also been underlined by a number of outside observers: notably the Council of Europe Venice Commission,¹³ the Group of States Against Corruption (GRECO),¹⁴ other Member States and international partners.¹⁵

These assessments also underline that constitutionality checks are important but not the only issue at stake: they do not replace the necessity for a debate on the policy choices underlying major changes.

The Venice Commission delivered a preliminary opinion in July, but the laws were nevertheless promulgated as they stood. In addition, the Government adopted several Emergency Ordinances which accentuated some of the problems identified, for example by consolidating the authority of the Minister of Justice over prosecutors in particular through the triggering of disciplinary proceedings.¹⁶ The decision of the Government to amend the provisions setting up the special department for investigating magistrates in this way, and to impose new procedures on how this body would be set up by the Superior Council of Magistracy, has raised further questions about the department's independence.¹⁷ It also raised questions about the readiness of the Government to address the Venice Commission recommendations only in a selective manner. In this sense, an opportunity was missed.

Dismissal of the DNA Chief Prosecutor and political pressure on judicial institutions

At the same time as the legal amendments, specific decisions have underlined the consequences of the concentration of power in the hands of the Minister of Justice. This was the case first with the dismissal of the Chief Prosecutor of the National Anti-Corruption Directorate (DNA) at the request of the Minister of Justice. In a first stage, the President of Romania rejected the proposed dismissal, in line with the negative opinion of the Superior Council of the Magistracy. However, a Constitutional Court Decision in May on the dismissal procedure reinforced the trend of increased power for the Minister:¹⁸ following the ruling, the President was required to sign the decree implementing the dismissal in July. The concentration of power in the hands of the Minister of Justice was further underlined by the decision of the Minister to propose the appointment of a new Chief Prosecutor of DNA, despite a negative opinion from the Superior Council of Magistracy stating that the candidate

¹² Specifically with respect to Romania, the Venice Commission has underlined the need to increase the independence of the prosecutors (Opinion 924/2018).

¹³ Venice Commission opinion No. 924/2018 of 20 October 2018.

¹⁴ Greco-AdHocRep(2018)2 of 23 March 2018.

¹⁵ Joint statement on behalf by Belgium, Canada, Denmark, Finland, France, Germany, Luxembourg, the Netherlands, Norway, Sweden, Switzerland, and the United States of 29 June 2018. Available on the website of the embassy of one of the signatories: <https://www.swedenabroad.se/en/embassies/romania-bucharest/current/news/joint-statement2/>.

¹⁶ Emergency Ordinance 92/2018.

¹⁷ Emergency Ordinance 90/2018.

¹⁸ Constitutional Court Decision 358 of 30 May 2018. The Venice Commission also pointed to inconsistencies in the case law of the Constitutional Court where previous decisions did not raise issues of constitutionality in relation to the President's role in the appointment procedure of top prosecutors and had even stated that the role of the President in that procedure could not be purely formal.

failed to meet many key criteria. These developments also have consequences for the irreversibility of the fight against corruption.¹⁹

In addition, the procedure concerning the Chief Prosecutor of the DNA has been mirrored by other steps against key judicial institutions. Following the same pattern as the dismissal process for the DNA Chief Prosecutor, on 24 October the Minister of Justice launched the process to dismiss the Prosecutor General. Earlier in October, the Chamber of Deputies had already referred the Prosecutor General to the Constitutional Court in relation to the working arrangement with the intelligence services. The Government also took the decision to refer the High Court of Cassation and Justice to the Constitutional Court.²⁰ The convergence of action against these key judicial institutions has clear implications for judicial independence.

There are also concerns about the work of the Judicial Inspection. Successive CVM reports until January 2017 had noted positively the progress in independence and professionalism of the Judicial Inspection. However, by November 2017 questions were being raised and relations with the Superior Council of the Magistracy grew more difficult.²¹ The November 2017 report made specific reference to the Judicial Inspection in the context of the need to further strengthen cooperation between judicial institutions.

The Judicial Inspection has now started to attract significant criticism. A series of disciplinary investigations were started against the heads of key judicial institutions.²² Many of the magistrates concerned were also seen as critical voices concerning ongoing legislative procedures. It should be noted that the Consultative Council of European Judges and the Venice Commission have both underlined the importance that judges should be free to comment in relevant public debates.²³ ²⁴ The Judicial Inspection also conducted a series of controls at the office of the General Prosecutor and the National Anti-Corruption Directorate. The fact that in at least two cases, information reached the press before the end of the control was the source of particular controversy.²⁵

In addition, there was no competition organised by the Superior Council to appoint a new management of the Judicial Inspection, although the mandate of the management team

¹⁹ See also Benchmark Three below.

²⁰ The Constitutional Court ruled on 7 November 2018.

²¹ An illustration of this was the positive reaction of the management of the Judicial Inspection when the Minister of Justice had proposed to bring the Judicial Inspection under its authority in August 2017. The Judicial Inspection challenged the SCM decision 13044/2.08.2018 to reject a report from the Judicial Inspection that the Prosecutor General was in breach of the deontological code.

²² Disciplinary proceedings have been initiated against the Prosecutor General, against the President of the High Court of Cassation and Justice, the former Chief Prosecutor of the National Anti-corruption Directorate, the Deputy Chief Prosecutor of the National Anti-Corruption Directorate, and a Head and Deputy Head of Section in National Anti-Corruption Directorate.

²³ The European Court of Human Rights has underlined that any interference with the freedom of expression of a judge in a managerial position calls for close scrutiny and that questions concerning the functioning of the justice system enjoy a high degree of protection under the right of freedom of expression. The Court also stressed the “chilling effect” that the fear of sanction has on the exercise of freedom of expression, in particular on other judges wishing to participate in the public debate on issues related to the administration of justice and the judiciary. ECtHR, judgement in case *Baka v. Hungary*, 23 June 2016, application n.20261/12, paras 162-167.

²⁴ In its opinion on the Justice laws, the Venice Commission also expressed concerns as regards the restrictions imposed on the freedom of expression of judges and prosecutors in the amended law 303/2014. Venice Commission opinion 924/2018, p 23.

²⁵ See Technical Report – SWD(2018) 551 – Recommendation 7, p 19.

expired end of August 2018. The decision of the Government to solve the situation by adopting an Emergency Ordinance to nominate the current team ad interim – rather than leaving this to the Superior Council – did nothing to assuage concerns.²⁶

The Superior Council of the Magistracy has not been able to act as an effective check and balance to defend the independence of judicial institutions under pressure, an important constitutional role highlighted in the January 2017 report. Divisions within the Council evident in its meetings with Commission services have made it increasingly difficult for the Council to be effective as a voice for the judicial system – notably when consulted on legislation – and as the manager of the judicial system. Even when the Council has come forward with a unanimous opinion, it has been ignored in significant cases.²⁷ Although 2018 has seen judicial institutions as well as individual judges and prosecutors subject to particularly strong public criticism from Government and Parliament representatives, the Council has shown reluctance to take ex-officio decisions to respond to attacks on the independence of the judiciary. This risks that magistrates are dissuaded from playing their normal role as a branch of the state in expressing their views on issues relevant to the judicial system.²⁸

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.

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. Successive CVM reports had highlighted the weaknesses of the checks and balances in the procedure, pointing to the degree of discretion of the Minister of Justice in selecting candidates, the limited role of the Superior Council of Magistracy (SCM) and the extent to which the same appointment and dismissal procedure would apply at lower management level within the prosecution.

The November 2017 report noted the lack of progress, and highlighted the ongoing amendments of the Justice laws gave an opportunity to address this. The report also recalled the need to call on the advice of the Venice Commission. The Romanian authorities did not follow up on this recommendation, but the Venice Commission was seized by the

²⁶ See Technical Report – Recommendation 7.

²⁷ For example: negative opinions on the legislative amendments on the Justice laws in September and November 2017, negative opinion on the dismissal of the Chief Prosecutor of the National Anti-Corruption Directorate in March 2018, negative opinion on the candidate for the appointment of the Chief Prosecutor of the National Anti-Corruption Directorate in October 2018.

²⁸ The European Court of Human Rights has underlined that any interference with the freedom of expression of a judge in an apical position calls for close scrutiny and that questions concerning the functioning of the justice system enjoy a high degree of protection under the right of freedom of expression. ECtHR, judgement in case *Baka v. Hungary*, 23 June 2016.

Parliamentary Assembly of the Council of Europe.²⁹ The Venice Commission opinion specifically highlights the need for changes to ensure a neutral and objective appointment and dismissal process, with a balance between the roles of different institutions.³⁰ However, the amendments of the Justice laws have weakened the role of the Superior Council of Magistracy and the role of the President of Romania in the appointment process for senior prosecutors, strengthening the role of the Minister of Justice. This further concentration of power in the hands of the Minister of Justice diverges from this recommendation.

Codes of conduct

Since the last CVM report, criticism of the judicial system and magistrates in the media and from the Government and the Parliament representatives has continued. Throughout 2018, there was regular criticism targeting the judiciary as a whole, in particular the institutions dealing with high-level corruption, as well as individual magistrates. This entails a clear risk to public trust in the judiciary.³¹ This confirms the need for action to discourage open challenges to the independence of justice and the authority of court decisions. Attempts to bring redress have been tried through the Superior Council of the Magistracy and through individual magistrates bringing their own cases to court. The CVM recommendation on a Code of Conduct for parliamentarians sought an institutional recognition of the problem, and a process to take steps to address it.

The November 2017 report acknowledged the adoption of a Code of Conduct by Parliament, as well as by the Government. The hope was that this would be carried through as a practical tool to address the problem. However, the evidence shows that, with a lack of explicit provisions on the respect for the independence of the judiciary, the Code is not yet performing this function. The Commission has not been made aware of any cases where procedures have been initiated in Parliament in response to a statement impinging on judicial independence.

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.*

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*

²⁹ In April 2018, the Parliamentary Assembly of the Council of Europe requested an opinion of the Venice Commission on the amendments of the three Justice laws.

³⁰ Venice Commission Opinion No. 924/2018 of 20 October 2018. The Venice Commission recognised that the changes needed to secure the right balance between the roles of different institutions might require Constitutional change.

³¹ See Council of Europe Recommendation CM/Rec (2010)12 on judges: independence, efficiency and responsibilities, §18: “*If commenting on the judges' decisions, the executive and legislative powers should avoid criticism that would undermine the independence of or public confidence in the judiciary.*”

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 and developments illustrate the lack of stability in the development of such key legislation. In December 2016, a new deadline of January 2019 was set for the entry into application of the remaining provisions of this Code. The November 2017 CVM report noted that steps were under way to provide the necessary infrastructure to accommodate the new system. But Parliament adopted amendments in June making substantial changes to the Civil Procedure Code, including removing the council chamber stage in the civil procedure. Some of these amendments were successfully challenged at the Constitutional Court by the High Court of Cassation and Justice. The law therefore needs to be revised in Parliament and this process should take particular account of the workload of the High Court of Cassation and Justice.

Criminal Codes

The November 2017 CVM report noted that the recommendation to conclude the current phase of the reform of Romania's Criminal Codes remained outstanding. The recommendation was based on the fact that there had been a gradual process of developing amendments through consultation and reflecting the need to adapt to recent Constitutional Court decisions and transposition of EU Directives.³² The Government adopted a draft law in November 2017. However, when discussion started in April 2018 in a Parliamentary Committee, this was based on completely new drafts and a very high number of amendments. This was reflected in the final drafts adopted by the Parliament in June and July.

The amendments constitute a profound overhaul of the Codes of 2014, including in the procedural aspects of the criminal investigations and trial, and in the balance between the public interest in sanctioning crime, victims' rights and the rights of suspects. The amendments also reduce the scope of corruption as an offence, which – if confirmed when the laws return to the Parliament following the Constitutional Court ruling – would entail a reassessment of the progress made so far under the CVM.³³

The amendments have not entered into force as they have been challenged at the Constitutional Court. The Constitutional Court ruled in October that a substantial number of the amendments are unconstitutional.³⁴ In addition to constitutionality issues, these amendments have raised a wide number of legal and policy concerns, underlined by law enforcement authorities and civil society inside Romania, as well as many partners outside Romania.³⁵

On 20 October, the Venice Commission adopted an opinion on the amendments of the Criminal Code and Criminal Procedure Code.³⁶ The conclusions of the Venice Commission

³² For example, EU Directives on the presumption of innocence and on the freezing and confiscation of the proceeds of crime.

³³ See also Benchmark 3 below.

³⁴ Ruling on the Criminal Procedure Code of 12 October and on the Criminal Code of 25 October 2018. The motivations of the rulings have not yet been published.

³⁵ The European Commission wrote to the Romanian government asking for views on a number of issues relating to compatibility with EU law on 4 October, and received a response on 5 November, referring to the pending follow-up to the Constitutional Court ruling.

³⁶ Venice Commission, Opinion 930 /2018.

opinion are very critical, pointing to rule of law concerns in leaving crimes unpunished, to the lack of quality of the legislation, and to shortcomings in its preparation as well as contradictions with the case law of the European Court of Human Rights and with the international obligations of the country, especially regarding the fight against corruption. The Venice Commission therefore recommends "that the Romanian authorities conduct an overall re-assessment of the amendments to the criminal and criminal procedure codes, through a comprehensive and effective consultation process, in order to come up with a solid and coherent legislative proposal, benefiting from broad support within the Romanian society, and taking fully into account the applicable standards."

The transparency and predictability of the legislative process for legislation on judicial reform and anti-corruption

The November 2017 report had pointed to the potential of the Special Parliamentary Committee on Systematisation, Unification and Ensuring Legislative Stability in the Judiciary to set up a predictable amendment process, ensuring debate and public consultation.

This Committee has dealt with the reforms of the Justice laws and the Criminal Codes. Some aspects of the legislative procedure prepared in the Committee could be considered as progress with regard to the past: the debates are broadcast, the drafts are usually available, and the judicial institutions are invited to the debates and can give their opinion. However the choice of urgency procedures has strongly limited the effectiveness and credibility of these openings. It remains difficult to understand the objective reasons for urgency procedures in the first place, as well as the fact that the urgency was not later reassessed, given the fundamental doubts raised on the drafts. These doubts were expressed by Romanian institutions like the High Court of Cassation and Justice, and by external partners such as the European Commission and other Member States. The lack of debate was particularly striking given the fact that, following the accelerated procedures in committee, there was little or no debate on these key issues of public policy in the two chambers of Parliament themselves. Even once the process on the Justice laws was complete, in October the Government made further changes by Emergency Ordinance, with even less opportunity for consultation. This process would leave a huge implementation challenge for the judicial authorities and a real risk to the provision of justice, which does not seem to have been a consideration in the process.

Members of the Parliament have argued that the legislative process is transparent and takes into account the opinion of the magistracy. It is true that the laws do include amendments suggested by the magistracy themselves. However, this is not the case for most of the most controversial provisions, which have passed into law with little or no clarity as to why the views of the judiciary have been rejected. The scale of the questions raised by the Constitutional Court – on constitutional issues alone – again underlines the poor preparation of these amendments and the consequences of failing to draw on the expertise of the key judicial institutions. As also pointed out by the Venice Commission and GRECO, when envisaging such fundamental legal changes, it should be expected that Parliament would undertake a genuine debate on the societal needs and impacts of the amendments, based on wide consultations: these are issues of public policy, and the issues of constitutionality tested in the Constitutional Court cannot be considered the only questions of relevance. The fact that the opinion of the Venice Commission on the Justice laws has found major remaining problems in the laws, and the concerns that the amendments to the Criminal Code and Criminal Procedure Code may be inconsistent with the legal obligations of Romania at EU and international level, are both illustrations of the risks of accelerated procedures. This process cannot be considered to be in line with the recommendation.

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

Respect and implementation of court decisions is an integral part of the efficiency of the judicial system as set out in Benchmark One.³⁷ Following a condemnation by the European Court of Human Rights in 2016, Romania proposed to the Council of Europe Committee of Ministers an action plan to address the structural problems of non-enforcement of court decisions against the State.³⁸ This action plan and the additional measures required by the Council of Europe Committee of Ministers are of direct relevance to addressing this recommendation.

Steps are under way to progress on the action plan and a list of measures to take was submitted to the Government in September. Proposals include amendments to the legal framework in order to guarantee timely execution and a mechanism to supervise and prevent late execution of judgements for which the State is a debtor. The Ministry of Justice and the Superior Council of Magistracy are also advancing with an IT registry of court decisions in which the State is a debtor or a creditor.³⁹

Structural reforms to the judicial system

The November 2017 report noted that the comprehensive Action Plan adopted in 2016⁴⁰ setting out the structural reform steps to be taken until 2020 for the development of the judicial system was under way, and that it should be a tool to bring major benefits to the users of the justice system and improve public trust. This Action Plan has been developed and adjusted in the course of 2018, and has financial support from EU structural funds,⁴¹ guided by meetings of the Strategic Management Council. It also tackled issues such as setting up a permanent mechanism of dialogue between the representatives of the three state powers and bringing the IT system up to date in terms of data protection.

³⁷ Guide on Article 6 of the European Convention on Human Rights – Right to a fair trial (civil limb), http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf.

³⁸ <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806dda63>.

³⁹ See Technical Report – Recommendation 5.

⁴⁰ Action Plan for implementing the Strategy for the Development of the Judiciary 2015-2020 approved through Government Decision no. 282/2016.

⁴¹ The Superior Council of Magistracy, the National Institute of Magistracy, the National School of Clerks and the Judicial Inspection have successfully applied for projects under the specific objective 2.3 of the Administrative Capacity Operational Programme. The Public Ministry is also implementing several projects funded under the same strategic objective.

However, the Strategic Management Council has not developed into a forum able to address major strategic questions for the judicial system. For example, it seems to have played no part in the debates about the changes to the Justice laws and the Civil and Criminal Codes, which will have fundamental consequences for the functioning and organisation of the justice system. As noted above, the implementation of the Justice laws has been taken forward through unilateral Emergency Ordinances rather than through consensual decisions from the Strategic Judicial Management.⁴²

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

The November 2017 report noted that the Superior Council of the Magistracy had set out its priorities for its mandate (2017–2022), providing a first basis to promote the accountability of the institution. The report also noted that despite challenging circumstances, the Council had been able to take difficult decisions, for example in rejecting proposed amendments of the Justice laws. It concluded that "the Council should continue to consolidate its work to defend the reputation of the magistracy in a consistent and effective way, and to contribute to a constructive and transparent dialogue with the Government and Parliament."

Since then, circumstances have made it increasingly difficult for the Council to maintain the approach set out in its priorities, with a series of opinions rejected by the government.⁴³ The Council was divided on how to react to the recommendations of the Venice Commission and GRECO on the Justice laws, even in more managerial areas such as analysing the impact of amendments such as the early retirement scheme and delayed entry into the profession.

On the amendments of the Criminal Codes, the Council was requested to give a point of view.⁴⁴ It consulted all courts and prosecution offices and shared a summary point of view with the Parliamentary Committee. Members of the Council attended the debates in Parliament, putting forward amendments and making comments. However, after the adoption of the laws by Parliament, the Council did not give an opinion on the changes, nor did it analyse the impacts of the amendments on the judicial system.

The January 2017 report underlined in particular the value of public reporting by the Council on actions it has taken in defending the independence of justice and protection of reputation, independence and impartiality of magistrates. However, the Council was not able to provide a strong stance in this area, despite the overall situation in terms of public criticism of the magistracy and judicial institutions.

⁴² Emergency Ordinance 90/2018 of 10 October 2018 on measures for the operationalisation of the Department for the investigation of offences committed within the judiciary; Emergency Ordinance 92/2018 of 16 October 2018 amending the law on the statute of magistrates; Emergency Ordinance 77/2018 of 5 September 2018 appointing an interim management team in the Judicial Inspection.

⁴³ See footnote 27.

⁴⁴ The SCM members informed the CVM mission that a "point of view" is not the same as an opinion and does not require a decision by the SCM plenum.

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

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

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 PREVENT system is designed to prevent conflicts of interests in public procurement procedures by setting up an ex-ante verification mechanism and allowing the contracting authorities to remedy possible problems prior to the award of the contract. The system is now fully operational and the National Integrity Agency (ANI) reports positive results.⁴⁵ In addition to the warnings, PREVENT has also raised awareness among contracting authorities. Overall, it seems that the preventive approach is gaining traction and the willingness of the large majority of contracting authorities to eliminate potential conflicts of interests before contracts are signed demonstrates its value. A legislative change introducing the possibility to fine a contracting authority for a failure to respond to alerts from the PREVENT system has been introduced, but its added value is unclear.⁴⁶

More broadly, the track record of the Agency remained steady on investigations of incompatibilities and administrative conflicts of interests.⁴⁷ However, the stability of the legal framework for integrity continues to face challenge. Two legislative proposals were adopted by the Parliament in July, despite a negative opinion from ANI. The first would set a

⁴⁵ Since the start of operations in June 2017 until 1 September 2018, PREVENT has analysed 16.210 public procurement procedures of a cumulative value of about EUR 15.470 million. Eight percent of the procedures analysed concerned EU funds. ANI issued 57 integrity warnings, some of them concerning procurements of very high values. The total amount of the value of the procurement procedures for which there was an integrity warning is EUR 112 million. In 48 cases, the contracting authorities eliminated the potential conflict of interest. For 9 cases the potential conflict of interests was not addressed. ANI has started an investigation for conflict of interests in two of these cases.

⁴⁶ Emergency Ordinance 98/2017 of 14 December 2017. See also Technical Report – Recommendation 8, p22

⁴⁷ See also Technical Report – Benchmark 2, p 21.

prescription deadline of three years for the deeds that determine the existence of the state of conflict of interests or incompatibility.⁴⁸ The second proposal would amend the sanctioning regime regarding conflict of interests for local elected officials.⁴⁹ Both have been challenged at the Constitutional Court.⁵⁰ Further proposals are pending in Parliament.

Another challenge relates to ANI's financial resources. Following a sharply reduced budget in 2017, further reductions leave ANI risking financial difficulties in paying salaries and contractors.⁵¹ It is essential that the Agency has the necessary resources to continue fulfilling its tasks in accordance with Benchmark Two.

Follow-up of court decisions concerning Members of the Parliament

Previous CVM reports have highlighted delays and apparent inconsistencies in the application of sanctions for Members of Parliament found incompatible or in conflict of interest following a final court decision on a report of the Agency. The Commission had therefore recommended more transparency in decision-making, and gave some concrete suggestions to this effect in the November 2017 report. Since October 2016, five final and irrevocable court decisions have been ruled against Members of Parliament. In two cases, as well as in two other cases relating to the December 2016 elections,⁵² Parliament has written to ANI stating that no disciplinary sanction would be applied.⁵³ For the other cases the Parliament has not yet reacted. Whilst such letters are a step forward in terms of transparency, the reasoning of the Parliament risks creating a loophole in terms of the dissuasiveness of sanctions. The argument was that no action was taken because the integrity incident in question came in a previous mandate or position. This is not an interpretation applied so far by the courts or by other public institutions. This suggests a need for clarity on the rules on incompatibilities and conflict of interests in a way which fulfils the CVM benchmark of securing "mandatory decisions on the basis of which dissuasive sanctions can be taken".

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

3.3 Benchmark Three: Tackling High-level corruption

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

The January 2017 report recognised the substantial progress made in tackling high-level corruption. It also underlined that weakening or shrinking the scope of corruption as an offence, or major challenges to the independence and effectiveness of the anti-corruption prosecution office, would constitute backtracking. Developments since the November 2017

⁴⁸ Law modifying Law 176/2010 regarding integrity in public functions.

⁴⁹ Law modifying Law 393/2004 on the Statute of locally elected officials.

⁵⁰ The Constitutional Court ruled on one of the laws on 16 October 2018 and on the other on 6 November 2018, where it announced, through a press release, that the first legislative proposal is unconstitutional.

⁵¹ From about 33 million Lei in 2016 to 22,5 million Lei in 2017. In 2018, the budget has been further reduced to 18 million Lei (a supplement of 1,5 million Lei was requested by ANI but was not approved).

⁵² These cases, three in total, were referred to in the November 2017 report COM(2017) 751, p 9.

⁵³ Referring to decisions of February 2018 of the Permanent bureau of the Chambers of Deputies. See Technical Report – Recommendation 9.

CVM report have required the Commission to look again at its assessment. A pattern of pressure on the key anti-corruption institutions has created growing concerns on their continued ability to deliver and hence on the irreversibility of the fight against corruption.

The National Anti-Corruption Directorate (DNA) has been a particular target in terms of pressure likely to damage its independence. As well as heavy public and media criticism from senior politicians, the fact that both the dismissal of the sitting Chief Prosecutor of the DNA, and the proposed appointment of a new Chief Prosecutor of the DNA, ignored the negative opinion of the Superior Council of the Magistracy raised major doubts about the process (see above). The Minister of Justice has also launched procedures for appointing new Deputies and Heads of Sector following the same procedure. The amended justice laws also create potential difficulties in terms of staff who may have to leave the DNA. In October, the Government adopted a new Emergency Ordinance which would modify the seniority requirements for DNA prosecutors, which could have further negative impacts on the operational capacity of the DNA.

The pressure has extended to the High Court of Cassation and Justice (HCCJ), in particular the judges of the criminal section. As mentioned above, the Government has referred the HCCJ to the Constitutional Court. This is in addition to pressure from within the judicial system, and there was controversy when the Superior Council of the Magistracy did not renew the mandate of the President of the criminal section of the HCCJ, dealing with many high-level corruption cases, and when the Judicial Inspection was seized with referrals concerning the President of the HCCJ (see above).

The steps taken by the Government may also be reflected in an apparent reduction in the cooperation with the DNA, with many public institutions such as ministries, the court of accounts and other control bodies reportedly more reluctant to notify potential fraud and corruption cases.⁵⁴

The establishment of the new section for investigation of offences committed by magistrates in the amended Justice laws creates a specific concern with regard to the fight against corruption, as a new structure could be more vulnerable in terms of independence than has been the case so far with the DNA, as it could be used as an additional instrument to intimidate and put pressure on magistrates. In addition, as a generalist department dealing with all crimes by magistrates, it will also lack expertise in terms of investigating specific corruption crimes, and the impact would be accentuated if investigations of all individuals linked to a case involving a magistrate were also removed from the jurisdiction of the DNA. As for the legal framework, the amendments to the Criminal Code and the Code of Criminal Procedures adopted by the Parliament before the summer could also undermine the fight against corruption (see above). In the widespread criticism of these amendments, the impact on corruption has been highlighted. As well as seriously hampering investigations, prosecution and sentencing, the scope of several corruption crimes as an offence has been diminished. This was also an important element in the opinion issued by the Venice Commission on the Codes,⁵⁵ and may raise questions on the compatibility with international conventions ratified by Romania. The Venice Commission highlights that, "*taken separately, but especially in view of their cumulative effect, many amendments will seriously impair the effectiveness of the Romanian criminal justice system in the fight against various forms of crime, including corruption-related offences, violent crimes and organised criminality.*" There is no indication that this issue of compatibility with international obligations has been the

⁵⁴ See Technical report – Benchmark 3.

⁵⁵ Venice Commission opinion 930 /2018.

subject of debate in Government or Parliament. Some of these changes have been ruled unconstitutional.⁵⁶

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.⁵⁷ 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 an MP when he/she is also or has been a Minister. This is a power under the Constitution, mirroring many parliamentary systems where immunities exist to protect Members of Parliament in the exercise of their elective mandate. The recommendation concerns not the fact that this power exists, but the way in which it is exercised. Previous CVM reports have highlighted the importance of transparent criteria to help Parliament demonstrate that it is exercising this power in an objective way. This would also help to show a link between the refusal of requests from the prosecution and the protection of Members of Parliament in the exercise of their elective mandate, and not to limit or avoid the investigation and prosecution of corruption crimes.

The November 2017 report welcomed that consideration had been given to the need for more transparency on the follow up to requests from the prosecution. However, it considered that more work was needed on recommendation 10 and reiterated its advice to seek the assistance of the Venice Commission and GRECO. The Legal Committee of the Chamber of Deputies has expressed openness to refer to existing criteria set out by the Venice Commission, but this has not been the case so far⁵⁸ and this has not been formalised in the rules of the Chamber or the Senate.

There has been no follow-up in 2018 on the invitation to the government to consider changing the law to clarify that Ministerial immunity related only to actions of ministers during their time in office. In the year to August 2018, two requests to start criminal proceedings against former ministers who are not Members of Parliament were accepted by the President of Romania.

The recommendation also pointed to reporting on decisions and holding a public debate. A first step in this direction is that debates in Parliamentary committees and plenary are broadcast live and can also be viewed online at a later stage.

On the basis of an analysis of Benchmark Three, the Commission can confirm its conclusion from November 2017 that more work is needed on recommendation 10. Moreover, the basis

⁵⁶ Constitutional Court decision on the special law on corruption 78/2000 of 25 September 2018, and on the Criminal Code on 25 October 2018.

⁵⁷ 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.

⁵⁸ In the period September 2017-August 2018, there was one request to authorise the start of criminal investigation of a former Minister, now Member of Parliament. The Chamber of Deputies rejected the request. No reference was made to criteria.

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

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 past year has seen some continued progress on the National Anti-Corruption Strategy. In March 2018, the Technical Secretariat within the Ministry of Justice published its first monitoring report.⁵⁹ The Technical Secretariat has continued to organise thematic evaluations of public institutions, aiming to check how these institutions define corruption risks in key areas and the measures in place to prevent incidents. Peer review evaluations will be supported by EU funds. The implementation of the strategy appears to have progressed in some important vulnerable sectors, especially in education, the Ministry of Interior and at local level, but less obviously in the case of health.

One of the objectives of the strategy is to improve performance in the fight against corruption by the application of criminal and administrative sanctions. Over the past year, the National Integrity Agency and the National Anti-Corruption Directorate have continued their work, and the General Prosecution Service has pursued the prosecution of corruption crimes not falling under DNA's remit.⁶⁰ However, as set out above, the effectiveness of these key institutions has been challenged, and several ongoing legislative initiatives raise concerns as regards their potential impact on the implementation of the Strategy and give a contradictory signal in terms of political support for the continuation of corruption prevention and sanctioning. This includes the amendments to the Criminal Code and Criminal Procedure Code, 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 and sets out this clearly in annual reports. The Agency has also progressed on the development of a national integrated system to monitor the

⁵⁹ Progress Report on the implementation of the National Anticorruption Strategy 2016-2020 in 2017 <https://sna.just.ro/Rapoarte+de+monitorizare>.

⁶⁰ Results of institutions are detailed in the Technical report.

measures taken by the authorities at each step of the asset recovery process. Nevertheless, ANABI has the potential to develop further. An important element would be to develop its activities relating to social and public re-use of seized assets, where the legislation allows for support to civil society projects such as legal education, criminality prevention, assistance to victims and other projects of public interest. Because of insufficient administrative capacity, the agency has so far been unable to launch a call for proposals in this area. In October 2018, the agency was operating with a staff of only 20 people out of the 35 staff foreseen, which limits it to a strict focus on core activities.⁶¹

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

4. CONCLUSION

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

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

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

To remedy the situation the following measures are recommended:

Justice laws

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

Appointments/dismissals within judiciary

- Suspend immediately all ongoing appointments and dismissal procedures for senior prosecutors.

⁶¹ Some recruitment procedures have recently been authorised.

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

Criminal Codes

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

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