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ROMANIA : Technical Report

Accompanying the document

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

on Progress in Romania under the Cooperation and Verification Mechanism

{COM(2018) 851 final}

Benchmarks to be addressed by Romania pursuant to Commission Decision of 13/XII/2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption:¹

Benchmark 1: Ensure a more transparent and efficient judicial process notably by enhancing the capacity and accountability of the Superior Council of Magistracy. Report and monitor the impact of the new civil and penal procedures codes

Benchmark 2: Establish, as foreseen, an integrity agency with responsibilities for verifying assets, incompatibilities and potential conflicts of interest, and for issuing mandatory decisions on the basis of which dissuasive sanctions can be taken

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

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

List of acronyms

ANABI: National Agency for the Management of Seized Assets

ANAF: National Agency for Fiscal Administration

ANI: National Integrity Agency

ANAP: National Agency for Public Procurement

ARO: Asset Recovery Office

CCJE: Council of Europe Consultative Council of European Judges

CCR: Constitutional Court

CVM: Cooperation and Verification Mechanism

DGA: Anti-corruption Directorate General – Ministry of Internal Affairs

DIICOT: Directorate for Investigating Organised Crime and Terrorism

DLAF: Fight Against Fraud Department

DNA: National Anti-Corruption Directorate

ECHR: European Court of Human Rights

ERDF: European Regional Development Funds

ESF: European Social funds

HCCJ: High Court of Cassation and Justice

MoJ: Ministry of Justice

NAS: National Anti-corruption Strategy

NIC: National Integrity Council

NIM: National Institute of Magistracy

SCM: Superior Council of the Magistracy

References to "CVM reports" refer to the Commission Progress Reports and the accompanying Technical Reports.

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

CVM report January 2017: COM(2017) 44 and SWD(2017) 25 – *report of progress since 2007 and in 2016*

CVM report November 2017: COM(2017)751 and SWD(2017)701 – *report of progress in 2017*

¹ Previous CVM reports can be consulted at: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/effective-justice/rule-law/assistance-bulgaria-and-romania-under-cvm/reports-progress-bulgaria-and-romania_en

1. INTRODUCTION

This technical report summarises the information which the Commission has used as the basis for its assessment of Romania's progress under the Co-operation and Verification Mechanism (CVM) since the last CVM report of November 2017.

This information has been collected from a variety of sources. The Commission has had the benefit of working closely with the relevant authorities in Romania, providing information on progress in detailed reports, as well as in face-to-face meetings.² Commission contacts with the Romanian administration and society across the full range of EU policies, including through the European Semester for economic governance, help to inform the CVM reports. In addition to official contacts with Romanian authorities, the Commission meets with non-governmental organisations active in the area of judicial reform and anti-corruption work, with professional associations of judges and prosecutors, and with representatives of other EU Member States in Romania. More generally, the Commission further draws on the various studies and reports that are available from international institutions and other independent observers in the field of judicial reform and the fight against corruption.³

Since the time when the CVM benchmarks were adopted, there have been major developments in Court of Justice and ECHR case-law, international standards and best practices,⁴ and comparative information on national justice systems in the EU,⁵ which also help to give an objective and comparable measure of the development of the Romanian judicial system and the fight against corruption.

The Commission also supports the efforts of Romania in achieving the CVM objectives through funding under the European Structural and Investment Funds and the Internal Security Fund–Police. In the 2014-2020 period, the European Social Fund (ESF) Administrative Capacity Operational Programme will provide funding of about EUR 100 million for judicial reform projects, linked to the development of the strategic management of the judicial system, reinforcing the capacity of the institutions and improving their performance, and the performance of practitioners (judges, clerks, prosecutors etc.), information and judicial education campaigns, improved transparency and integrity at the level of the judiciary system. In addition, ESF also supports reform and improvements in public procurement (with around EUR 10 million contracted so far), and the implementation of the National Anti-Corruption Strategy at local level. ERDF resources of up to EUR 15 million will be invested in capacity building and technical assistance in public procurement, in fraud prevention for Management Authorities and in the Fight Against Fraud Department (DLAF). Financing by EU funds can also be subject to the agreement of strategies and implementation of actions with the Commission (ex-ante

² In 2018, the Commission services had three fact-finding missions in Romania. Meetings were held with the Ministry of Justice, the National Agency for Fiscal Administration (ANAF), the Ministry of Regional Development and Public Administration (MRDAP), the High Court of Cassation and Justice (HCCJ), the Superior Council of the Magistracy (SCM), the Prosecutor General, the National Anti-Corruption Directorate (DNA), the Directorate for Investigation of Organised Crime and Terrorism (DIICOT), the Judicial Inspection, the National Integrity Agency (ANI), members of the Chamber of Deputies, members of the Senate, and the Constitutional Court, as well as with non-governmental organisations active in the area of judicial reform and anti-corruption projects, with judges and prosecutors unions. The Commission also has a CVM resident adviser in Bucharest.

³ In particular, the Council of Europe Group of States against Corruption (GRECO) issued a special report on the amendments on the justice laws in April 2018 (Greco-AdHocRep(2018)2) and the Venice Commission adopted two opinions in October 2018 on the amendments on the justice laws (Opinion 924/2018) and the amendments on the criminal codes and the code of criminal procedures (Opinion 930/2018).

⁴ The most important being the developments in the Court of Justice case-law on judicial independence, the European Court of Human Rights (ECtHR) case-law on fair trial rights, the UN Convention Against Corruption, Venice Commission Reports on European standards as regards the independence of the judicial system, and the European Commission for the Efficiency of Justice (CEPEJ) indicators.

⁵ Including the EU Justice Scoreboard: <http://ec.europa.eu/justice/effective-justice/scoreboard/>.

conditionalities for using the Funds). Over the years, Romania has also benefited from bilateral support from EU Member States.⁶

The CVM Commission Decision of 2006 defined four benchmarks for Romania. The four benchmarks were conceived in the circumstances of the day and their concrete wording reflects this, but the underlying themes have remained fully relevant.

On 25 January 2017, the Commission adopted a comprehensive assessment of ten years' progress in Romania on judicial reform and the fight against corruption. This report used a long-term perspective to identify the key remaining steps to reach the goals of the CVM. Most of them focus on the responsibility and accountability required by the Romanian authorities and on the internal safeguards needed to ensure that progress achieved is irreversible. When these steps set out under a benchmark are taken, the respective benchmark will be considered provisionally completed. When this applies to all benchmarks, the CVM will be closed. This process resulted in twelve final recommendations set out in the January 2017 CVM report. Complying with the twelve recommendations can therefore be considered as sufficient to meet the CVM goals – except if developments were to clearly reverse the course of progress underlying the baseline assessment of January 2017.

On 15 November 2017, the Commission adopted its report on the Cooperation and Verification Mechanism focusing on the progress under each of the key remaining recommendations, also including where necessary, an assessment of developments, which could call into question previous positive evaluations. This last report concluded that: *“During the nine-month period since the January 2017 report setting out the key recommendations to fulfil all CVM benchmarks, progress has been achieved on a number of recommendations, 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.*

On this basis, though progress has brought some benchmarks closer to the point of fulfilment, the Commission cannot yet conclude that any of the benchmarks are at this stage satisfactorily fulfilled.”⁷

2. PROGRESS ON KEY REMAINING STEPS

In the November 2017 report, the focus was able to remain strongly on the key remaining steps identified in the January 2017 CVM report and the actions taken by the Romanian authorities to fulfil the recommendations. However, given developments since January 2017 and as set out in the report from the Commission, it is also necessary to set out broader issues, which could have a bearing on whether the progress underlying the baseline assessment of January 2017 has been compromised.

Benchmark 1: ensure a more transparent and efficient judicial process notably by enhancing the capacity and accountability of the Superior Council of Magistracy. Report and monitor the impact of the new civil and penal procedures codes

Since the November 2017 report, there have been a number of developments with important implications across Benchmark 1. These are summarised here before looking specifically at the recommendations under this benchmark.

Justice laws

The three Justice laws adopted in 2004 define the status of magistrates and organise the judicial system and the Superior Council of Magistracy.⁸ They are therefore central to promoting the

⁶ Funding from the European Economic Area (Norway) further complements national and EU funding for judicial reform.

⁷ COM(2017)751, p.12.

⁸ Law 303/2004 on the Statute of magistrates; Law 304/2004 on Judicial organisation; Law 317/2004 on the Superior Council of Magistracy

independence of magistrates and the good functioning of the judiciary. The Justice laws were an essential basis for the positive assessment of the progress of Romania in the January 2017 CVM report.

At the time of the November 2017 report, the amendment process for the three Justice laws in Parliament had just started. The report warned that some of the proposed changes concerned judicial independence and raised questions about whether the January 2017 assessment would have to be reconsidered. The Commission emphasised that the provision by the Government and the Parliament of an open, transparent and constructive legislative process on the Justice laws would be crucial. This echoed the view of the Council of Europe Consultative Council of European Judges on the importance of involving the judiciary in the preparation of legislation.⁹

The laws as amended by the Parliament have been promulgated by the President of Romania. At the time of writing this report further changes were introduced ex-post in Government Emergency ordinances¹⁰, delaying very selectively the entry into force of certain provisions criticised by the Venice Commission but otherwise accentuating some of the problems already highlighted. The Venice Commission opinion on the Justice laws concludes that *“Although welcome improvements have been brought to the drafts following criticism and a number of decisions of the Constitutional Court, it would be difficult not to see the danger that, together, these instruments could result in pressure on judges and prosecutors, and ultimately, undermine the independence of the judiciary and of its members and, coupled with the early retirement arrangements, its efficiency and its quality, with negative consequences for the fight against corruption”*.¹¹

Beyond the most problematic changes pointed out by the Venice Commission opinion, there are changes in the Justice laws regarding the practical organisation of the courts and prosecution offices and the running of judicial proceedings which have been introduced without impact assessment and where the future impact of those changes on the effectiveness of the judicial system is therefore difficult to establish.

Concerns with the content of the Justice laws

The extent of the amendments of the three Justice laws is considerable. Many amendments were important amendments modernising certain human resources aspects (such as addressing long-term sickness or promotions) and had been discussed within the judicial system since 2015. Other changes were deemed necessary to align the laws with Constitutional Court decisions.

However, other amendments have been the source of major concern amongst the magistracy and observers including civil society. A number of these amendments could open the door to putting pressure on judges and prosecutors and hence undermining the independence of the judiciary. This also includes a greater potential for inference in individual cases. These concerns have been echoed by GRECO and the Venice Commission. In its opinion, the Venice Commission has singled out a number of aspects in the laws *“which seen alone, but especially taking into account their cumulative effect in the complex political context currently prevailing in Romania, are likely to undermine the independence of Romanian judges and prosecutors, and the public confidence in the judiciary.”*¹²

Several problematic amendments affect the independence of magistrates and limit the role of the Superior Council of Magistracy, the guarantor of the independence of the judiciary:

- The new system for appointment and dismissal of Chief Prosecutors and the role of the Minister of Justice (see below);
- Limits on the freedom of expression and information. Firstly, an amendment requires magistrates to refrain from “defamatory manifestation or expression against the other powers of the state”.

⁹ The position of the judiciary and its relation with the other powers of state in a modern democracy stated 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”*. Opinion No 18 (2015).

¹⁰ Emergency Ordinance 92/2018, Emergency ordinance 90/2018.

¹¹ Venice Commission, Opinion 924/2018 - paragraph 164.

¹² Venice Commission, Opinion 924/2018 - paragraph 161.

Whilst a general duty of restraint is understandable, highlighting a special protection for other state powers puts into questions the capacity for magistrates to express views on issues and legislative changes affecting the functioning of justice. This could even affect the role of the SCM to defend judges and prosecutors from public statements from other state bodies, which may damage judicial independence. Secondly, there is a concern that an amendment to the Criminal Procedure Code will prevent public authorities and courts from providing information about criminal proceedings. This may be detrimental to the right of the public (and possible victims) to be informed.

- New provisions dealing with the material liability of magistrates. These provisions have been seen as opening a possibility to be used as a means to put pressure on magistrates. They open the possibility for the Ministry of Finance to launch regress action against a magistrate for judicial error, on the basis of its own assessment, with a consultative role for the Judicial Inspection. A decisive role in determining action is given to the Judicial Inspection and the Ministry of Finance, rather than to the Superior Council of the Magistracy (given its responsibilities both for judicial independence and disciplinary liability).
- A new department for investigating criminal offences committed by magistrates. The establishment of this new department could be seen as an (additional) instrument to put pressure on judges. The rationale for a special treatment of magistrates compared to other office holders and civil servants has not been made clear. In addition, the National Anti-Corruption Directorate (DNA) already has an established solid track record in investigating and prosecuting cases of corruption within the magistracy.
- The revocation of members of the Superior Council of Magistracy. The possibility of revoking SCM members through a non-confidence vote/petition from courts and prosecution offices risks upsetting the balance between the accountability and the stability and independence of SCM members.¹³
- The removal of the previous reference to the independence of prosecutors in their statute. Taking into account the cumulative effect with other measures and given the complex political context currently prevailing in Romania, this further tends toward reinforcing hierarchical control and the authority of the Minister of Justice and entails a risk of giving way to political interference in criminal cases.¹⁴

In addition, amendments such as the incentive to early retirement¹⁵ and the increased training period for entry into magistracy¹⁶ create serious risks of disruption of the human resources management in the judiciary, with consequences on its efficiency and quality. Several other changes are less obviously problematic but could affect the daily operations of the courts and prosecution offices and the challenges resulting from their introduction seems not to have been thought through.¹⁷ The individual and cumulative impacts of the changes have not been subject to impact assessment whereas many of the changes have implications in terms of managerial, human and financial resources.

¹³ Emergency Ordinance EOG 92/2018 further modifies the provisions on revocation of SCM members

¹⁴ While the Venice Commission has acknowledged that there are no common standards requiring more independence of the prosecution system, and that “*a plurality of models exist*”, only a few of the Council of Europe member states have a prosecutor’s office under the executive authority and subordinated to the Ministry of Justice (e.g. Austria, Denmark, Germany, the Netherlands) and “*a widespread tendency to allow for a more independent prosecutor’s office, rather than one subordinated or linked to the executive*” may be observed. “*Specifically, with respect to Romania, the Venice Commission has underlined the need to increase the independence of the prosecutors*” (Opinion 924/2018).

¹⁵ Retirement after only 20 years of service with a slightly reduced pension (and no age requirement)

¹⁶ The amendment increases the duration of the training period at the National Institute of Magistracy (NIM) from two to four years, and the probationary period from one to two years. This means a possible gap of four years for admitting judges and prosecutors via the NIM. Creating new avenues for entry into magistracy for filling the gap creates other risks. Successive CVM reports have recognised that having the large majority of magistrates recruited through the NIM has importantly contributed to the professionalization and independence of the Romanian magistracy.

¹⁷ Examples include changes regarding the number of judges in panels and the rules for delegation of staff.

These concerns were already reflected in the conclusions and recommendations of the GRECO report of March 2018¹⁸, and have now been further confirmed in the conclusions of the opinion of the Venice Commission of 20 October 2018. The Venice Commission has also issued recommendations for Romania in order to address the problems identified with the laws.¹⁹

The introduction of the Justice laws

In August 2017, the Minister of Justice presented the main lines of the planned amendments to the three laws. In October 2017, the Parliament started the debate over three new legislative initiatives concerning the three laws, on the basis of drafts tabled by Members of Parliament. The amendments were adopted at the end of December 2017 by the Romanian Parliament. An overall process of a potential reform of the three laws had been considered starting 2015, but those previous drafts have been eventually abandoned to promote the new amendments, with an accelerated adoption process in Parliament. The slow progress on the 2015 amendments raised further questions as to why the 2017 process was considered so urgent. The amendments were processed by a special joint committee of the two chambers of Parliament set up for this particular purpose.

Because of the accelerated parliamentary procedure, the opportunities for the proposed amendments to these key Justice laws to be subject to consultations with magistrates, other stakeholders and civil society were few. Many key judicial interlocutors sought nevertheless to give a view and their conclusions were often highly critical. This included two negative opinions from the SCM, opinions of the High Court for Cassation and Justice, and a request for the withdrawal of the draft amendments signed by almost 4,000 magistrates, as well as street protests and warnings from civil society. This also included calls to postpone the adoption process of the amendments until after an evaluation of the Venice Commission that could have recommended practical solutions to address the most controversial issues raised by the proposed amendments. The Venice Commission regretted that the current process could not benefit from such a wide and comprehensive debate.²⁰

The adopted amended laws have been challenged several times before the Constitutional Court, by the President of Romania, the opposition parties in Parliament, as well as the High Court for Cassation and Justice. The challenges have addressed potential constitutional issues, but constitutionality checks do not cover other issues regarding potential impacts on the quality and efficiency of the functioning of courts and prosecutor's offices.

In its initial recommendations, and also in the November 2017 report, the Commission had emphasised the role of the Venice Commission. However, it was not until April 2018 that the Venice Commission was seized, and then by the Parliamentary Assembly of the Council of Europe rather than the Romanian authorities. The opinion on the amended Justice laws by the Venice Commission seems to have had no impact on the accelerated timetable for the laws and has not been the subject of debate in Parliament. The result is that the recommendations of the Venice Commission came when the avenues for referral had been exhausted. The President was required to promulgate the laws: the law on judicial organisation was promulgated in July, the law on the Superior Council of Magistracy was promulgated in September and the law on the status of magistrates was promulgated in October.

As soon as the law on the judicial organisation was promulgated, the High Court of Cassation and Justice was criticised for not changing the appeal panels in line with the new law.²¹ The controversy was amplified when the Judicial Inspection announced the start of a possible disciplinary investigation against the President of the High Court at end of August. At the beginning of October, the Government referred the High Court to the Constitutional Court invoking a constitutional conflict with the Parliament regarding to the implementation of the amended law on judicial organisation.²²

¹⁸ On the basis of the amendments adopted by Parliament in December 2017 - Greco-AdHocRep(2018)2.

¹⁹ On the basis of the amended laws as promulgated - Venice Commission Opinion 924/2018

²⁰ Venice Commission, Opinion 924/2018 – paragraph 158

²¹ The issue concerns the composition of criminal appeal panels.

²² <https://www.ccr.ro/noutati/COMUNICAT-DE-PRES-329>. The conflict also refers to the constitution of appeal panels since 2013. The Constitutional Court ruled on 7 November 2018, admitting the conflict. The motivation of the ruling has not yet been published.

On 10 October, the Government adopted an emergency ordinance in relation to interim measures for setting up the new special prosecution department for investigating magistrates.²³ It modifies ad interim the rules and criteria for appointing the Chief Prosecutor, the deputy and the prosecutors of the department.²⁴ This seemed in conflict with one of the arguments used earlier in the year to reassure critics of the department - that the organisation of the appointments would fall entirely under the competence of the Superior Council of Magistracy and offer important procedural guarantees. In its opinion the Venice Commission had noted the importance of procedural guarantees such as a project-based competition for the Chief Prosecutor and the involvement of the Plenum of the SCM (i.e. judges and prosecutors) in the appointments.²⁵ The SCM applied the modified rules of the emergency ordinance and the President of the SCM issued a statement on 23 October when the department entered into operations.²⁶

On 15 October, the Government adopted another emergency ordinance, modifying the law on the status of magistrates.²⁷ This text postpones the entry into force of the provisions on the early retirement of magistrates until 1 January 2020 and holds the implementation of the provisions on the composition of three judges' panels. At the same time, it adds further seniority conditions for prosecutors in the National Anti-Corruption Directorate and the Department for investigating Organised Crime and terrorism by adding a compulsory experience of 10 years. In addition to postponing the entry into force of certain problematic provisions (but not removing them all together) the Emergency Ordinance changes the rules for the organisation of the prosecution services and consolidates the power of the Minister of Justice to trigger disciplinary proceedings specifically against prosecutors.²⁸

Cooperation between the intelligence services and the judicial institutions

A particular debate has arisen concerning the cooperation in criminal cases between the Romanian Intelligence Service ('SRI') and various judicial institutions, including the DNA and the General Prosecutor's Office. In particular, it has been claimed that classified cooperation protocols concluded between SRI and various judicial institutions have led to widespread abuses and the illegal gathering of evidence in criminal proceedings, notably related to technical surveillance measures such as interceptions. Given the role of the courts to establish whether or not allegations of abuses are substantiated and to decide on the legality of the evidence gathered on the basis of these protocols in criminal cases, as of today no court decision clearly upholding those claims has been reported to the Commission services.

While the operation of the national intelligence services and the democratic control thereof is not a matter of EU competence,²⁹ the debate has relevance for the CVM process in the sense that arguments raised in this debate have been cited as a justification for the changes in both the Justice laws and the Criminal Code and Code of Criminal Procedures.³⁰ Senior political figures have also used them as

²³ The Emergency Ordinance 90/2018 *on measures to operationalise the Department for the investigation of offences committed by magistrates* modifies the justice law on judicial organisation (amended law 304/2004) which entered into force in July 2018

²⁴ Changes concern the panel for the selection (at least 3 members instead of 4 – in practice there were 3 judges and no prosecutor), documents to be provided (only a letter and any other documents considered relevant for the Chief Prosecutor post rather than a project based competition), publicity of the documents provided by the candidates is no longer obligatory, change of selection criteria for the prosecutors of the section, appointment to be made by the President of the SCM rather than the plenum of the SCM.

²⁵ Venice Commission opinion 924/2018 – paragraph 85 – 87.

²⁶ <https://www.csm1909.ro/299/6185/COMUNICAT-DE-PRES%C4%82-privind-opera%C5%A3ionalizarea-Sec%C5%A3iei-pentru-investigarea-infrac%C5%A3iunilor-din-justi%C5%A3ie> - (23.10.2018)

²⁷ Emergency Ordinance 92/2018.

²⁸ The Minister of Justice had powers to launch disciplinary proceedings against all magistrates in another law from 2012, which then was repealed by the amended Justice laws. The Emergency Ordinance now re-instated the power to trigger disciplinary proceedings by the Judicial Inspection specifically for prosecutors.

²⁹ In accordance with the Treaties (notably Article 4 TEU), the responsibility for national security belongs to Member States.

³⁰ The possibility of adopting further measures, possibly of legislative nature, that would enable defendants in criminal cases where surveillance measures based on the above-mentioned protocols were used, to seek

core arguments in the public criticism of magistrates and judicial institutions. In early October 2018, the Chamber of Deputies filed an action with the Constitutional Court invoking a possible constitutional conflict between the Public Ministry (the General Prosecutor's Office) and the Parliament in relation to these protocols.

From the information that became public in 2018, it appears that the collaboration between the SRI and the judicial system was regulated in various laws, which were in place before the accession of Romania to the EU and stipulated a strict separation of the role of the prosecution and the technical support from the Intelligence services. The Senate is responsible for oversight of the security services in Romania, with annual reports from the SRI.

Practical arrangements for these collaborations were later laid down in technical agreements (the protocols) referring to the laws regulating the collaborations.³¹ According to judicial authorities, these protocols were classified at the request of the SRI. The main document subject to controversy is a cooperation protocol concluded in 2009 between the Prosecutor General and the SRI.³² The Protocol was declassified in 2018 and is now in the public domain. It sets out a number of principles and technical provisions concerning the operational cooperation between SRI and the prosecution, notably with regard to technical surveillance measures taken during criminal proceedings at the initiative of the prosecutor, in accordance with the Criminal Procedure Code, as well as with regard to information exchange regarding notifications from the SRI in relation to indications of a possible crime to be followed up by the prosecutors. Other protocols signed with the courts contained provisions to ensure the confidentiality of the exchange of information concerning judicial warrants.

In February 2016, the Constitutional Court issued a decision³³ regarding technical surveillance actions implemented by the SRI. These technical surveillance interventions required a mandate issued by a judge on the request of a prosecutor.³⁴ The national authority for wiretapping was a department within the SRI owning the technical platforms for such operations. In its decision the Constitutional Court declared unconstitutional a provision of the Criminal Procedure Code which allowed 'other specialised state bodies' (i.e. other than the prosecutors and law enforcement agents) to enforce technical surveillance mandates upon request of the prosecutor.³⁵ To fill the gap, the government adopted an emergency ordinance putting the technical surveillance function in the hands of specialised police within the prosecution services and setting up a "Chinese wall" between the management of the tools by the SRI and the requests of the prosecution.³⁶ This was noted in the January 2017 CVM report. Commission services had also previously discussed with the DNA the sources of their signals, including from the SRI, where DNA underlined that these notifications could not be used as evidence, and that prosecutors still had to gather the evidence necessary to demonstrate the existence of a crime. The January 2017 report noted that the DNA had explained that, as public confidence in their work increased, over 80% of signals came from the general public and therefore their reliance on the SRI and other public authorities had diminished.³⁷

This debate is also linked to the question of fair trial rights in criminal proceedings. The Commission had noted that the issue of respect of fair trial rights was often used as an argument in public debates to criticise the judiciary and advocate for changes in the (corruption) laws.³⁸ Successive CVM reports

redress, be it within the framework of ongoing criminal proceedings or even in cases where final court judgments have been rendered, has also been mentioned regularly in the debate.

³¹ It has been reported to the Commission that no court has ruled that such protocols were illegal.

³² http://www.mpublic.ro/sites/default/files/PDF/protocol_declasificat.pdf

³³ Constitutional Court Decision 51/2016 of 16 February 2016.

³⁴ DNA reports that from January 1, 2005 – February 16, 2016, 24,576 technical surveillance mandates or technical mandates to authorise interception of communications were dispatched, covering 36.406 people.

³⁵ Provision art. 142 alin. (1) of the Criminal Procedure Code " The prosecutor shall enforce an electronic surveillance measure or may order that this be enforced by criminal investigation bodies or by specialized employees of the law enforcement bodies or of other specialist bodies of the state"

³⁶ This Emergency Ordinance (EOG 6/2016) needs to be adopted by Parliament to become definitive and this is now the subject of debate in the Chamber of Deputies.

³⁷ CVM report January 2017 – technical report SWD(2017)25 p35

³⁸ CVM report January 2017 – technical report SWD(2017) 25 p17

have highlighted that respect of fair trial rights in line with the case law of the Court of Justice and the European Court of Human Rights is an essential element of the criminal codes and the criminal judicial proceedings, and that trust in the respect of fair trial rights in another country are the basis for judicial cooperation in criminal matters and mutual recognition. CVM reports therefore welcomed the entry into force of the new Criminal Code and Criminal Procedure Code in 2014 as increasing guarantees for the rights of suspects, defendants and also the victims of crimes.³⁹ The Commission had also been informed by the European Court of Human Rights (ECtHR) and the Council of Europe that many applications to the ECtHR alleging a violation of fair trial rights by the prosecution services (in corruption cases) had not been admitted. Some proceedings are now ongoing and the results may have a bearing on whether or not there is a need to amend the Criminal Code or Criminal Procedure Code.

A further issue in the public debate concerns allegations of infiltrated intelligence service agents in the justice system. The CVM report of January 2017 mentioned the issue and the verification steps made by the Superior Council of Magistracy and the CSAT (the Supreme National Defence Council). Both institutions denied that there were infiltrated agents in the justice system. The law clearly forbids a situation where intelligence service agents would be embedded in the justice system, as incompatible with the statute of magistrates. The amendments of the Justice laws reinforce this prohibition and require that annual declarations of magistrates will be verified annually by the CSAT, as all magistrates have to make declarations on an annual basis that they are not an *informant* or *collaborator* of the intelligence services. The Venice Commission opinion notes that there is a lack of clarity in these terms and a risk that an annual check might be inappropriate or even infringing on their independence if not coupled with adequate procedural safeguards and a right of appeal in court.⁴⁰

Recommendation I: 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.

The January 2017 report reiterated previous recommendations to put in place a system of transparent and merit-based appointments of top prosecutors which would ensure appropriate safeguards in terms of independence and checks and balances. Successive CVM reports had highlighted the need for sufficient checks and balances in the procedure, as well as the extent to which the same appointment and dismissal procedure would apply at lower management level within the prosecution.

The November 2017 report had underlined the lack of progress, but noted that amendments to the procedure could still be envisaged in the ongoing amendment of the Justice laws. The report also recalled the requirement to call on the advice of the Venice Commission.

The appointment of the top rank of prosecutors is regulated by Justice law 303/2004 on the status of magistrates, as amended this year. The appointment procedure (applicable for the Prosecutor General and deputies, DNA chief prosecutor, deputies, and heads of sections, as well as the DIICOT chief prosecutor and deputies) has been amended by limiting the Romanian President's right to refuse the proposal of the Minister of Justice to only once after the (consultative) opinion of the SCM's section for prosecutors. There were no changes in the selection process itself, which remains entirely in the hands of the Minister of Justice. The result enhances the power of the Minister of Justice and represents an additional limitation of the weight and relevance of the SCM opinion, given that the President is bound to appoint the second candidate proposed by the Minister of Justice, irrespective of the profile of that candidate and the SCM opinion.

Serious concerns about this new procedure were expressed by GRECO in March 2018⁴¹ and the Venice Commission⁴²: *"This new rule can therefore only be considered as a step backwards, reducing the independence of the leading prosecutors. This is particularly worrying in the context of the current tensions between prosecutors and some politicians, due to the fight against corruption. If the leading*

³⁹ CVM report 2016 – technical report SWD(2016) 16 p11-12; CVM report January 2017 – technical report SWD(2017) 25 p17 – 18.

⁴⁰ Venice Commission, Opinion 924/2018 – 106.

⁴¹ Greco-AdHocRep(2018)2

⁴² Venice Commission, Opinion 924/2018 - paragraph –54.

prosecutors depend for their appointment and dismissal on a Minister, there is a serious risk that they will not fight in an energetic manner against corruption among the political allies of this Minister."

In the selection procedures for the appointment of the DIICOT Chief Prosecutor, in June 2018, and of the DNA chief prosecutor, in August-October, selection criteria have been published,⁴³ (although not set by law which would provide for a better guarantee).⁴⁴ It is however not clear how they were taken into account in the evaluation and final decision by the Minister of Justice.⁴⁵

The predominant power of the Minister of Justice in the appointment procedure was illustrated by the dismissal and appointment process for the DNA Chief Prosecutor. This is a post of high public interest, with the DNA responsible for cases of high-level corruption, and indeed of particular EU interest, given the DNA's responsibility for cases involving EU funds.

However, in February 2018, the Minister of Justice started the revocation procedure of the Chief Prosecutor of the DNA, based on an evaluation report carried out by the Minister himself.⁴⁶ The report mainly raised allegations of bad management,⁴⁷ one of the reasons provided by the law as potential grounds for dismissal. The SCM issued a negative opinion against the proposal for dismissal, considering that the grounds for dismissal presented by the Minister were insufficient and the allegations of mismanagement not substantiated.⁴⁸ The President of Romania, taking also account of the SCM opinion, found the dismissal proposal groundless and unjustified and rejected it at the end of April.⁴⁹

Subsequently the Government seized the Constitutional Court, on the grounds of a conflict of constitutional nature between the Government and the President. The Constitutional Court decided in favour of the Government and ruled that the President can only refuse the Minister of Justice's dismissal proposal on matters of legality and not on merits or opportunity, irrespective of the SCM opinion.⁵⁰ Applying the Constitutional Court decision, the President of Romania dismissed the DNA Chief prosecutor on 9 July 2018

On 25 August 2018, the Minister of Justice also launched an evaluation of the management activity of the Prosecutor General, the same procedure as in the sequence which led to the dismissal of the Chief Prosecutor of the DNA. On 24 October 2018, the Minister of Justice presented his evaluation report on the Prosecutor General, and launched the request for his dismissal.⁵¹ This move triggered a strong reaction within the magistracy, with over 1000 judges and prosecutors requesting the Minister of

⁴³ Selection criteria for the DNA Chief Prosecutor: <http://www.just.ro/ministerul-justitiei-organizeaza-in-perioada-09-30-07-2018-selectia-procurorilor-in-vederea-efectuarii-propunerii-de-numire-in-functia-vacanta-de-procuror-sef-al-directiei-nationale-antic/>

⁴⁴ EOG 92/2018 adds requirements of publicity of the interview with the Minister of Justice.

⁴⁵ The candidate for Chief Prosecutor of DIICOT was selected by the Minister of Justice over the incumbent Chief Prosecutor following an interview (in a panel with Secretaries of State). The candidate received a positive evaluation by the SCM and he was appointed by the President of Romania.

⁴⁶ Evaluation published by Minister of Justice on 22 February 2018 <http://www.just.ro/comunicat-de-presa-raportul-privind-activitatea-manageriala-la-dna/>

⁴⁷ A management control had been performed by the judicial Inspection. The SCM had examined the report but found no major deficiencies in management, proposing a six-month period to implement certain recommendations with regard to identified weaknesses. The implementation of these recommendations was not finalised when the Minister launched the dismissal procedure.

⁴⁸ http://old.csm1909.ro/csm/linkuri/16_03_2018_90840_ro.pdf.

⁴⁹ Decision of President of Romania of 16 April 2018 (<http://www.presidency.ro/ro/media/declaratii-de-presa/declaratia-de-presa-sustinuta-de-presedintele-romaniei-domnul-klaus-iohannis>)

⁵⁰ CCR decision no 358 of 30 May 2018.

⁵¹ The arguments of the Minister of Justice include "a lack of management reaction from the Prosecutor general with regard to the failures of the DNA" (which the Minister of Justice had invoked to justify the dismissal of the DNA Chief prosecutor) and "public statements of the Prosecutor General of a political character" when criticising the Parliament and the Government policies with regard to the judiciary and instances of political pressure on the judiciary, as well as "problems of legality of his appointment". <http://www.just.ro/raport-privind-activitatea-manageriala-a-procurorului-general-al-romaniei/>

Justice to abandon this request.⁵² The dismissal request will be examined by the SCM on 20 November.

The CVM recommendation specifically calls on Romania to draw on the advice of the Venice Commission. In its opinion of 20 October 2018, the Venice Commission notes that the Constitutional Court decision “gives the Minister of Justice the crucial power in removing high-ranking prosecutors, while confining the President in a rather ceremonial role, limited to certifying the legality of the relevant procedure. The weight of SCM [...] is also considerably weakened, taken into account the increased power of the Minister of Justice and the limited scope of influence that it may have on the President’s position (only on legality issues)”.^{53, 54} The Venice Commission concluded that it was necessary to change this situation, even if this required a change to the Constitution: “the judgment leads to a clear strengthening of the powers of the Minister of Justice with respect to the prosecution service, while on the contrary it would be important, in particular in the current context, to strengthen the independence of prosecutors and maintain and increase the role of the institutions, such as the President or the SCM, able to balance the influence of the Minister. [...] To strengthen the independence of the prosecution service and individual prosecutors, one key measure would therefore be to revise, in the context of a future revision of the Romanian Constitution, the provisions of Article 132 (1) of the Romanian Constitution. At the legislative level, it could be considered, as far as dismissal is concerned, to amend Law no. 303 in such a way as to give to the opinion of the SCM a binding force.”⁵⁵

Given that the dismissal procedure mirrors the one for the appointment, it may be the case that this new interpretation of the Constitutional Court would also apply to the appointment procedure.

For the new appointment of the DNA Chief Prosecutor, a first set of candidates, many with relevant experience, was initially rejected by the Minister of Justice following an interview in July. No detailed reasoning was provided. A candidate from a second selection process launched in August was selected by the Minister of Justice. The SCM gave a negative opinion on the candidate at the beginning of October (see also recommendation 10). In its reasoning, the SCM section of prosecutors mentioned low resistance to stress, low analytical and synthesis capacity, a lack of clarity in adherence to values such as honesty and impartiality and a submissive ideological attitude inconsistent with the needs of the job.⁵⁶ The Minister of Justice took no account of this negative opinion and proposed the candidate for approval by the President of Romania.

The same appointment procedure applies for all deputy and heads of sector positions within the DNA, and the Minister of Justice has already initiated new procedures in this regard. The new legislation and the way the rules have been applied recently open the possibility that the whole hierarchy within the DNA could be removed and replaced with prosecutors selected by the Minister.

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.*

Past CVM reports have acknowledged that the successful prosecution and conviction of many prominent figures in Romania is a sign of judicial independence, showing that high office holders and prominent personalities are not beyond the law if they have committed a crime. However, they have

⁵² <https://www.romaniajournal.ro/two-magistrates-associations-urge-toader-to-immediately-abandon-the-revocation-procedure-of-prosecutor-general-lazar/>

⁵³ Venice Commission opinion 924/2018 - Paragraph 58

⁵⁴ The Venice Commission also points out that the impact of the Constitutional Court decision of 30 May 2018 is likely to have wider consequences on the statute of prosecutors in general since it also contains elements of interpretation of constitutional provisions concerning the relationship between prosecution services and the executive and suggests a strengthening of the powers of the Minister of Justice in relation to prosecutors.

⁵⁵ Venice Commission opinion 924/2018 - Paragraph 61

⁵⁶ http://old.csm1909.ro/csm/linkuri/12_10_2018_92763_ro.pdf; <https://www.romania-insider.com/superior-magistracy-council-report-adina-florea-dna/>

also noted that this work has triggered a reaction in terms of public attacks against individual magistrates or the judicial institutions. The Committee of Ministers of the Council of Europe has recommended that the executive and legislative powers should avoid criticism that would undermine the independence of or public confidence in the judiciary.⁵⁷ The Venice Commission has noted that: "*Compliance with the rule of law cannot be restricted to the implementation of the explicit and formal provisions of the law and of the Constitution only*",⁵⁸ and the Commission recommendation sought to encourage the putting in place of a mechanism which could create more of a sense of responsibility for public statements and their consequences.

A new Code of Conduct for parliamentarians was prepared in May 2017 and was adopted by both Chambers of Parliament on 11 October 2017.⁵⁹ The Code of Conduct does not specifically mention respect for the independence of the judiciary but includes a general provision on the respect of separation of powers. "*Deputies and senators shall exercise their mandate in accordance with the principle of the separation and balance of powers — legislative, executive, and judicial — within the framework of constitutional democracy.*" The Code includes a process and sanctioning mechanism in cases of breaches. However, as the provision on respect of separation of powers is very general, establishing breaches and imposing sanctions for excessive criticism of the judiciary may require practical examples and guidelines. GRECO has noted how further implementation steps can help the practical application of such a Code.⁶⁰ A specific opportunity exists in the form of decisions by the Superior Council of Magistracy against statements of a Member of Parliament discrediting a magistrate or the judicial system (see below), which could be used to automatically trigger follow-up in Parliament. In the reporting period, no cases of application of the Code of Conduct for Members of Parliament have been reported.

In July 2017, the Government adopted a Code of Conduct for Ministers,⁶¹ which also includes a general provision on the respect for the separation of powers. As with the Code of Conduct for parliamentarians, the regime for application and sanctions is not set out in detail and has not yet been tested.

In the reporting period, criticism of the judicial system and individual magistrates in the media and from the Government and the Parliament representatives has been particularly prevalent, in particular against the institutions dealing with high level corruption.

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 SCM 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.*

Criminal Code and Criminal Procedure Code

The new Criminal Code and Code of Criminal Procedures entered into force on 1 February 2014. This was a successful endeavour from both the Romanian government and the magistracy. However, a number of developments have called into question the stability of the Codes, and in some cases urgent amendments have been required. Governments since 2014 have proposed a number of amendments to

⁵⁷ Council of Europe, Recommendation CM/Rec(2010)12, para. 18.

⁵⁸ Venice Commission, [Opinion no. 685 / 2012](#), CDL-AD(2012)026, Opinion on the compatibility with Constitutional principles and the Rule of Law of actions taken by the Government and the Parliament of Romania in respect of other State institutions and on the Government emergency ordinance on amendment to the Law N° 47/1992 regarding the organisation and functioning of the Constitutional Court and on the Government emergency ordinance on amending and completing the Law N° 3/2000 regarding the organisation of a referendum of Romania.

⁵⁹ <https://www.juridice.ro/wp-content/uploads/2017/10/Codul-de-conduită.pdf>.

⁶⁰ A similar analysis was made in the 4th evaluation of the Group of states Against Corruption (GRECO): http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/Eval%20IV/GrecoEval4%282015%294_Romania_EN.pdf

⁶¹ <http://gov.ro/ro/guvernul/sedinte-guvern/cod-de-conduită-al-membrilor-guvernului>.

address shortcomings, which were consolidated in several draft laws in 2016 to ensure stability of the legal framework. These amendments have still to a large extent to be approved in Parliament.⁶² The Commission therefore recommended in January 2017 that the current phase of this reform needed to be concluded, with Parliament taking forward its plans to adopt the amendments presented by the government in 2016 after consultation with the judicial authorities (Recommendation 3). The Commission also recommended that 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. (See also recommendation 4 below).

The November 2017 CVM report noted that the recommendation to conclude the current phase of the reform of Romania's Criminal Codes remained outstanding. Parliament had adopted none of the draft amendments proposed by the Government in 2016, which had been the result of broad consultations with the judiciary. Parliament had however adopted other amendments to the Criminal Code, notably those with the effect of decriminalising conflict of interests.

The November 2017 report further mentioned that the Ministry of Justice had started to propose amendments in relation to recent Constitutional Court decisions and transposition of EU Directives⁶³ through consultations with the judiciary, legal professions and civil society and the Government has indicated its intent to adopt relevant amendments. The Government adopted a draft law in this sense in November 2017, which was also sent to Parliament. In parallel, the Parliament had started to look into amendments of the Criminal Code and Criminal Procedure Code within the Special Parliamentary Committee on Systematisation, Unification and Ensuring Legislative Stability in the Judiciary.⁶⁴ Discussions on the criminal codes were stopped as the Parliamentary Committee started dealing with the amendments to the Justice laws instead.

In May 2018, debates on the amendments of the Criminal Code and Code of Criminal Procedures resumed on the basis of completely new drafts and a very high number of amendments. These amendments were different from the draft law prepared by the Government in 2017 and from the amendments adopted by the Government in 2016. The amendments presented in the Special Committee in May were adopted by Parliament before the summer break. On 18 June 2018, the Parliament adopted amendments to the Code of Criminal Procedures and on 4 July 2018 amendments to the Criminal Code. The amendments are a profound overhaul of the Codes of 2014, including in the procedural aspects of the criminal investigations and trial, and in the criminal policy underlying the codes. The amendments make major changes to the balance between, on the one hand, the rights of the suspects and, on the other hand, the public interest to sanction serious crime and the rights of the victims. One example is the addition of very restrictive procedural constraints that risk undermining the investigation and sanctioning of fraud and corruption, but also all serious crimes, with the risk that major offences remain unpunished. In addition the amendments restrict the scope of corruption related offences.

Supporters of the changes have argued that the changes are needed to increase the protection of the accused. However, the Criminal Code and Code for Criminal Procedures which entered into force in 2014 (building also on amendments of 2013) were already a major step in addressing earlier structural deficiencies which had been identified by the European Court of Human Rights, and allowed to close the monitoring from the Court on most issues in relation to fair trial rights in this regard.⁶⁵ The entry into force of the criminal codes in 2014 further ensured the compliance of Romania with the Council of Europe Criminal Law Convention of Corruption and the UN Convention Against Corruption.

⁶² CVM reports 2015, 2016, 2017

⁶³ Directive (EU) 2016/343 on the Presumption of Innocence, Directive on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (Directive 2014/42/EU). Romania should have implemented the Confiscation Directive by 4 October 2016. On 8 November 2018 the Commission addressed a reasoned opinion to Romania for not having fully communicated the national measures taken to implement the Directive.

⁶⁴ This special Committee was setup in October 2017 to set up a permanent dialogue between State institutions on amendments to the Criminal Codes and other important legislation, in order to set up a predictable amendment process, ensuring debate and public consultation.

⁶⁵ CVM report January 2017

The revised Codes are not yet in force, but the amendments are of significance well beyond the CVM recommendation of January 2017, and indeed the CVM itself.⁶⁶ The combined effect on the judicial system with the amendments of the Justice laws is also of relevance. The Constitutional Court ruled in October that a substantial number of the amendments are unconstitutional.⁶⁷

The amendments pending in Parliament since 2014, the subject of this recommendation, have not yet been adopted. One is under discussion in the legal Committee of the Chamber (decisional Chamber). It concerns an Emergency Ordinance adopted in 2016 (6/2016) in relation to the organisation of (electronic) surveillance mandates within the prosecution services following a Constitutional Court Decision of 2016 annulling the possibility within the Code of Criminal Procedure to rely on technical services from the Romanian Intelligence Services to perform the technical surveillance under the authority of the prosecutor. The Ordinance was adopted after consultation of the competent authorities and put forward technical solutions, which would allow the operational continuity of ongoing investigations. Some have called for the ordinance to now be rejected, evidence obtained since the ordinance is in force to be annulled and for a review of sentences ruled on the basis of evidence obtained under this ordinance.

Recommendations of the Venice Commission

On 20 October, the Venice Commission adopted an opinion on the amendments of the Criminal Code and Criminal Procedure Code.⁶⁸ This opinion was requested by the Parliamentary Assembly of the Council of Europe following the request on the Justice laws. The conclusions of the Venice Commission opinion are very critical, pointing to rule of law concerns in leaving crimes unpunished and to a lack of quality of the legislation, 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 is concerned 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.*"

Civil Code and Code for Civil Procedures

The January 2017 CVM report included a recommendation that the Minister of Justice, the Superior Council of Magistracy (SCM) and the High Court of Cassation and Justice (HCCJ) 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. In December 2016, a new deadline of January 2019 was set for the entry into application of those provisions. The November 2017 CVM report noted that steps were underway to provide the necessary infrastructure for the changes.

In June 2018, Parliament adopted amendments to the Code of Civil Procedure annulling three out of the four provisions in question. In particular, a major change was made in eliminating the preliminary analysis stage in the Council Chamber in the civil procedure.

The amendments were challenged to the Constitutional Court by the HCCJ. The Constitutional Court ruled in July and admitted part of the challenge. The law need to be revised in Parliament accordingly. The effects of these new amendments, in particular on the workload of the HCCJ, will need to be assessed.

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*

⁶⁶ On 4 October 2018, the European Commission sent a letter to Romania requesting clarifications with regard to aspects of the amendments with regard to various aspects of EU law. The request for clarification includes aspects relating to the transposition of the confiscation Directive (2014/42/EU). The Commission is analysing the answer of Romania received on 5 November, also taking into account the decisions of the Constitutional Court.

⁶⁷ Ruling on the Criminal Procedure Code of 12 October - <https://www.ccr.ro/noutati/COMUNICAT-DE-PRES-332> and on the Criminal Code of 25 - <https://www.ccr.ro/noutati/COMUNICAT-DE-PRES-338>. The motivations of the decisions are not yet available.

⁶⁸ Venice Commission, Opinion 930/2018

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

The January 2017 CVM report had highlighted the difficulties with certain legislative practices allowing for the sudden introduction of changes through Parliament, with a lack of preparation, notably impact assessment and consultation, and noted that this made it harder to demonstrate the sustainability of the legal framework. This recommendation was therefore explicitly aimed at strengthening internal safeguards against abrupt reversals of the progress made, in order to ensure the irreversibility required to satisfactorily fulfil the CVM benchmarks. Amendments and updates will of course always need to be possible, but continuity can be expected in terms of general principles, such as judicial independence, access to justice, and the sanctioning of crime in accordance with the law. Consultation and debate are ways to contribute to the respect of these general principles as the foundation for a sustainable legal order.

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. The report also noted that the operation and outcome of this committee will be directly relevant to the fulfilment of the recommendation.

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 broadcasted, the drafts are usually available and the judicial institutions are invited to the debates and can give their opinion.

However, the process raised a number of concerns. The legislation was looked at in great haste, under procedures either imposed by the Chair of the Committee or because an urgency procedure had been chosen formally. The examination in the Committee of the amendments to the Justice laws and the Criminal Code and Criminal Procedure Code lasted about two months. This limited the possibility of debates on issues of profound societal importance and a high level of controversy, while the objective reasons for urgency procedures in the first place remain unclear. Later, when the debates were finalised in the Special Committee, the draft laws passed through the two chambers of Parliament with little or no debate. The amendments have been challenged before the Constitutional Court by the President of Romania, the opposition parties in Parliament, as well as the High Court of Cassation and Justice. However the urgency procedure only left 48 hours for the different parties to file the referral to the Constitutional Court.

While Members of Parliament have argued that the legislative process is transparent and takes into account the opinion of the magistracy, pointing that many amendments in the laws (especially the Justice laws) came from the magistracy themselves, it remains the case that the most critical problems were not debated and that at successive stages, there has been almost no real engagement with the views of judicial institutions with legitimate roles under the Constitution. An examination of the practical implications of the amendments has also been hampered by the lack of impact assessment.⁶⁹ The adoption of Government Emergency Ordinances modifying the freshly promulgated Justice laws with even less debate raised similar concerns with regard to the legislative processes. (See above).

The risks of this approach were demonstrated when the Venice Commission eventually confirmed concerns on judicial independence in the justice laws which were already flagged in the initial stages of the parliamentary debate, and further when in October 2018, the Constitutional Court issued decisions on the amendments to the Criminal Procedure Code and the Criminal Code where it found

⁶⁹ GRECO had specifically recommended an impact analysis of potential changes.

that many of the challenged amendments were unconstitutional.⁷⁰ The Constitutional Court rulings touch on many of the issues raised by the Venice Commission and by the European Commission, as many had constitutional implications.

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 SCM and Court of Auditors in order to ensure proper implementation of the Action Plan.*

Respect and implementation of court decisions is an integral part of the efficiency of the judicial system as set out in Benchmark One.⁷¹ This recommendation concerns enforcement of decisions against the State, in which a public institution has to pay an amount of money or in which a public institution has to fulfil an action. Non-implementation or delayed implementation of court decisions by the administration erodes confidence in justice and wastes time and resources in follow-up cases or appeals on repetitive decisions.⁷²

As set out in the January 2017 CVM report, following the condemnation of Romania by the European Court of Human Rights in a group of cases on non-enforcement or delayed enforcement, in December 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.⁷³ This action plan and the additional measures required by the Council of Europe Committee of Ministers are of direct relevance to addressing this recommendation.

In 2018, Commission services were able to meet the interinstitutional working group responsible for this action plan and discuss the progress directly. Overall work is progressing, although not always as quickly as announced in the action plan. In several strands the working group has identified solutions. The working group prepared a Memorandum “*Measures to ensure the execution of judgments against a public debtor, in line with the case law of the European Court of Human Rights (Săcăleanu against Romania)*” that it submitted in September 2018 to the Government⁷⁴ for approval. The memorandum includes proposals for amendments to the legal framework in order to guarantee timely execution of the domestic judgments and for establishing a mechanism to supervise and prevent late execution, with a special fund intervening to guarantee the payment of the debt if the debtor (a given legal entity under the responsibility of the State) is unable to pay.

After input from the Government, the working group will resume its work and finalise the legislative proposals to have the laws adopted by the Government. It will also need to examine whether other legislative changes than those already identified will be necessary to fulfil all the requirements of the action plan, in particular with regard to the implementation of judgments imposing on the State or on legal entities under the responsibility of the State an obligation to perform a specific act.

Complementing the activity of the working group, the Ministry of Justice with the support of the Superior Council of Magistracy has progressed on the definition of an IT registry of court decisions in

⁷⁰ Decision of 12 October on the Criminal procedure Code <https://www.ccr.ro/noutati/COMUNICAT-DE-PRES-332> and decision of 25 October on the Criminal Code <https://www.ccr.ro/noutati/COMUNICAT-DE-PRES-338>. The motivations of the decisions have not yet been published.

⁷¹ 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

⁷² An example of repetitive case in 2016 was VAT or environmental tax cases where the national and European level (ECJ) had already given clear rulings, but where the administration continued to bring cases forward.

⁷³ COM(2017) 44 p.6. The Action plan of structural measures in relation to the Săcăleanu group of cases can be found at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806dda63>

⁷⁴ The memorandum has been transmitted to the General Secretariat of the Government, for approval by the Prime Minister.

which the State is a debtor or a creditor.⁷⁵ The registry will make available statistics on effective enforcement, and will allow responsible entities to monitor the execution of judgements, to prevent late enforcement by making public debtors proactive and if necessary provide solutions for systemic problems. The creation of the IT registry has now been taken up as part of the mechanism for prevention. A pilot project for this registry will be implemented in the Arges Tribunal in February 2019, with a first version to be developed in December 2018.

The registry takes data from the court information system (ECRIS). The more systemic integration with ECRIS will be achieved in the project to modernise the ECRIS system to be finalised by 2020.

Other actions have been taken already to facilitate the execution of decisions. The Ministry of Finance revised the operational procedures for the execution of enforceable titles to optimise the flows of documents and reduce the time between submission of the application from the creditor to the actual settlement of the claim. The amendments of the Justice laws include a proposal from the Superior Council of Magistracy giving general mandatory effect to the decisions issued by the High Court of Cassation and Justice in the matter of appeals in the interest of the law and of preliminary rulings. This would address problems with repetitive court referrals by the administration on interpretations of the law where the issue has already been solved by the HCCJ.

Recommendation 6: *The Strategic Judicial Management, i.e. the Minister of Justice, the SCM, the HCCJ 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.*

The November 2017 report noted that the comprehensive Action Plan adopted in 2016⁷⁶ setting out the structural reform steps to be taken until 2020 for the development of the judicial system was under way, that it should bring major benefits to the users of the justice system, also improving public trust.

In March 2018, the Strategic Judicial Management published the first report on the implementation of the Action Plan.⁷⁷ The report covers the implementation of the six directions of activity, with their 19 Strategic objectives and 153 measures, with a total of 258 indicators of performance. Overall, by 31 January 2018, 26% of indicators had been achieved, 60% were ongoing (with 43% within the deadline) and 14% unachieved. The reasons for the delays were identified⁷⁸ and practical solutions suggested. The report notes that applications for EU funds (POCA) have started only end of 2016.

The Action Plan is followed up by a Technical Working Group with representatives from all institutions within the Strategic Judicial Management. They meet regularly, re-planning overdue measures; detailing the ample measures into activities, with deadlines and responsible institutions; and determining intermediary targets for indicators with deadlines in 2019, 2020. The Working Group was also tasked to propose revisions of the Action Plan, such as rescheduling the terms for fulfilling certain measures, amending or eliminating measures.⁷⁹ A Monitoring Commission follows the work of the Working Group and has defined new ways of monitoring and reporting on the implementation of the Action Plan, such as monitoring by actions and objectives and not per institution. It also approved the

⁷⁵ The solutions identified have been transmitted for approval to the SCM on 20 September by the Strategic Management Council.

⁷⁶ Action Plan for implementing the Strategy for the Development of the Judiciary 2015-2020 approved by Government Decision no. 282/2016

⁷⁷ <http://www.just.ro/wp-content/uploads/2016/12/Raport-monitorizare.pdf>

⁷⁸ Some measures no longer correspond to recent developments and needed to be re-planned or intermediate deadlines are to be set.

⁷⁹ Examples of measures being revised are: allocating the necessary positions for implementing the legislation on the bankruptcy of natural persons; reducing the workload of courts and prosecutor's offices by promoting mediation; monitoring and annual evaluation of progress under the National Anti-Corruption Strategy 2016-2020 on the integrity of the judiciary; developing and improving tools for solving identified risks and vulnerabilities and to ensure the performance of the Strategy within the judiciary; promoting ethics and conduct standards for all legal professions and analysing the mechanisms to identify and tackle the violation of ethical standards.

proposed revisions of the Action Plan drafted by the Technical Working Group and passed these on to the Strategic Judicial Management for its meeting in September 2018.

Between November 2017 and September 2018, the Strategic Management Council met regularly.⁸⁰ It followed up on the monitoring of the Action Plan. In March 2018, it also assigned new tasks to the Technical Working Group: drafting a memorandum to set up a permanent mechanism of dialogue between the representatives of the three state powers; drawing up proposals for improving the management of the judicial system and identifying innovative solutions for its development; and drafting guidelines for updating the IT system for cases follow-up within the justice system (ECRIS) in accordance with the entry into force of the General Data Protection Regulation. This was followed up by the meeting of the Strategic Judicial Management in September.

The implementation of the action plan is financed also through EU structural funds. The Superior Council of the 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 European Social Fund Administrative Capacity Operational Programme. The Public Ministry is also implementing several projects funded under the same strategic objective.⁸¹

The Strategic Judicial Management was set up as part of the Strategy for the Development of the Judiciary 2015-2020 to create a forum of discussion and strategic decision making for the management of the judicial system. The competences and responsibilities for the management of the judicial system are shared between the Superior Council of the Magistracy, the High Court of Cassation and Justice, the Prosecutor General and the Ministry of Justice. The creation of the Strategic Judicial Management was a recommendation from the functional review of the judicial system finalised by the World Bank in 2013, following the finding that these institutions tended to make decisions in isolation.

Recommendation 7: *The new SCM 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.*

Previous CVM reports have underlined the importance for the Superior Council of Magistracy (SCM) to maintain the momentum of reform, to articulate clear collective positions and philosophy and take measures for increasing its transparency and accountability. The November 2017 report noted that the Superior Council of the Magistracy (SCM) had set out its priorities for its mandate (2017–2022), providing a first basis to promote the accountability of the institution. The defence of the independence of the justice system being one of the priority areas. The report had therefore concluded positive steps in relation to the activities of the SCM in line with the recommendation, and noted 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. The Council should also promote further strengthening of cooperation between judicial institutions on key outstanding issues, including the functioning of the Judicial Inspection."

The SCM is the defender of the independence of the justice. This role includes giving a point of view on draft laws which could affect the independence of justice. In November 2017, the CVM report noted that the SCM had been able to speak in one voice in September 2017 rejecting proposed amendments of the Justice Laws, after having consulted all courts and prosecution offices.

After November 2017, as discussion evolved in the Romanian Parliament on the Justice laws, it became increasingly difficult for the SCM to speak in one voice and articulate, in the name of the courts and prosecution offices, a reasoned point of view on changes which could affect judicial independence as well as the quality and efficiency of the judicial system. In the debates leading to the

⁸⁰ January, March, June and September 2018.

⁸¹ Four projects amounting to 85 million Lei.

adoption of the amended Justice laws in December 2017, magistrate associations noted that it was unclear whether SCM members present at the debates were defending an agreed position of the Council or only individual views.⁸² Later on, although also requested by GRECO, the SCM did not take the opportunity to make an impact assessment of the amendments of the laws, notably changes with a major managerial impact such as the changes regarding early retirement and entry into profession.

Following the preliminary opinion of the Venice Commission in July, pointing to serious problems in the amended Justice laws regarding independence, efficiency and quality of the justice system, the SCM appeared again divided on whether or not the Venice Commission recommendations should be followed up. Some members of the SCM expressed support for the changes proposed by the Parliament, pointing to the progress and increased independence provided by the amended Justice laws and dismissing negative impacts of the amended laws, also questioning the conclusions and the recommendations of the Venice Commission's opinion. In early October, upon request of the Parliament, the SCM adopted a decision on changes it would consider necessary in the Justice laws.⁸³ This process seems to have in the end been short-circuited by Emergency Ordinances adopted by the Government (see recommendation 1).

On the amendments of the Criminal Codes, the SCM was requested to give a point of view.⁸⁴ The SCM consulted all courts and prosecution offices and on this basis compiled a point of view which it shared with the Parliamentary Committee. Members of the SCM attended the debates in Parliament, putting forward amendments and comments, drawing on this point of view. However there was no public position of the SCM on the amendments, neither an analysis of the impacts on the judicial system. After the adoption of the amendments to the Criminal Code and Code of Criminal Procedures, the SCM had no official opinion on the amendments. SCM members expressed the view that the SCM could no longer express itself at this stage of the procedure.

In the January 2017 report, the Commission had also recommended that the SCM should continue to report publicly on actions it has taken in defending the independence of justice and protection of reputation, independence and impartiality of magistrates. In November 2017, the report highlighted that this would be an important illustration of the priority given to this role. Following the November 2017 report, the SCM proposed a number of measures. However, in practice the SCM does not appear to have pursued the many cases of criticism of judicial institutions or individual magistrates, except for a few particularly flagrant cases.⁸⁵ Since November 2017, the SCM has taken four decisions to defend the independence of the judicial system and four decisions to defend the professional reputation, independence and impartiality of magistrates.⁸⁶ The January 2017 report had noted that the pro-active defence of the independence and impartiality of judges by the Superior Council of Magistracy was an important element in fulfilling Benchmark One.

Cooperation between the sections (judges and prosecutors) is also important, especially in view of stronger separation of competences under the amended law 317/2004 on the Superior Council of Magistracy and important pressure on the magistracy.

Judicial Inspection

⁸² On 24 November 2017, the SCM reacted to criticism in relation to the presence and statements of the SCM's civil society member in the Special Committee in Parliament and making clear that this person was not the person responsible for representing the SCM.

⁸³ <https://www.csm1909.ro/ViewFile.ashx?guid=44b8138e-a33d-42e0-814b39458cc3299b|InfoCSM>

⁸⁴ The SCM members informed Commission services that a "point of view" is not the same as an opinion and does not require a decision by the SCM plenum.

⁸⁵ For example following declarations of the Prime Minister, the President of the Senate and President of the Chamber of Deputies at a rally "against the abuses of the justice system" on 9 June 2018. SCM Section for Judges' decision of 22 June 2018 upon referral of the judges association - Forum of Romanian Judges.

⁸⁶ From a total of 34 decisions (6 requests to defend the independence of the judicial system were rejected and 20 requests to defend the professional reputation, independence and impartiality of magistrates were rejected).

Successive CVM reports until January 2017 had noted positively the progress in independence and professionalism of the Judicial Inspection. Its professional and independent checks had helped to improve individual and collective accountability within the Judicial System, and the Commission had noted that the Judicial Inspection was a respected body within the judicial system. The Judicial Inspection was perceived as helping to improve the public service and public trust of the judicial system.

In 2017, there were signs of a shift in the positioning of the Judicial Inspection within the judiciary and tense relations with the SCM.⁸⁷ In the November 2017 report, the Commission had therefore emphasised that the SCM should promote further strengthening of cooperation between judicial institutions on key outstanding issues, including the functioning of the Judicial Inspection.

Since then, the Judicial Inspection has been involved in a number of controversial steps in terms of a series of disciplinary investigations started against all the heads of the judicial institutions⁸⁸ (see also recommendation 10).⁸⁹ 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 303/2014.⁹⁰

The Judicial Inspection also conducted management controls, at the request of the Ministry of Justice, and thematic controls at the office of the General Prosecutor and the DNA. In at least two cases potentially misleading information reached the public domain before the end of the control⁹¹ (see also recommendation 10) and was used in public debate.

The SCM did not launch a competition to appoint a new management of the Judicial Inspection, although the mandate of the management team expired at the end of August 2018. This led the Government to address the situation by adopting an Emergency Ordinance to nominate the current team ad interim.⁹² The argument put forward for this was that the law regulating the competition has been challenged in court (by the Judicial Inspection in 2016) and therefore there is a legal vacuum. The SCM did not manage to take steps to ensure that an appropriate solution could be found in order for the competition to be organised in time. The fact that the Minister of Justice decided to intervene, prolonging the mandates of the incumbent, could be seen to cut across the competences of the SCM.

Benchmark 2: Establish, as foreseen, an integrity agency with responsibilities for verifying assets, incompatibilities and potential conflicts of interest, and for issuing mandatory decisions on the basis of which dissuasive sanctions can be taken

The track record of the National Integrity Agency (ANI) remained steady. In the year September 2017- August 2018, ANI found 157 cases of incompatibility, 66 cases of administrative conflict of interests and 11 cases of unjustified wealth. During the same period, 256 cases have become definitive, either through final Court decisions that confirmed ANI's report, or through the fact that there was no legal challenge to the ANI evaluation report.⁹³

⁸⁷ 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.

⁸⁸ For example disciplinary proceedings (verifications, investigations...) have been initiated against the Prosecutor General, against the President of the High Court of Cassation and Justice, against the former Chief Prosecutor of the National Anti-corruption Directorate, against the Deputy Chief Prosecutor of the National Anti-Corruption Directorate, against a Head and Deputy Head of Section in National Anti-Corruption Directorate.

⁸⁹ Note that the Judicial Inspection challenged the SCM decision 13044/2.08.2018 to reject the report from the Judicial Inspection that the Prosecutor General was in breach of the deontological code.

⁹⁰ Venice Commission opinion 924/2018, p 22-24

⁹¹ http://old.csm1909.ro/csm/linkuri/29_11_2017_90051_ro.pdf The prosecution section discussed the issues of leaks in the management control of the DNA in November 2017; Press release from the Judicial Inspection in relation to an ongoing thematic control in the DNA in August 2018 <http://www.inspectiajudiciara.ro/Download.aspx?guid=1a0f390e-6bc2-4b92-b6ea-03aa770aa206|InfoCSM>

⁹² Government Emergency Ordinance 77/2018 of 5 September 2018.

⁹³ 167 cases of incompatibility, 86 cases of administrative conflict of interests, 3 cases of unjustified wealth.

Previous CVM reports have noted the challenges to the legal framework for integrity.⁹⁴ Two legislative proposals were adopted by the Parliament on 10 July 2018, in spite of a negative opinion from ANI. The first one aimed at introducing a prescription deadline of 3 years for the deeds that determine the existence of the state of conflict of interests or incompatibility.⁹⁵ The draft law has been challenged at the Constitutional Court.⁹⁶ The second proposal amends the sanctioning regime regarding conflicts of interests for local elected officials.⁹⁷ A challenge has also been made before the Constitutional Court.⁹⁸ Further proposals for amendments are pending in Parliament. CVM reports have also previously regretted that frequent changes to the law have made it more difficult to bring clarity and sustainability to the integrity framework through a single codification.⁹⁹

ANI continued to develop its preventive work, including issuing guidelines and clarifications on practical implementation of the law and the case law, as well as organising training and outreach to public authorities. ANI is also closely involved in some activities of the National Anti-Corruption Strategy. As mentioned in the November 2017 report, the budget of ANI was sharply reduced in 2017.¹⁰⁰ This situation has continued and for the fourth quarter of 2018, ANI risks shortfalls in paying salaries and contractors.¹⁰¹

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.*

The PREVENT system is designed to prevent conflicts of interests in public procurement procedures by setting up an ex-ante verification mechanism to detect situations that may generate conflicts of interests in procurement procedures launched through the electronic procurement system. It is also designed to allow the contracting authorities to remedy these situations prior to the award of the contract. It was the result of a close collaboration between the Government, the National Integrity Agency (ANI), the agency for public procurement (ANAP) and the Digital Agenda Agency. It became operational in June 2017.¹⁰²

The PREVENT system involves the analysis of the data and information filled in on an integrity form by staff of the contracting authority, by cross-checking this information with relevant databases (National Trade Register Office, Directorate for Persons Record and Databases Management). It can automatically track connections that may exist between officials in charge of public procurement (such as evaluation committee members and persons with decision-making powers in the contracting authority) and applicants in public procurement procedures (tenderers or their representatives). The results of this cross-checking is verified by ANI inspectors, who issue an integrity warning to the contracting authority if the system flags a possible conflict of interest. The contracting authority must then take all necessary measures to remove the possible conflict of interests and inform ANI, in order to lift the warning and proceed with the contract award.

The PREVENT system is now fully operational. From the start of operations in June 2017 until 1 September 2018, PREVENT has analysed 16,210 public procurement procedures with a cumulative

⁹⁴ CVM Report January 2017 – Technical Report SWD(2017)25 p 25, 28.

⁹⁵ Law modifying Law 176/2010 regarding integrity in public functions.

⁹⁶ CCR decision of 6 November. It seems that the amendments are unconstitutional. <https://www.ccr.ro/noutati/COMUNICAT-DE-PRES-339>. The motivation has not yet been published.

⁹⁷ Law modifying Law 393/2004 on the Statute of locally elected officials.

⁹⁸ CCR decision of 16 October; It seems that the decision partially admits the referral and annulled the provisions restricting the situations for conflict of interests <https://www.ccr.ro/noutati/COMUNICAT-DE-PRES-333>. The motivation has not yet been published.

⁹⁹ CVM report 2017 COM(2017) 44.

¹⁰⁰ From about 33 million Lei in 2016 to 22,5 million Lei in 2017.

¹⁰¹ In 2018, the budget has been further reduced to 18 million Lei (a supplement of 1,5 million Lei requested by ANI was not approved).

¹⁰² <https://www.integritate.eu/prevent.aspx>

value of over EUR 15 billion. Eight percent of the procedures analysed concerned EU funds. As a result, ANI issued 57 integrity warnings, some of them concerning procurements with 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 nine cases, the potential conflict of interests was not addressed. ANI has started an ex-officio investigation for conflict of interests in two of these cases.

In addition, the National Integrity Agency has also notified the National Agency for Public Procurement (ANAP) of 38 cases of possible irregularities¹⁰³ in the public procurement procedures regarding possible conflicts of interest between members of the contracting authority and bidders within the tender. These concern cases of potential conflict of interest as defined by the transposed EU public procurement directives but do not fall under ANI competence and are therefore to be followed up by ANAP.¹⁰⁴ In addition to the warnings, the PREVENT system has also raised awareness among contracting authorities who regularly contact both the National Integrity Agency and the National Agency for Public Procurement for advice on conflict of interest and integrity rules when preparing procurement procedures. Overall it seems that the preventive approach has had some positive effects, and the willingness of the large majority of contracting authorities to eliminate potential conflicts of interest before the contracts are signed demonstrates the value of the PREVENT system.

Through an Emergency Ordinance (98/2017 of 14 December 2017), ANAP has been granted the possibility to fine contracting authorities which do not respond to alerts from the PREVENT system. However, it is not clear what is the added value of adding provisions on fining to a system with a preventive purpose. The risk is that a shift to using PREVENT as a trigger for sanctions will undermine the success it has had so far in terms of awareness raising and advice.¹⁰⁵

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 January 2017 CVM report noted that there has been substantial progress in the follow-up of reports from the National Integrity Agency (ANI), but that court proceedings remained very long and that there remained exceptions to the applications of sanctions. In particular, CVM reports had previously highlighted the delay and the inconsistency in the application of sanctions for Members of Parliament found incompatible or in conflict of interest following a final court decision or a final ANI report. The Commission had recommended that the Parliament should be transparent in its decision-making with regard to the follow-up to final and irrevocable integrity decisions against its members.

Article 7 of the Statute of Senators and Deputies regulates how the Parliament should proceed when a member has been found incompatible. Although the termination of office is automatic on the date the decision of incompatibility becomes final and irrevocable,¹⁰⁶ other steps are needed to put this into effect. The President of the Chamber to which the member belongs has to take note of the termination of the mandate of the Deputy or the Senator, and to put the question to the vote of the plenary session

¹⁰³ Since the start of the PREVENT system.

¹⁰⁴ ANAP send standard replies to ANI on whether the notifications have been taken into account. For 2018 ANAP was not present in the meetings during the last CVM mission to discuss the follow-up to these cases.

¹⁰⁵ ANAP informed the Minister of Justice on 13 September 2018 of the opportunity to modify the Emergency Ordinance (98/2017 of 14 December 2017) in the sense of what ANI have requested, A final solution has not yet been decided.

¹⁰⁶ Act No 96 of 21 April 2006 on the Statute of Deputies and Senators, Article 7 (2): *The termination of office of Deputies or Senators due to incompatibility occurs:....c) on the date of the final and irrevocable judgement dismissing the appeal against the National Integrity Agency report stating the incompatibility; d) on the expiry date of the term stipulated in Act No 176/2010 on the integrity in the exercise of public functions and dignities, [...], from the date of taking knowledge of the evaluation report of the National Integrity Agency, unless within that period the Deputy or Senator disputed the report at the administrative litigation court. Acknowledgement shall be done by signing the receipt of the National Integrity Agency report by the Deputy or Senator concerned or, if they refuse its receipt, by the announcement made by the President of the plenary session of the Chamber to which they belong.*

of the relevant Chamber.¹⁰⁷ However there is no deadline for this step to take place. In cases of administrative conflict of interests, Article 19 and 51 of the Statute regulates the applicable sanction, the procedure and the deadlines, if the Member of Parliament appeals the sanction. The applicable sanction is a 10 % allowance reduction for up to three months.¹⁰⁸ As reported in the November 2017 CVM report, debates within the Legal Committee and the Plenary Session of the Parliament are transmitted live and the video recording is also available after the session.

Since October 2016, five final and irrevocable court decisions have been issued against Members of Parliament (two cases of incompatibility and three cases of administrative conflict of interests). As already mentioned in the CVM report of November 2017, three other cases concern the election and validation in Parliament (after the elections of December 2016) of persons under an interdiction to occupy a public office for a period of three years following a final court decision against them for incompatibility or administrative conflict of interests. ANI signalled these cases to the Parliament in February 2017.¹⁰⁹ In February 2018, the Parliament sent a letter to ANI stating that no disciplinary sanction would be applied for four of the cases above.¹¹⁰ For the other cases the Parliament has not yet reacted.

In its letters, the Parliament states that the *"integrity incident ascertained by ANI was not committed in the current mandate, but in a previous mandate/position. Moreover, the respective deputy or senator did not commit any disciplinary offence in the current mandate, thus no disciplinary sanction should be applied"*. It should be noted that the courts have not applied this interpretation, and that other public institutions have applied the sanctions following final court decisions whether or not the individuals concerned have changed mandate or function. A large majority of the 265 cases of incompatibility and conflict of interests of local elected officials in 2017-2018 where ANI reports have become definitive related to integrity incidents occurred in previous mandates or positions, and in only two cases the disciplinary sanction was not applied. This is therefore a new element of uncertainty in an important area for the dissuasiveness of sanctions in integrity policy.

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

An important conclusion of the January 2017 report was the strong track record of the institutions involved in investigating, prosecuting and ruling on high-level corruption.¹¹¹ The report explicitly noted that weakening or shrinking the scope of corruption as an offence, or major challenges to the independence and effectiveness of the National Anti-Corruption Directorate (DNA), would entail a reassessment of the progress made.

During 2018 the judicial institutions involved in fighting high-level corruption have maintained this record. Despite increasingly difficult circumstances, the results of the judicial institutions are comparable to previous years. From September 2017 to August 2018, the DNA sent 854 defendants to trial in 299 cases. 266 final conviction decisions were issued against 659 defendants. Seizing measures were ordered for EUR 447 million and final confiscations amount to about EUR 67,4 million, with final decisions on compensation to civil parties of EUR 109 million, including EUR 81 million (74%) as compensation awarded to public authorities and institutions and to companies with state capital. From January 1 to 31 August 2018, the High Court of Cassation and Justice solved 13 high level

¹⁰⁷ Act No 96 of 21 April 2006 on the Statute of Deputies and Senators – Article 7 (4).

¹⁰⁸ Act No 96 of 21 April 2006 on the Statute of Deputies and Senators – Article 19 and Article 51.

¹⁰⁹ COM(2017) 751, p9

¹¹⁰ Referring to decisions of February 2018 of the Permanent bureau of the Chambers of Deputies.

<http://www.cdep.ro/bp/docs/F1147986081/Ibram.pdf>;

<http://www.cdep.ro/bp/docs/F1858352224/informare%20interese.pdf>;

<http://www.cdep.ro/bp/docs/F-1815178120/Cjur%20Cataniuciu.pdf>;

<http://www.cdep.ro/bp/docs/F2118784823/Cjur%20Roman.pdf>;

<http://www.cdep.ro/bp/docs/F153640837/Cjur%20Suciu.pdf>

¹¹¹ CVM reports have also noted that the DNA has investigated and sent to trial politicians of all political parties, including politicians still in office, and high level officials from public institutions throughout the country.

corruption cases at first instance and settled 10 high-level corruption cases by final decision.¹¹² It should also be noted that DNA's responsibilities for fraud and corruption involving EU funds are of specific interest and the European Anti-Fraud Office has reported the professional collaboration and successful follow-up on files by the DNA.

At the same time, there are a number of important concerns. The issue of the appointment procedure for senior prosecutors and the lack of checks and balances discussed under recommendation 1 above have particular significance for the DNA.

The first area of concern relates to the amended Justice laws. As well as the general problematic issues described earlier, certain provisions create a specific concern with regard to the fight against corruption. The amended law 304/2004 on the judicial organisation creates a new department whose exclusive responsibility would be investigating crimes committed by magistrates. The set-up of this new section has sparked concern that a new standalone structure would be more vulnerable in terms of independence than the DNA's current responsibilities in this area, as it could be used as an additional instrument to intimidate and put pressure on magistrates.¹¹³ As a department dealing with all crimes by magistrates, it will also lack the horizontal expertise of the DNA on corruption crimes, and the investigation of persons in cases also involving magistrates may further fall out of the jurisdiction of the DNA.¹¹⁴ Advocates of the change have invoked shortcomings in the activity of the DNA and cases where defendants have been acquitted in court. But there has been no analysis or impact assessment published which justifies the claims of systematic shortcomings and the preference for a new structure. In their recommendations, both GRECO and the Venice Commission clearly point to keeping this competence within the specialised anti-corruption prosecution service (DNA), suggesting that any shortcomings could be addressed not by creating a separate prosecutor's office structure but instead by ensuring the respect of effective procedural safeguards.^{115 116}

A second area of concern is that the DNA appears to have 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 dismissal of the sitting Chief Prosecutor and the proposed appointment of a new Chief Prosecutor for the DNA took no account of the clear and strong opinion of the Superior Council of the Magistracy (SCM) raised major doubts about the process.^{117 118} The Minister of Justice has also launched procedures for appointing new Deputies and Heads of Sector following the same procedure.¹¹⁹ An added concern has been the approach of the Judicial Inspection, which launched several disciplinary proceedings against the former Chief Prosecutor of the DNA, as well as the use

¹¹² In the period January to August 2017, the DNA sent 573 defendants to trial in 209 cases (compared to 238 in 2016). 209 final conviction decisions (compared to 214 in 2016) were issued against 439 defendants. Seizing measures were ordered for 59 million EUR and final confiscations amount to about 7,4 million EUR. In 2017, the HCCJ solved 13 high-level corruption cases at first instance and settled two high-level corruption cases by final decision.

¹¹³ Venice Commission, Opinion 924/2018, p17

¹¹⁴ According to the law, conflicts of jurisdiction for corruption cases with several defendants including a magistrate will be decided by the Prosecutor General.

¹¹⁵ GRECO, Greco-AdHocRep(2018)2, p19: "*GRECO recommends that that the creation of the new special prosecutor's section for the investigation of offences in the judiciary be abandoned.*"

¹¹⁶ Venice Commission, Opinion 924/2018, p30: "The Venice Commission recommends to reconsider the proposed establishment of a separate prosecutor's office structure for the investigation of offences committed by judges and prosecutors; the recourse to specialized prosecutors, coupled with effective procedural safeguards appears as a suitable alternative in this respect."

¹¹⁷ See recommendation 1, footnote 56.

¹¹⁸ Public statements of the candidate after her selection by the Minister of Justice have also sparked controversy, including commenting on the use of files as blackmail against magistrates:

<https://www.mediafax.ro/social/exclusiv-adina-florea-la-sefia-dna-nu-exclud-ca-dosarele-care-vizeaza-magistrati-sa-reprezinte-o-forma-de-santaj-ce-spune-despre-actiunea-de-decapare-institutionala-17519006>.

¹¹⁹ <http://www.just.ro/anunt-referitor-la-selectia-procurorilor-in-vederea-efectuarii-propunerilor-de-numire-pentru-8-functii-vacante-de-conducere-din-cadrul-parchetului-de-pe-langa-inalta-curte-de-casatie-si-justitie-dire/>

that has been made of these disciplinary reports.¹²⁰ Non-final reports and reports rejected by the SCM were used to justify the dismissal.¹²¹ Disciplinary proceedings were also launched against the deputy Chief Prosecutor and other magistrates in the DNA. In addition, the Minister of Justice triggered two management controls by the Judicial Inspection in 2017 and 2018 within the DNA.¹²² The methods used by the Judicial Inspection also gave rise to controversy when conclusions reached the media before finalisation. In August 2018 the Judicial Inspection started a new ex-officio control on all files relating to corruption within the magistracy. The release of selective data on the number of cases involving magistrates was also seen as engaging in a political debate in a way damaging to the impartiality of the Judicial Inspection.^{123 124}

Third, this pressure has extended to the High Court of Cassation and Justice (HCCJ), in particular the criminal sections, which deal with many high-level corruption cases. Since November 2017, the Judicial Inspection has been seized with several disciplinary referrals against the President of the High Court.¹²⁵ In autumn 2018, the Judicial Inspection launched a second inquiry in relation to the implementation of new provisions of the amended justice law 304/2004.¹²⁶ In addition, on 2 October,

¹²⁰ Two were rejected by the SCM. The SCM rejected on 25 July 2018 the Judicial Inspection action regarding non presentation of former DNA Chief Prosecutor in Parliament hearings; on 13 June, and rejected the disciplinary action for allegedly having designated an incompatible member as a control team member. Others still need to be examined by the SCM.

¹²¹ In the evaluation made by Minister of Justice on 22 February 2018 which was the basis of the dismissal procedures <http://www.just.ro/comunicat-de-pres-a-raportul-privind-activitatea-manageriala-la-dna/>

¹²² According to the law, the Minister of Justice can launch the revocation procedure for the DNA chief prosecutor based on a management control. The report of the Judicial Inspection was examined by the SCM in November 2017 but did not conclude on major deficiencies in the DNA management. A number of recommendations had to be implemented within 6 months. This period had not elapsed when the Minister of Justice launched the request for dismissal.

¹²³ A press release of 24 August from the Judicial Inspection published the number of cases concerning magistrates received from the DNA during the inspection "Between January 1, 2014 and July 30, 2018, the National Anticorruption Directorate settled 1965 cases concerning 3420 magistrates (2193 judges and 1227 prosecutors)".

¹²⁴ On 5 October, the DNA published a statement explaining the numbers cited by the Judicial Inspection. The statement explains that (1) 2396 cases were registered between January 1, 2014 and July 30, 2018 the large majority of cases is caused by the high number of complaints, which the DNA is obliged to follow-up. In total 1978 cases were settled; (2) Only a small fraction of complaints and ex-officio investigations (183) concern criminal judges (3) Less than 3% of these cases were referred to court (*56 cases with referrals for 73 magistrates (42 judges and 31 prosecutors)*). 97% of the cases were either closed or declined; (4) In the same period, 65 magistrates were convicted, 10 magistrates acquitted and trials are still ongoing for 25 magistrates.

<http://www.pna.ro/comunicat.xhtml?id=9110>; <http://business-review.eu/news/dna-transmitted-that-only-2396-magistrated-were-heard-in-the-last-four-and-a-half-year-186762>

¹²⁵ On 9 November 2017, made by the President of the Senate in relation to her statements concerning the amendments of the Justice laws; on 22 July 2018 made by [Lumea Justitiei](#) in relation to her statements on the revocation procedure of the DNA Chief Prosecutor.

¹²⁶ Press release of 17 September 2018. The Judicial Inspection was notified on 23 August 2018 regarding possible disciplinary misconducts regarding the application by the management of the High Court of Cassation and Justice of Law no.207 / 2018 amending and supplementing the Law no.304 / 2004 on judicial organization. This concerned the constitution and composition of appeal panels. In its press release the Judicial Inspection felt the need to justify its action: "The inspections carried out by the Judicial Inspection are not conditioned, according to the Law no. 317/2004, by the level of the court and the position held by the magistrate concerned. Also, verifications are not conditional on the notoriety of the causes of the judgment. In all cases, the inspections carried out by the Judicial Inspection aim at observing and correctly enforcing the law. The public exposure of judges and prosecutors with leading positions determines among other things an appreciable number of disciplinary complaints about their activity and conduct. As such, performing inspections by the Judicial Inspectorate on the professional activity of the President of the High Court of Cassation and Justice cannot be a novel fact. Associating the work of the Judicial Inspection with events with potential significance in political life is only another attempt to reduce the institution's vulnerability and weaken its ability to respond to disciplinary slippages."

the Government referred the High Court to the Constitutional Court, invoking a constitutional conflict (see above).¹²⁷

Fourth, as already mentioned in the section on recommendation 3, certain amendments to the Criminal Code and Criminal Procedure Code and the special law on corruption as adopted by the Parliament in June and July 2018 would impact the prosecution and sanction of corruption crimes. Some of the amendments would bring about the near-decriminalisation of many corruption-related crimes. For example, the revised definition of abuse of office would limit the undue advantage obtained to pecuniary benefits and the scope of third parties to family members. Similarly, the revised trading in influence offence would restrict this to the promise of pecuniary benefits only, and require that the promise is followed by actual intervention to generate a certain outcome and obtain a benefit. In addition, criminal action for embezzlement would have to be preceded by a preliminary complaint introduced by the person suffering the damage, ruling out ex-officio investigations. Other amendments would restrict the possibility for applying extended confiscation, significantly reduce the limitation periods and reduce the application of the ban on being elected or exercising a public function after a fraud and corruption sentence. Some changes have already been ruled unconstitutional.¹²⁸

The Venice Commission opinion also highlighted the incompatibility with international conventions of which Romania is a party.¹²⁹ Such is the case of the modification related to certain corruption-related crimes in law 78/2000, which would restrict the elements of the offences to requesting, receiving or accepting the promise of an undue advantage exclusively to material benefits and exclude third parties from the scope of beneficiaries. In its decision, the Constitutional Court referred to Romania's obligations under international anticorruption instruments.¹³⁰ There is no indication that this issue of compatibility with international obligations has been the subject of debate in Government or Parliament.

The overall climate created and reflected in these issues is also linked to a further concern that public institutions, including the Court of Accounts, seem to be less active in sending notifications of potential corruption crimes and frauds to the DNA, although this is a legal obligation for all public institutions.¹³¹ An exception seems to be DLAF, the national counterpart of the European Anti-Fraud Office, which continues its notifications to DNA.

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 GRECO¹³². 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.*

This recommendation 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 are applied with the goal of

¹²⁷ <http://www.inspectiajudiciara.ro/Download.aspx?guid=ab9bdb64-9f0d-4997-b564-dce7a3c4a5c3InfoCSM>
<https://www.ccr.ro/noutati/COMUNICAT-DE-PRES-329>. The Constitutional Court ruled on 7 November.

¹²⁸ CCR decision on the special law on corruption 78/2000 of 25 September 2018 (<https://www.ccr.ro/noutati/COMUNICAT-DE-PRES-327>), and on the Criminal Code on 25 October 2018 (<https://www.ccr.ro/noutati/COMUNICAT-DE-PRES-338>).

¹²⁹ Articles 17, 18 and 19 of the United Nation Convention Against Corruption.

¹³⁰ United Nation Convention Against Corruption and the Council of Europe Criminal Law Convention on Corruption.

¹³¹ Cases following notifications of public institutions fell from 490 in 2016, to 370 in 2017 and 341 in 2018 for the same period January-September; the reduction of notifications was even sharper coming from private persons or entities: from 1740 in 2016, to 1034 in 2017 and 849 in 2018.

¹³² 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.

protecting MP in the exercise of their elective mandate. Previous CVM reports have highlighted that transparent criteria for such decisions would be an important way to prevent doubts about the motivation for decisions.¹³³ Criteria would help to put these decisions on a more transparent and objective basis.¹³⁴

The November 2017 report mentioned steps taken by the Chamber of Deputies to improve transparency on the follow up to requests from the prosecution, notably by starting to release the arguments of the Legal Committee for rejecting or agreeing on requests from the prosecution before the plenary vote. The report welcomed the fact that consideration had been given to the need for more transparency. However, it considered that more work was needed on recommendation 10 and reiterated its advice to seek assistance of the Venice Commission and GRECO.

In meetings with Commission services in 2018, the President of the Legal Committee of the Chamber mentioned that the Legal Committee would also refer to the criteria elaborated by the Venice Commission in any upcoming demand. This has not yet been formalised in the rules of the Chamber nor of the Senate. 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, arguing that the crime in respect of which the prosecution made the request did not exist. No reference was made to criteria.

As for the invitation to consider changing the law to clarify that Ministerial immunity related only to actions of ministers during their time in office, the November 2017 report noted that Parliamentary representatives argued that this would need a Constitutional change. The November 2017 report clarified that there were alternative ways of making this clarification. One possibility flagged for consideration would have been to amend the law of 1999 on ministerial responsibilities, such as to increase transparency and objectivity in decision-making on requests of starting criminal prosecution against former ministers, in order to safeguard the principle of equality before the law.¹³⁵ There has been no follow-up in 2018 on this issue.

In the period September 2017–August 2018, two requests for starting criminal proceedings against former ministers who are not MPs were accepted by the President of Romania.

Regarding the second part of the recommendation on reporting and debate on these issues,¹³⁶ Parliament informed that debates in Parliamentary committees and plenary are broadcast live and can also be viewed online after the session took place. There has been no follow-up reported in terms of opening up an opportunity to debate these issues.

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

***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).*

The January 2017 report highlighted the potential of the National Anti-Corruption Strategy presented by the Government in August 2016 to be an effective corruption prevention policy, if properly implemented and followed up on the ground, including at local level. EU funds can have a major part to play in supporting this work.

¹³³ CVM report January 2017

¹³⁴ Based on guidelines from the Venice Commission and GRECO

¹³⁵ Legea nr. 115/1999-Lege privind responsabilitatea ministerială, republicată, în „Monitorul Oficial al României”, partea I, nr. 200 din 23 martie 2007.

¹³⁶ "to set up a system to report regularly on decisions taken by its Chambers on requests from the prosecution to authorise preventative measures such as searches or arrest or to authorise the investigation of an MP when he/she also is or has been a Minister, and to organise a public debate so that the Superior Council of Magistracy and civil society can respond".

The November 2017 report noted that the implementation of the anti-corruption strategy had been launched at technical level but that the strategy needed a visible political support from the Government and local authorities to demonstrate progress. The November 2017 report emphasised that in general a political priority should be set on corruption prevention, notably by putting in place the necessary measures to fully support the implementation of the Strategy at both central and local level, and by ensuring the stability of the relevant legal framework, as well as by maintaining the positive track record of the General Prosecution.

In March 2018, the technical secretariat for the National Anti-Corruption Strategy published its first monitoring report "*Progress Report on the implementation of the National Anticorruption Strategy 2016-2020 in 2017*".¹³⁷ The progress report is a compilation of the actions performed by the public authorities and institutions under each of the six general objectives. It also includes an inventory of institutional transparency and corruption prevention measures as well as an update of integrity incidents and a brief presentation of structural corrective measures taken to prevent new incidents. The progress report presents many actions under the objectives related to the capacity to address failures in management, to identify corruption risks and to reduce vulnerabilities.¹³⁸ It also reports on the implementation of measures to increase transparency and open governance at central and local level, anti-corruption training for staff within local and central public institutions¹³⁹ and also actions regarding the adhesion declarations of public institutions to the Strategy.¹⁴⁰ Activity on the administrative sanctions regime and its implementation appears less advanced and this appears to have remained the case for 2018.

Platform meetings in April 2018 have discussed whether the set of actions performed by public authorities are in line with the calendar of implementation and whether these meet the objectives of the strategy, although this information does not appear specifically in the progress report.

Since the annual report in March 2018, the clearest example of progress has been in the implementation of actions under the objective 4.1 (increasing the level of anticorruption education of the staff within authorities and institutions at central and local level through trainings on integrity issues).¹⁴¹ An important achievement in 2018 was also the adoption by the Government in August of two standard methodologies for institutions at central level: one for the evaluation of corruption risks and a second for the ex-post evaluation of integrity incidents. The two texts were debated within the cooperation platforms and interinstitutional working groups. One priority for 2018 has also been the preparation of internal auditing of the systems for preventing corruption within all institutions, which should take place every two years.¹⁴²

The Technical Secretariat for the national Anti-Corruption Strategy within the Ministry of Justice has continued to organise thematic evaluations of public institutions for 2018-2019. The chosen themes are conflicts of interest during and after holding a public office (including revolving-doors); transparency of public institutions (which include state-owned enterprises) and access to public information, and incompatibilities. Ten institutions within the central public administration and ten independent institutions will be evaluated in 2018-2019. The evaluations aim to check how these institutions define their corruption risks in these areas and the measures in place to prevent incidents.

¹³⁷ <https://sna.just.ro/Rapoarte+de+monitorizare>

¹³⁸ Examples include an Ethics Code for the pre-university system; a transparent framework for inspectors' competitions; a system sanctioning plagiarism; a Protocol for ethical training in schools; and video and audio monitoring of exams in the education system.

¹³⁹ With DGA (In 2017, 3.877 training activities, integrity classes and prevention campaigns).

¹⁴⁰ For 2016-2017, 1.667 adhesion declarations and 757 integrity plans have been centralised regarding central, local and independent authorities.

¹⁴¹ <https://sna.just.ro> does not mention activities performed in 2018, but the website <http://ogp.gov.ro/> and <http://data.gov.ro/ro/> for open data partnership mentions a series of actions and events for 2018 regarding transparency and public consultation process.

¹⁴² The purpose of this objective 2.1.1. is to internalise the peer review mechanism of the strategy within the public institutions.

The peer review evaluations will be supported by EU funds. The total EU funding to the implementation of the Strategy through a variety of projects amounts to EUR 9,7 million.¹⁴³

During the CVM mission of October 2018, Commission services also received information on the measures taken within central ministries in vulnerable sectors such as health, education, and the interior. The Ministry of Education reported on prevention measures in higher education establishments and schools, measures against plagiarism, and the evaluation of integrity incidents. The General Anti-corruption Directorate (DGA) within the Ministry of Interior reported on its continued activity for the prevention of corruption and investigation of integrity incidents.¹⁴⁴ The Directorate has a long-standing track record in this area. Progress with the measures foreseen in the healthcare sector appears less evident, the Ministry of Health reporting exclusively on some aspects related to internal control during the mission. The thematic peer-review evaluation carried out in October 2017¹⁴⁵ pointed to a number of structural weaknesses in the implementation of the strategy in this sector, including a continued lack of resources at the level of the control and integrity department of the Ministry of Health, making a number of recommendations.¹⁴⁶

Regarding the implementation of the National Anti-corruption Strategy at local level, the Ministry of Regional Development and Public Administration also published a progress report for 2017. The efforts of the Ministry are aimed at involving as many local public administrations as possible in the monitoring mechanism of the Strategy. The percentage of local public institutions involved has now risen to 45% from 16% in the previous cycle, though this remains far below participation at central level. The report further notes a drastic reduction of the annual self-assessment reports, to only 8% in 2017. From the report it appears that many local authorities do not have sufficient knowledge or administrative capacity to implement the measures of the Strategy. It was also found that there is a lack of self-awareness and promotion of good practices or innovative measures. The priorities for the implementation of the Strategy at local level seek to address these weaknesses by including specific trainings and awareness raising. One ongoing project concerns an interactive map of good practices in corruption prevention identified in local administrations.¹⁴⁷

One of the objectives of the Strategy is to improve performance in the fight against corruption by the application of criminal and administrative sanctions. The institutions responsible for this objective are the National Integrity Agency (ANI), the National Anti-Corruption Directorate (DNA) and the General Prosecution Services. Results for ANI and the DNA were comparable to previous years (see recommendations 8, 9 and 10). Since September 2017, the Public Ministry pursued the prosecution of corruption crimes not falling under DNA's remit, with 2046 cases solved, with 325 indictments against 483 persons and 2016 final court decisions.¹⁴⁸

Another objective of the Strategy is to consolidate the confiscation of criminal assets (see recommendation 12). In 2018, the General Prosecution (including DIICOT) seized more than EUR 2 billion as provisional measures in cases relating to tax evasion, EUR 38 million in money laundering and EUR 128 million in smuggling cases. The results of the Public Ministry in the fight against corruption are stronger than last year.

While the technical activity on the Strategy continues in many central and local administrations and the judicial institutions continue to sanction corruption, several ongoing legislative initiatives raise

¹⁴³ Support for National Anticorruption Strategy is made available from the Specific Objective 2.2 of the Administrative Capacity Operational programme (POCA) and within this objective there have been 6 calls for proposals in order to support its implementation by both central and local authorities, including the technical secretariat of the NAS. The total amount contracted is EUR 9.635.600, of which for central institutions: EUR 7.278.657 and for local public admin: EUR 2.356.943. The anticorruption measures that refer to the judicial system are included in the funding of the Strategy for Justice (recommendation 6).

¹⁴⁴ Examples of prevention activities in 2018: <http://www.mai-dga.ro/arhive/43423>

¹⁴⁵ <http://sna.just.ro/docs/pagini/51/Raport%20de%20evaluare%20tematica%20Ministerul%20Sanatatii.docx>.

¹⁴⁶ Information on the follow-up given to these recommendations will be available towards the end of the year

¹⁴⁷ <http://greencity.mdrap.ro/>

¹⁴⁸ For cases of conflict of interest or using one's office for favouring certain individuals: 24 indictments involving 30 persons, 10 final court decision.

concerns as regards their potential knock-on effects on the implementation of the strategy. In particular, as mentioned earlier, the amendments to the Criminal Code and the Criminal Procedure Code and amendments to the special corruption law adopted by Parliament on 4 July and 18 June respectively also risk weakening the legislative framework for investigating and sanctioning corruption crimes. (See recommendations 10, 3). Also linked are the amendments concerning the integrity laws, which risk weakening the impact of the integrity laws and the credibility of sanctions (See recommendation 8). The ongoing reform of the Administrative Code should also support the implementation of the National Anti-Corruption Strategy by strengthening the professionalization of the national and local public administration and thereby the effective implementation of corruption preventive measures, such as the responsibility of managers of public institutions in the prevention and occurrence of integrity incidents.¹⁴⁹

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.*

The January 2017 CVM report noted that the National Agency for the Management of Seized Assets (ANABI) has been set up and that the next step was to demonstrate it could function properly, provide transparent data on the confiscation of criminal assets and eventually increase the proportion of assets effectively recovered. The November 2017 report noted that the Agency had become operational, had its own building, administrative departments in charge with financial and human resources, and had a staff of about 25 people, which was already half of the planned staff for full operations. ANABI had published its first annual report in February 2017.

Since November 2017, ANABI has continued to take its activities forward. In March 2018 the Agency published its second annual report providing detailed description on the activity of 2017 and on the priorities for 2018.¹⁵⁰ It increased its activity of storage and management of seized movable assets and also organised the sale of movable seized assets. In the period January-August 2018, ANABI registered nine new requests for storage and management of seized moveable assets and 27 requests for interlocutory sales. ANABI organised public auctions relating to seven requests of interlocutory sales (when specific circumstances justify immediate action, for example when perishable goods are at stake, before a final court decision). In several complex cases, the Agency demonstrated its capacity to deal with new situations and find solutions. The Agency is also engaging in knowledge sharing and awareness raising activities for law enforcement and prosecutors as regards seizing and confiscation orders.

Since June 2017, the unique bank account through which the Agency took over the management of seized money is operational. As a result, ANABI manages and keeps track of the funds involved, such as the amount subject to seizure, the amount resulting from the selling of perishable goods, and the amount resulting from the interlocutory sales. At the end of the first semester of 2018 the unique bank account totalled about 70 million lei (EUR 15 million, about three times the amount of 2017).

ANABI also monitors the aggregated data of amounts of money actually seized in criminal proceedings. During 2018, there has been an increase. In total 780 million lei had been seized by the second quarter of 2018.¹⁵¹ Between September 2017 and August 2018, the General Prosecution (including DIICOT) seized EUR 137 million as provisional measures in cases relating to tax evasion, EUR 15 million in money laundering and EUR 128 million in smuggling (including DIICOT).

Regarding the execution of final court decisions, the National Agency for Fiscal Administration (ANAF) reports that 787 court decisions relating to confiscation remained final during 2017, an

¹⁴⁹ <https://www.senat.ro/Legis/PDF/2018/18L132LP.pdf>. The Administrative Code has been adopted by Parliament in July and is being challenged at the Constitutional Court. On 7 November, the Court ruled that the Administrative Code was unconstitutional.

¹⁵⁰ <https://anabi.just.ro/docs/pagini/52/Raport%20annual%20ANABI%202017.pdf>

¹⁵¹ From a total of about 10000 court decisions issued by 224 Courts

increase with regard to 2016 (491 final court decisions). The total amount resulting from the enforcement of special or extended confiscation measures is approximatively 11,5 million lei, out of which 3,7 million lei originates from the selling of movable and immovable seized property, and 7,8 from confiscation. The amount to be distributed for 2018 to eligible beneficiaries for social and public re-use was 2,2 million lei.¹⁵² Part of this should be allocated to funding civil society projects¹⁵³ such as legal education, criminality prevention, assistance to victims and other projects of public interest. Because of insufficient administrative capacity, the agency was so far unable to launch a call for proposals in this area. More generally, ANABI faces difficulties filling in open positions, a situation similar to other public institutions resulting from a generalised recruitment ban in the Government.¹⁵⁴ Early October the agency was operating with a staff of only 20 people out of a scheme of 35 foreseen, which limits the capacity of the agency to a strict focus on core activities.¹⁵⁵

The Agency has successfully applied for technical assistance with EU funds (EUR 1,3 million). The project has started recently and will allow the externalisation of some tasks to support the agency, notably on the organisation of grants and training activities for prosecutors. The agency further reports that the cooperation with prosecution services and police is effective. A high number of cases dealt with by the Agency come from economic crime police and organised crime prosecution.

The Agency has also progressed on the development of a national integrated system ROARMIS (Romanian Assets Recovery and Management Integrated System). The aim of this system is to provide information on the different stages of the asset recovery process, starting with the first phases of identification and tracking of assets, followed by seizing the proceeds of crime and other types of assets and ending with the procedures related to the final execution of special or extended confiscation, damages, or a decision on the reuse for public or social interest. This IT system will allow monitoring the measures taken by the authorities at each step of the asset recovery process. Using its analytical functions ROARMIS may also become a very useful tool in generating statistics and reports, best practices and identifying priority areas for the development of policies, strategies and plans to increase efficiency in the process of asset recovery in Romania. ANABI finalised detailed technical specification in September 2018 and plans to have the system in place by October 2019.

The Agency is also operating as Asset Recovery Office. During the first and second quarter of 2018, the Romanian Asset Recovery Office has dealt with 72 incoming requests (requests from other Member States) and 38 outgoing requests (requests to other Member States). The Member States most frequently requesting information were the United Kingdom, France, Italy and Spain and ANABI sent the largest number of requests to Germany, the United Kingdom and Italy.

¹⁵² In 2017, 20 million lei from 2016 were redistributed according to art.37 of ANABI Law to the Ministries of Education, Health, Internal Affairs, Justice and the Public Ministry.

¹⁵³ According to same art.37 of ANABI Law 318/2015

¹⁵⁴ Law no. 80/2018 for the approval of EOG no. 90/2017 regarding fiscal and budgetary measures (art. 14 of the EOG stipulated that competitions for vacancies are suspended for 2018); another EOG stipulated the same since summer 2017

¹⁵⁵ In October, ANABI started procedures for transfer recruitment for filling 6 vacant positions (5 public officials and one contractual). The Ministry of Justice approved the transfer of a legal advisor starting November 2018.