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

**On Progress in Romania under the Cooperation and Verification Mechanism**

## 1. INTRODUCTION

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

Work under the CVM has been ongoing since 2007 to encourage and follow the reform process based on the benchmarks. In January 2017, the Commission undertook a comprehensive assessment of progress over the ten years of the mechanism.<sup>3</sup> This perspective gave a clearer picture of the significant progress made, and the Commission was able to set out twelve specific recommendations which, when met, would suffice to end the CVM process. This would depend on fulfilling the recommendations in an irreversible way, but also on the more general condition that developments were not such as to clearly reverse the course of progress.

Since then, the Commission has carried out three assessments of progress on the implementation of the recommendations. In November 2017,<sup>4</sup> the Commission noted progress on a number of the recommendations, but also that the reform momentum had been lost, warning of a risk of re-opening issues which the January 2017 report had considered as closed.<sup>5</sup> The November 2018 report concluded that developments had reversed or called into question the irreversibility of progress, and that additional recommendations had to be made.<sup>6</sup> Both the European Parliament and the Council supported this view.<sup>7,8</sup> The October 2019 report welcomed the intention of the Romanian government to reset the approach, but regretted that Romania did not engage with all the recommendations.<sup>9</sup> The Commission called on the competent Romanian authorities to translate their commitment to resume reform into concrete steps aimed at addressing all the recommendations.

In 2020, the government reaffirmed its commitment to achieve the objectives of the CVM, though overall progress was limited. Amongst other factors, this could be explained by the situation related to the COVID-19 pandemic and the fact that 2020 was an electoral year in Romania. In these circumstances, the Commission did not publish a dedicated CVM report, but maintained nevertheless its close monitoring of developments, as well as the cooperation and dialogue with the Romanian authorities and stakeholders including through the rule of law mechanism.

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<sup>1</sup> Following the conclusions of the Council of Ministers, 17 October 2006 (13339/06), the Mechanism was established by Commission Decision of 13 December 2006 (C(2006) 6569).

<sup>2</sup> Judgment of the Court of Justice of 18 May 2021 in Joined Cases C-83/19, C-127/19, C-195/19, C-294/19, C-355/19 and C-379/19 *Asociația 'Forumul Judecătorilor Din România' and Others*, para 164.

<sup>3</sup> COM(2017) 44.

<sup>4</sup> COM(2017) 751.

<sup>5</sup> These concerns were echoed by the Council. Council Conclusions on the Cooperation and Verification Mechanism, 12 December 2017 - [https://ec.europa.eu/info/sites/info/files/20171212-st15587\\_en.pdf](https://ec.europa.eu/info/sites/info/files/20171212-st15587_en.pdf).

<sup>6</sup> COM(2018) 851

<sup>7</sup> European Parliament non-legislative resolution on the rule of law in Romania of 13 November 2018, P8\_TA-PROV(2018)0446.

<sup>8</sup> Council Conclusions of 12 December 2018 [https://ec.europa.eu/info/sites/info/files/2018-st15187\\_en.pdf](https://ec.europa.eu/info/sites/info/files/2018-st15187_en.pdf).

<sup>9</sup> COM(2019) 499

In September 2020, the Commission adopted its *2020 Rule of Law Report: the rule of law situation in the European Union*<sup>10</sup> covering rule of law developments in all Member States in the areas of judicial reform, the anti-corruption framework, media pluralism and other institutional checks and balances. The proactive participation of the Romanian authorities in this new rule of law mechanism is an important sign of commitment to strengthening the rule of law and thus the issues falling under the CVM. The dedicated country chapter for Romania included updates on developments in judicial reform and fight against corruption since the October 2019 CVM report,<sup>11</sup> as well as issues with an important bearing on the Member State's capacity and sustainability of reform in general, such as the quality of legislation and the legislative process, as well as the media environment.

The rule of law in general, and the independence of the judiciary, restoring the fight against corruption and "addressing the stagnation and regressions of the last years" are included in the programme of the new Government, which took office in late December 2020. The programme sets out the intention of the Government "to continue the demarches to finalise the CVM, based on real progress regarding the independence and efficiency of the Romanian justice system".<sup>12</sup> In January 2021, it adopted a memorandum expressing the political commitment to address all pending CVM recommendations, with a view to lifting the mechanism.<sup>13</sup> The plans set out in the memorandum include a draft law abolishing the Section for investigating criminal offences within the judiciary (SIIJ) and amendments to the justice laws, both directly connected to CVM recommendations.

The judgment of the CJEU of 18 May 2021 in a series of preliminary references is an important development which clarified the nature of the CVM and the obligations of Romania following from it. As regards the 2006 CVM decision, the Court explained that it is binding in its entirety on Romania as from its accession to the EU, and obliges it to address the benchmarks set out in the annex to the decision, which are also binding.<sup>14</sup> Those benchmarks, defined on the basis of the deficiencies established by the Commission before Romania's accession, seek in particular to ensure that that Member State complies with the value of the rule of law. Romania is therefore required to take appropriate measures to meet the benchmarks and to refrain from implementing any measures which could jeopardise their being met.<sup>15</sup> The judgment also clarifies that the Commission's reports on the CVM formulate requirements with regard to Romania and that the 'recommendations' are made with a view to meet the benchmarks. In accordance with the principle of sincere

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<sup>10</sup> COM(2020) 580

<sup>11</sup> SWD(2020) 322

<sup>12</sup> [https://gov.ro/fisiere/pagini\\_fisiere/Program\\_de\\_guvernare\\_2020\\_2024.pdf](https://gov.ro/fisiere/pagini_fisiere/Program_de_guvernare_2020_2024.pdf)

<sup>13</sup> Memorandum: Priority steps necessary to complete the Cooperation and Verification Mechanism (CVM) - legislation in the field of justice (No. 5073/2021/19.01.2021)

<sup>14</sup> CVM benchmarks to be addressed by Romania:

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

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

<sup>15</sup> Judgment of the Court of Justice of 18 May 2021 in Joined Cases C-83/19, C-127/19, C-195/19, C-294/19, C-355/19 and C-379/19 *Asociația 'Forumul Judecătorilor Din România' and Others*, paras 167-172.

cooperation, Romania must take due account of those requirements and recommendations, as well as refrain from adopting or maintaining measures which could jeopardise the result prescribed by those requirements and recommendations.<sup>16</sup>

This report takes stock of the progress under the CVM since October 2019. Whilst some of the recommendations were formulated in terms specific to the moment of their adoption, their intent remains clear and all remaining recommendations should be implemented, while those already implemented still need to be taken into account to avoid backsliding. The Commission encourages Romania, its government and Parliament, to meet the commitments made under the CVM and to pursue actively the fulfilment of all the remaining CVM recommendations. This would allow the CVM to come to an end, and rule of law issues in Romania would continue to be followed under the rule of law mechanism, applicable to all Member States.

As in previous years, this report is the result of a careful process of analysis by the Commission, drawing on close cooperation with Romanian institutions, civil society and other stakeholders.<sup>17</sup>

## **2. ASSESSMENT OF PROGRESS ON THE FULFILMENT OF THE RECOMMENDATIONS**

This section assesses progress on the 12 recommendations of January 2017 and the eight additional recommendations of November 2018. The fulfilment of all remaining recommendations is essential to the reform process, redressing the negative effects of the backtracking identified in the 2017, 2018 and 2019 CVM reports and allowing the CVM to be completed.

### **2.1. Benchmark One: Judicial independence and Judicial reform**

#### ***Justice laws and legal guarantees for judicial independence***

##### *2018 Recommendations*

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

Three Justice laws define the status of magistrates and organise the judicial system and the Superior Council of Magistracy. They are therefore central to ensuring the independence of magistrates and the good functioning of the judiciary. Amendments to these Justice laws in 2018 and 2019,<sup>18</sup> still in force, had a serious impact on the independence, quality and efficiency of the justice system. Major issues identified included the creation of a Section for

<sup>16</sup> Ibid., paras 173-177.

<sup>17</sup> Commission services organised two fact-finding missions in February and June 2020, and two fact-finding missions in January and March 2021 (virtual missions where required). Meetings included the Minister of Justice, Members of the Romanian Parliament, the Superior Council of Magistracy, the High Court of Cassation and Justice, the Prosecutor General, the National Anti-Corruption Directorate, the National Integrity Agency, the national Agency for the Management of seized assets (ANABI), civil society organisations and judicial associations.

<sup>18</sup> Law 207/2018 amending Law 304/2004 on the judicial organisation; Law 234/2018 for amending Law no. 317/2004 on the Superior Council of Magistracy; Law 242/2018 amending Law no. 303/2004 on the statute of judges and prosecutors. The laws were further modified through Government Emergency Ordinances in 2018 and 2019.

investigating criminal offences within the judiciary (SIJ), the system of civil liability of judges and prosecutors, early retirement schemes, the entry into the profession, and the status and appointment of high ranking prosecutors. The implementation of the amended laws soon confirmed concerns, and new issues have emerged in the intervening years.<sup>19</sup>

Concerns about the continued impact of the amended laws were confirmed in the 2018 and 2019 reports, with a recommendation that the amended laws be suspended and revised to reflect the recommendations of the Commission, GRECO and the Venice Commission. The reports highlighted how the SIJ has been used to create pressure on judges and prosecutors and change the course of some high-level corruption cases.<sup>20</sup> They also noted that the situation had created uncertainty and pressure for both individual magistrates' career development and independence, and for the justice system as a whole. The reports also questioned the soundness of the rules for the appointment and accountability of the management of the Judicial Inspection.

With the Justice laws as amended in 2018-19 still in force, the concerns of damage to the functioning of the justice system remain. In particular, the existence and the functioning of the SIJ remains a serious concern.<sup>21</sup> Although fewer than in previous years, there were renewed instances of pressure from the SIJ on magistrates through summons<sup>22</sup>, and concerns that the choice of cases to be subject to criminal investigations lacks objectivity<sup>23</sup>, as well as examples of leaks to the media<sup>24</sup> which can exert pressure on judges and prosecutors. Its negative impact on high-level corruption cases also continues. The SIJ is less active in interfering in ongoing high-level corruption cases – for example, it is no longer taking over corruption cases assigned to parts of the prosecution services and the problematic practice of withdrawal of appeals in high-level corruption cases was stopped after the Constitutional Court ruled that the transfer of appeals to the SIJ was unconstitutional.<sup>25</sup> However, the SIJ continues to request original evidence from other prosecution services in ongoing corruption cases, and cases in court risk disruption as a result.<sup>26</sup> In its judgment of 18 May 2021, the CJEU declared that, in order to be compatible with EU law, the legislation creating such a specialised section must be justified by objective and verifiable requirements relating to the sound administration of justice, ensure that that section cannot be used as an instrument of political control over the activity of judges and prosecutors, and that the section exercises its competence in compliance with the requirements of the Charter of Fundamental Rights. If it fails to fulfil those requirements, that legislation could be perceived as seeking to establish an instrument of pressure and intimidation with regard to judges, which would prejudice the trust of individuals in

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<sup>19</sup> In particular relating to appointment rules for the High Court of Cassation and Justice and the Judicial Inspection.

<sup>20</sup> Since its creation all investigations and prosecutions involving a magistrate, including past and ongoing investigations were transferred to the SIJ, which would also deal with the investigation and prosecution of all other persons involved in these cases (including high-level corruption), even if the magistrate's role in the file is marginal.

<sup>21</sup> See details in CVM reports of 2018 and 2019.

<sup>22</sup> <https://www.csm1909.ro/PageDetails.aspx?FolderId=786>

<sup>23</sup> With several examples of actions against magistrates vocal in the cause of judicial reforms.

<sup>24</sup> Judicial Inspection report on the public communication of the SIJ during part of 2020.

<sup>25</sup> Decision no 547 from 7 July 2020

<sup>26</sup> Information received during the CVM missions. In addition, the efficiency of the SIJ is another concern with 6600 cases pending and few cases finalized in 2020 (500 closed and 2 sent to court). The low efficiency is an additional risk factor of impunity in high-level corruption cases.

justice.<sup>27</sup> The CJEU adds that the national legislation at issue cannot have the effect of disregarding Romania's specific obligations under the CVM Decision in the area of the fight against corruption.

At the same time, the pressure on the human resources of the judicial institutions continues to increase. This is due to the combined effect of the absence of new entries into the profession in 2019 and 2020,<sup>28</sup> an increasing workload per judge and per prosecutor, an increasing number of retirements, dissuasive seniority thresholds for appointments,<sup>29</sup> and restrictions on temporary delegations (in particular at the National Anti-corruption Directorate). Further deterioration in the situation was avoided when the Government and Parliament took steps to delay, and then repeal, the entry into force of problematic provisions on the possibility for early retirement of magistrates after 20 years of service and on the increased number of judges in certain panels.<sup>30</sup>

#### *The ongoing process for amending the justice laws*

In September 2020, the Ministry of Justice presented amended justice laws for public consultation for six months. The new drafts represented an important overhaul of the three justice laws.<sup>31</sup> According to the Minister of Justice, the approach gave full account to the CVM Reports, GRECO reports and Venice Commission opinions, as well as the broader need to rethink, re-discuss and amend the justice laws. A specific intended goal was to remedy the negative effects of the previous amendments. The September 2020 draft laws propose solutions to many issues identified in CVM reports, in particular: abolishing the SIJ, increasing the professional independence of prosecutors; removing the early retirement scheme for magistrates; modifying the provisions on the civil liability of magistrates; removing restrictions on the freedom of expression of magistrates; and amending the procedures for revocation and appointments for top management prosecutors (see also below).

Overall, the consultation process and reaction from the magistracy brought a mixed response. The Superior Council of Magistracy (SCM) first issued a statement on the laws

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<sup>27</sup> Judgment of the Court of Justice of 18 May 2021 in Joined Cases C-83/19, C-127/19, C-195/19, C-294/19, C-355/19 and C-379/19 *Asociația 'Forumul Judecătorilor Din România' and Others*, para 216. The Court further clarifies that it is for the national court to ascertain that the reform which resulted, in Romania, in the creation of a specialised section of the Public Prosecutor's Office responsible for investigating judges and prosecutors and the rules relating to the appointment of prosecutors assigned to that section are not such as to make the section open to external influences. As regards the Charter, it is for the national court to ascertain that the national legislation at issue does not prevent the case of the judges and prosecutors concerned being heard within a reasonable time.

<sup>28</sup> The 2019 competition was postponed by the Superior Council of Magistracy and in 2020, the Constitutional Court invalidated the competition process. (121/2020 CCR decision)

<sup>29</sup> In 2018 and 2019, the seniority requirement for prosecutors in certain services was significantly increased from one day to another. As a result a number of persons had to leave, not meeting the requirements anymore, and recruitment of new personnel was made more difficult.

<sup>30</sup> In December 2019, the entry into force of the early retirement provisions was delayed until January 2022. In March 2021 the Parliament definitively abrogated the provisions on early retirement with effect as from 1 January 2022. By Government Emergency Ordinance no. 215/2020, measures were adopted in order to postpone the entry into force of the provisions regarding the composition of the appeal panels (3 judges instead of 2). The emergency ordinance stipulated that the appeal panels are composed by 2 judges until 31 December 2022. The Parliament is also in the process of adopting a draft law stipulating that the appeal panels are composed by 2 judges. The draft was approved by the Chamber of Deputies in May 2021, and is now in the Senate for adoption, and will abrogate EOG 215/2020 on entry into force.

<sup>31</sup> Law 207/2018 amending Law 304/2004 on the judicial organisation; Law 234/2018 for amending Law no. 317/2004 on the Superior Council of Magistracy; Law 242/2018 amending Law no. 303/2004 on the statute of judges and prosecutors.

noting with concern the draft amendments to the Laws of Justice as they were put up for public debate.<sup>32</sup> Later, the judges and prosecution sections of the SCM organised separate consultations and sent their views to the Minister of Justice, but these were not made public.<sup>33</sup>

In January 2021, the new Government changed the approach, accelerating the adoption of two specific and more limited amendments. First, it proposed a draft law on temporary measures on admission into the magistracy,<sup>34</sup> having received a positive opinion from the SCM. The draft law was adopted by Parliament on 3 February 2021, but after a challenge before the Constitutional Court, some provisions of the law were found unconstitutional on 17 March 2021.<sup>35</sup>

Second, the draft law on the abolition of the SIIJ was published on the website of Ministry of Justice on 4 February 2021 and was sent to the SCM for opinion. The SCM issued a negative opinion, arguing that additional guarantees to protect magistrates from potentially abusive corruption investigations are needed.<sup>36</sup> The Government did not follow the opinion of the SCM and adopted the draft law unchanged on 18 February, considering that the dismantling of the SIIJ would support judicial independence, and submitted the draft to Parliament. Parliament did not agree with the Government's request for adoption through an emergency procedure, and when the Chamber of Deputies, as first chamber, passed the draft law in March, it added provisions which in its view are meant to "protect magistrates against abusive corruption investigations", proposing that a request for approval of sending to court should first pass through the SCM.<sup>37</sup> This additional step brought criticism from civil society, a large part of the judiciary,<sup>38</sup> and from within the SCM itself,<sup>39</sup> on the grounds that it equated to a new form of immunity and could be seen as limiting the accountability of magistrates. The draft law is now in the Senate as decisional chamber. On 26 March 2021, the Minister of Justice requested an opinion from the Venice Commission on the draft law, and in particular on the additional guarantees. The Venice Commission's opinion is expected to be adopted in July.

### *The Justice laws*

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<sup>32</sup> Statement of 1 October 2020

<sup>33</sup> Letters were sent to the Minister of Justice by the prosecution and judges sections from the Superior Council of Magistracy in February 2021 and December 2020, but these letters are not public.

<sup>34</sup> The draft law concerns admission to the National Institute of Magistracy (NIM), the initial professional training of judges and prosecutors, the graduation exam for NIM, the internship and capacity examination of the judges and prosecutors, as well as the examination of admission to magistracy. Some provisions had been annulled by the Constitutional Court in March 2020 (CCR Decision no. 121/2020 of 10 March 2020) and therefore no competition for admission into the magistracy had been possible.

<sup>35</sup> CCR Decision 187/2021 of 17 March 2021, published on 7 May 2021

<sup>36</sup> The SCM states that the proposed solution is not accompanied by guarantees to give effect to the principle of judicial independence, by ensuring adequate protection of judges and prosecutors against pressure, and notes the general obligation of the legislator to provide appropriate guarantees to ensure actual judicial independence when legislating on the judiciary.

<sup>37</sup> [http://www.cdep.ro/pls/proiecte/upl\\_pck2015.proiect?cam=2&idp=19177](http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?cam=2&idp=19177)

<sup>38</sup> A memorandum signed by over 1000 magistrates from across the country criticised the "guarantees" as introducing an unconstitutional "filter" by making the prosecution of judges and prosecutors conditional on the approval of the Superior Council, and decreasing public confidence in appearing to introduce a "super immunity". The signatories asked Parliament to await the opinions of the Venice Commission and GRECO before voting on the amendment.

<sup>39</sup> There are diverging opinions within the SCM on the abolishing of the SIIJ, on the need of guarantees and on whether the guarantees proposed by the Chamber of Deputies are appropriate.

In parallel, the debate on the full set of amendments to the three Justice laws was revived, through additional debates and consultations with the judicial institutions, and, in March 2021, the three draft amended laws sent to the SCM for an opinion. The Minister of Justice committed to sending the draft laws to the Venice Commission for an opinion, at the same time as these would be sent to Parliament. The drafts are still the subject of debate and consultation in Romania. There were also reactions from civil society.<sup>40</sup> In early May, the Minister of Justice held discussions on the judicial reforms with 14 NGOs active in the field of justice.<sup>41</sup>

One important development is the judgment of the CJEU of 18 May 2021, which considered a number of provisions of the justice laws in the light of Articles 2 and 19(1) TEU and of the CVM decision, in particular as regards the SIIJ and the *ad interim* appointments to management positions within the Judicial Inspectorate, as well as the personal liability of judges as a result of judicial error.<sup>42</sup> More generally, in its judgment, the CJEU recalled that a Member State cannot amend its legislation, particularly as regards the organisation of justice, in such a way as to bring about a reduction in the protection of the value of the rule of law.<sup>43</sup>

The final form of the three justice laws will have a key impact on the independence, quality and efficiency of the justice system, as well as its ability to ensure citizens' right to an effective remedy. The Government has already confirmed that it is approaching the reform in a way which seeks to address CVM recommendations on both process and substance. In terms of process, it remains important that besides taking due account of the CVM recommendations themselves, full attention is paid to the case law of the CJEU in relation to judicial independence, and in particular the recent decision of 18 May 2021, as well as to opinions of the Venice Commission and GRECO reports. This is an important element in finding robust, stable and sustainable solutions.

In terms of substance, the CVM recommendations point to a number of areas where the Commission will pay particular attention to the outcome of the revision of the justice laws. These include issues of structures and procedures, such as the dismantling of the SIIJ, the disciplinary, civil and criminal liability regimes for judges and prosecutors, the accountability and appointment of the Judicial Inspection management, and the appointment and dismissal procedures for senior prosecutors, as well as the role of the High Court of Cassation and Justice and the SCM. Also important is the impact of the reforms on the independence and career organisation of magistrates.

*The conclusion of the legislative process will allow the Commission to assess more fully progress towards the CVM recommendations on the justice laws.*

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<sup>40</sup> <https://expertforum.ro/legile-justitiei-nu-redeschideti-cutia-pandorei/>

<sup>41</sup> <http://www.just.ro/ministrul-justitiei-a-consultat-reprezentantii-societatii-civile/>

<sup>42</sup> Judgment of the Court of Justice of 18 May 2021 in Joined Cases C-83/19, C-127/19, C-195/19, C-294/19, C-355/19 and C-379/19 Asociația 'Forumul Judecătorilor Din România' and Others, paras 179-241.

<sup>43</sup> Ibid., para. 162. See also Case C-896/19 Repubblika v Il-Prim Ministru of 20 April 2021, para.64.

## *Appointments to leadership posts in the prosecution services*

- *2017 Recommendation: 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.*
- *2018 Recommendation: Respect negative opinions from the Superior Council on appointments or dismissals of prosecutors at managerial posts, until such time as a new legislative framework is in place in accordance with recommendation 1 from January 2017.*
- *2018 Recommendation: Relaunch a process to appoint a Chief prosecutor of the DNA with proven experience in the prosecution of corruption crimes and with a clear mandate for the DNA to continue to conduct professional, independent and non-partisan investigations of corruption.*

Successive CVM reports had highlighted the need for sufficient checks and balances in the procedure to appoint top prosecutors, as well as the extent to which the same appointment and dismissal procedure would apply at lower management levels within the prosecution. The 2018 CVM report had concluded that the situation had regressed, while the 2019 CVM report highlighted the risk that constant modifications created further uncertainty and a lack of confidence: although the procedure had been modified four times in less than six months, none of these changes addressed the core issue of the balance between the influence of different institutions on the process and the concentration of power with the Minister of Justice. The Venice Commission also focused on the lack of counterbalance to the influence of the Minister of Justice.<sup>44</sup>

There have been no further legal changes since 2019, and the issue is now part of ongoing amendments of the justice law as concerns the statute of judges and prosecutors. A new draft from March 2021, on which the Minister of Justice has requested an SCM opinion (see above), proposes to strengthen the role of the SCM, by introducing a binding SCM opinion. The role of the President of Romania is also strengthened regarding the possibility to refuse a candidate.

Since the last report, new heads of the prosecution services have been appointed, but the long-standing concerns with the procedure remain. In early 2020, one of the first actions of the then Minister of Justice was to organise selection procedures with increased transparency, in order to appoint new leadership for the prosecution services.<sup>45</sup> Nevertheless, while the new DNA chief prosecutor was appointed following a positive opinion of the SCM, the Prosecutor General and the Chief Prosecutor for the Directorate for investigation of organised crime and terrorism (DIICOT)<sup>46</sup> were appointed despite a negative opinion of the SCM. The Section for Prosecutors of the SCM further reports that the prosecutors who voted to reject the candidates for Prosecutor General and DIICOT were subject to pressure from the SIIJ as a result.<sup>47</sup> There were further instances in 2020 where the Minister of Justice disregarded the opinion of the SCM for deputy management posts.<sup>48</sup>

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<sup>44</sup> Venice Commission opinion 950/2019 CDL-AD(2019)014

<sup>45</sup> The selection criteria, the name of candidates and procedures were published on the website of the Ministry of Justice, and interviews were streamed online.

<sup>46</sup> In September 2020, the Chief Prosecutor of DIICOT resigned from her position after her husband was investigated and convicted in first instance for corruption and influence peddling.

<sup>47</sup> This came in the form of leaked summons from the SIIJ shortly after the vote.

<sup>48</sup> For example, one of the deputy posts for the Prosecutor general attached to the High Court of Cassation and Justice

The dismissal procedure of top prosecutors is closely related to the appointment process. The dismissal in 2018 of the former DNA chief prosecutor<sup>49</sup> has been reviewed by the European Court of Human Rights (ECtHR). Romania was found in violation of the right to a fair trial and the freedom of expression as enshrined in Articles 6(1) and 10 of the European Convention of Human Rights.<sup>50</sup> The ECtHR held that the former Chief Prosecutor had not been able to effectively challenge in court the reasons for her removal from the position. It also drew attention to the growing importance attached to the intervention of an authority independent of the executive and the legislative branch in respect of decisions affecting the appointment and dismissal of prosecutors. It also noted the risk that the dismissal could have a chilling effect on the willingness of magistrates to participate in public debate concerning the judiciary. The Romanian Government recently presented an action plan for the execution of the judgment<sup>51</sup> and in the draft amendments of the justice laws, a review procedure before an administrative court has been added to the procedure for dismissal of top prosecutors.

*In summary, the CVM recommendation on the appointment of the DNA Chief Prosecutor has been addressed. The ongoing legislative process to amend the justice laws includes provisions aiming to address the remaining recommendations on prosecutorial appointments, and the fulfilment of the recommendations can be assessed when the process has been completed.*

### **Codes of conduct**

*2017 Recommendation: 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.*

A Code of Conduct for parliamentarians is in place since the end of 2017.<sup>52</sup> The 2018 and 2019 reports found that given the lack of explicit provisions on respect for the independence of the judiciary, the Code has not yet fulfilled its purpose.<sup>53</sup> Since the last report no further developments on the application of the code have been reported. Disregard of judicial independence in the parliamentary process and criticism of the judicial system and of individual magistrates from some Members of Parliament, relayed in the media, continued to be reported,<sup>54</sup> although the number and virulence of the attacks has significantly decreased compared to the 2017-2019 period.

The Commission had also suggested that it would be beneficial for the ministerial code to serve the same purpose, and in April 2019 the Government amended the ministerial code of conduct to include an explicit mention of the need to respect judicial independence. Since

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<sup>49</sup> The dismissal took place in 2018 on a proposal of the Minister of Justice. Following the refusal of the Prosecutors' Section of the Superior Council to endorse the proposal, the President of the Republic refused to sign the dismissal decree, which prompted the Prime Minister to complain to the Constitutional Court, which ultimately ordered the President to sign the decree.

<sup>50</sup> Judgment of the European Court of Human Rights of 5 May 2020, Kövesi v. Romania, 3594/19

<sup>51</sup> The Committee of Ministers of the Council of Europe will examine the implementation of the action plan in June 2021.

<sup>52</sup> Parliament decision 77/2017: <https://www.juridice.ro/wp-content/uploads/2017/10/Codul-de-conduită.pdf>.

<sup>53</sup> 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: Article 1 paragraph (3) provides: "Deputies and senators have the obligation to act with honour and discipline, taking into account the principles of separation and balance of powers in the state, transparency, moral probity, responsibility and respect for Parliament's reputation."

<sup>54</sup> Superior Council of Magistracy website – statements and decisions regarding judicial independence

the last CVM report, there have been a few instances where the Superior Council of Magistracy (SCM) found that criticism from a member of the Government was likely to undermine the independence of the judiciary, but noticeably fewer than in previous years.<sup>55</sup> No information was received as to whether, in those cases, compliance with the Government code of conduct was discussed.

*The developments in the previous legislature on respect for judicial independence by the Parliament meant that this recommendation could not be considered fulfilled. The new Parliament in place since the beginning of 2021 and the forthcoming debates on justice issues give a new opportunity for Parliament to apply the code of conduct as appropriate to meet the recommendation's goal of respect of judicial independence.*

### **Civil procedure code**

*2017 Recommendation: The Minister of Justice, the Superior Council of the Magistracy and the High Court of Cassation and Justice should finalise an action plan to ensure that the new deadline for the implementation of the remaining provisions of the Code of Civil Procedures can be respected.*

This Recommendation covered the finalisation of the reform of the Code of Civil Procedures, which in particular set up a council chamber stage in the civil procedure and procedures for appeals in certain cases. In 2018, this reform was abandoned.<sup>56</sup> The 2019 CVM report concluded that this should provide an opportunity for a period of stability in this branch of the judicial system.

*This recommendation can be considered fulfilled. Assessments of the efficiency and quality of the judicial proceedings are being examined in the context of the Rule of Law Report.*

### **Criminal code and criminal procedure code**

- *2018 Recommendation: Freeze the entry into force of the changes to the Criminal Code and Criminal Procedure Code*
- *2018 Recommendation: Reopen the revision of the Criminal Code and Criminal Procedure Code taking fully into account the need for compatibility with EU law and international anti-corruption instruments, as well as the recommendations under the CVM and the Venice Commission opinion*
- *2017 Recommendation: 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.*

In April 2019, Parliament adopted in urgency procedure changes to the criminal code and criminal procedure code and to the special law on corruption, raising strong concerns about the impact on the investigation and sanctioning of crimes in general, and on corruption-related crimes in particular. These amendments received widespread criticism and were declared unconstitutional in their entirety in July 2019.<sup>57</sup> This decision meant that the laws did not come into force, but the fact that there had been a policy choice to make such amendments remained a concern for the Commission and many other observers,<sup>58</sup> all the more so since this policy choice was not explicitly renounced immediately after the court

<sup>55</sup> Website of the SCM. The SCM has also requested the judicial inspection to verify the statements of the Minister of Justice regarding a court judgement.

<sup>56</sup> The amended laws entered into force in December 2018.

<sup>57</sup> Constitutional Court of Romania, Decision 466 of 29 July 2019.

<sup>58</sup> See also Venice Commission opinion (CDL-AD(2018)021).

decision and the draft laws remained pending in Parliament throughout the previous legislature.

In March 2021, both houses of the newly elected Parliament definitely rejected the 2018 and 2019 amendments. Previously, in May 2020, Parliament had also rejected seven problematic draft amendments to the criminal code and criminal procedure code tabled by Members of Parliament.

Amendments to the two codes remain necessary. In the first place, this is required to follow up on a number of far-reaching decisions of the Constitutional Court made since 2014, which have annulled provisions of both codes and had a particular impact on the fight against corruption and organised crime. In the absence of solid legislative and policy solutions, legal uncertainty hinders some individual cases and, as a result, affects the fight against corruption.

An inter-institutional working group has been in place since 2019 to examine legislative initiatives to amend the criminal code and criminal procedure code and propose common solutions and positions from the judiciary.<sup>59</sup> The meetings of the working group were interrupted in 2020 due to the COVID-19 pandemic, but have now resumed. The Minister of Justice has made the work on the two codes a priority, and the work of the working group will be the basis for the revision of the criminal code and criminal procedure code. The Government intends to present new consolidated texts to Parliament once the amendments to the justice laws are adopted.

*These various steps effectively mean that the amendments identified as a backward move in the recommendations have been renounced. This opens the way to the process of revision of the criminal code and criminal procedure code to follow up on the Constitutional Court decisions, taking fully into account the need for compatibility with EU law and international anti-corruption instruments, as well as the recommendations under the CVM and the Venice Commission opinion set out in the recommendations. Preparatory steps are now being taken by the Romanian authorities.*

### ***The legislative process in the CVM area***

*2017 CVM Recommendation: In order to improve further the transparency and predictability of the legislative process, and strengthen internal safeguards in the interest of irreversibility, the Government and Parliament should ensure full transparency and take proper account of consultations with the relevant authorities and stakeholders in decision-making and legislative activity on the Criminal Code and Code for Criminal Procedures, on corruption laws, on integrity laws (incompatibilities, conflicts of interest, unjustified wealth), on the laws of justice (pertaining to the organisation of the justice system) and on the Civil Code and Code for Civil Procedures, taking inspiration from the transparency in decision-making put in place by the Government in 2016.*

This recommendation was an acknowledgement that an open and robust legislative process is the best way to ensure that reforms are sustainable as well as effective.<sup>60</sup>

<sup>59</sup> The working group includes the Superior Council of Magistracy, the High Court of Cassation and Justice, the Prosecutor's Office attached to the High Court of Cassation and Justice and the Ministry of Justice.

<sup>60</sup> The 2020 Rule of law report - Country Chapter on the rule of law situation in Romania and the European Semester Country Specific Recommendations have underlined concerns regarding the predictability and quality of the legislative process in general.

In the May 2019 referendum, a majority of citizens voted in support of banning the use of Government Emergency Ordinances (GEO) in the area of justice. This illustrates concern about the excessive use of GEOs, and there have been few cases since November 2019.<sup>61</sup>

As regards procedures in Parliament, the number of emergency procedures concerning the justice laws, the criminal code and criminal procedure code, the legal framework on integrity and the fight against corruption has significantly decreased since the 2019 CVM report. In February 2021, Parliament rejected a proposal to examine the draft law to abolish the SIIJ through an emergency parliamentary procedure. There have also been fewer cases where controversial legislative drafts in the scope of the CVM have been advanced in Committees or in one of the Chambers, and even fewer have been adopted. One exception was a law abolishing special pensions, including the special pension of judges and prosecutors, which the Superior Council of Magistracy considered as targeting the judiciary. It was eventually declared unconstitutional.<sup>62</sup> However, given the parliamentary procedure whereby amendments remain tabled until specifically removed, several long-standing amendments remain before Parliament, including several which could seriously undermine the legal framework to prevent and sanction incompatibilities and conflicts of interests. Against that background, the vote by Parliament to reject problematic amendments of the criminal code and the criminal procedure code was an important sign of progress. In March 2021, the Parliament further rejected a number of pending amendments raising concerns about the integrity legal framework (see below).

*The legislative process for the various proposals for reform – on the SIIJ, the justice laws, and later the criminal code and criminal procedure code – is an opportunity to show that the approach of the recommendation is being followed.*

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

*2017 CVM Recommendation: The Government should put in place an appropriate Action Plan to address the issue of implementation of court decisions and application of jurisprudence of the courts by public administration, including a mechanism to provide accurate statistics to enable future monitoring. It should also develop a system of internal monitoring involving the Superior Council of the Magistracy and Court of Auditors in order to ensure proper implementation of the Action Plan.*

Respect and implementation of court decisions is an integral part of the efficiency of the judicial system.<sup>63</sup> Romania was sanctioned by the European Court of Human Rights in 2005 on the grounds of failure or significant delay by the State or by legal entities under the responsibility of the State to abide by final domestic court decisions.<sup>64</sup> This has remained a problem: in 2016 Romania proposed to the Council of Europe's Committee of Ministers an action plan to address the structural problems of non-enforcement or delayed enforcement of

<sup>61</sup> Exceptions include (i) steps taken to ensure the functioning of the justice system during the COVID-19 pandemic; (ii) an act of February 2020 on public acquisitions which introduced a potential new disciplinary procedure for judges, and which was declared unconstitutional; (iii) the EOG of 30 December 2020 delaying the entry into force of provisions increasing the number of judges required in certain court panels, which are expected to be abolished as part of the ongoing revision of the Justice laws.

<sup>62</sup> Decision no. 153 of 6 May 2020. Later, Parliament adopted another law to tax the special pensions, also declared unconstitutional.

<sup>63</sup> See 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](http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf).

<sup>64</sup> Judgment of the European Court of Human Rights of 6 September 2005, *Săcăleanu group v. Romania* (Application No. 73970/01).

court decisions against the State.<sup>65</sup> This action plan and the additional measures required by the Council of Europe Committee of Ministers are of direct relevance to addressing this recommendation.<sup>66</sup>

The 2019 CVM report marked some progress, reporting that in April 2019, the Government had approved the list of measures and tasked the responsible inter-ministerial working group to draft the legal proposals to implement the action plan. These measures included amendments to the legal framework in order to guarantee timely execution and a mechanism to supervise and prevent late execution of judgements for which the State is a debtor.<sup>67</sup>

However, none of these measures have been adopted or implemented.<sup>68</sup> Responsibility has been moved inside the government,<sup>69</sup> and a dedicated working group has been tasked to propose new legal solutions.

As also underlined by the Council of Europe's Committee of Ministers in March 2021, a strong political commitment to bring comprehensive and sustainable solutions is indispensable.<sup>70</sup>

*There have been no major new steps to implement this recommendation since the last report.*

### ***Strategic Judicial Management and Action Plan for the judiciary***

*2017 CVM Recommendation: The Strategic Judicial Management, i.e. the Minister of Justice, the Superior Council of the Magistracy, the High Court of Cassation and Justice and the Prosecutor-General should ensure the implementation of the Action Plan as adopted and put in place regular common public reporting on its implementation, including solutions to the issues of shortages of court clerks, excessive workload and delays in motivation of decisions.*

In 2017, the Strategic Judicial Management was set up with the aim of addressing major strategic questions for the judicial system, bringing together the main institutions with responsibility for the functioning of the judicial system.<sup>71</sup> It is also responsible for ensuring the implementation of the Action Plan of the Strategy for the Development of the Judiciary 2015-2020<sup>72</sup>, which was intended to become the main motor for judicial reform, internalising the reform momentum from the CVM. The November 2019 CVM Report

<sup>65</sup> See Council of Europe reference CM/Notes/1280/H46-21.

<sup>66</sup> Romania is under enhanced supervision from the Council of Europe Committee of Ministers for the execution of this judgment (Decision CM/Del/Dec(2019)1340/H46-15).

<sup>67</sup> Memorandum nr. L1/1814/26.02.2019 on 'Measures to Ensure the Execution of Judgments against a Public Debtor, in accordance with the case law of the European Court of Human Rights regarding non-execution or execution with delay of the judgments handed down against a public debtor.'

<sup>68</sup> The 2019 CVM Report also noted that the 'ECRIS' IT application will be able to identify the number of definitive judgments in which public institutions are debtors or creditors. The registry should make available statistics on effective enforcement, and will allow monitoring of the execution of judgements. No information was received on whether this register is now operational and statistics available.

<sup>69</sup> To the General Secretariat of the Government rather than the Ministry of Justice.

<sup>70</sup> In March 2021, the Committee of Ministers examined again the execution of the judgement and "underlined again the crucial importance of a strong commitment at a high political level to bring about a swift, comprehensive and sustainable resolution of the problems revealed by these judgments", expressing "deep concern at the prolonged absence of tangible progress".

<sup>71</sup> It is composed of the Minister of Justice, the President of the Superior Council of Magistracy, the President of the High Court of Cassation and Justice and the Prosecutor-General.

<sup>72</sup> Action Plan approved by Government Decision 282 of 2016.

found that the Strategic Judicial Management had not been operating as intended and that the action plan remained largely unimplemented.<sup>73</sup>

Since 2019, the situation faced by the justice system in terms of human resources and organisation has continued to worsen, following the amendments to the justice laws and policies adopted in the period 2017-2019. Key structural problems mentioned in the 2017 report remain: shortages of court clerks, excessive workload in certain courts and delays in motivating court decisions.<sup>74</sup> While a few meetings of the Strategic Judicial Management took place in late 2019, and the professional institutional cooperation could resume, no tangible results were achieved. The Minister of Justice has now started reconvening meetings, and first discussions have taken place on the functioning of the Strategic Judicial Management and on the human resources strategy for 2021-2022.

A final report on the implementation of the Action Plan is now being prepared, which could help to identify the next steps and the actions from the previous plan that remain relevant.

*A new vision and strategy for an effective and sustainable development of the justice system for the coming years will be an important complement to a revised legal framework through the justice laws. It would also show the Strategic Judicial Management becoming an active forum able to address major strategic questions for the judicial system, building consensus and trust between the key judicial and governmental institutions. This would be an important step towards showing that sustainable structures exist to continue reform once the CVM has ended.*

### ***The transparency and accountability of the Superior Council of the Magistracy***

*2017 CVM Recommendation: The new Superior Council of the Magistracy should prepare a collective programme for its mandate, including measures to promote transparency and accountability. It should include a strategy on outreach, with regular open meetings with assemblies of judges and prosecutors at all levels, as well as with civil society and professional organisations, and set up annual reporting to be discussed in courts' and prosecutors' general assemblies.*

CVM reports have consistently underlined the importance that the Superior Council of Magistracy (SCM) contributes to the momentum of reform, articulating clear collective positions and securing confidence through transparency and accountability. The 2018 and 2019 CVM reports had raised concerns on this matter, and noted that the positions the SCM had taken on questions such as the Section for investigating criminal offences within the judiciary (SIJ), key appointments and defending the independence of justice, had raised concerns about its institutional independence and authority. The work of the SCM since November 2019 has continued to be marked by controversy.

One important concern relates to the capacity of the SCM to build consensus in the judicial system and thereby play a constructive role in key decisions for the organisation and the functioning of the judiciary. This concern can be illustrated by the decision not to engage

<sup>73</sup> The Ministry of Justice reported that by the end of 2019, 32.11% of the indicators were realised, 41.14% of the indicators were in progress, 25.42% of the indicators were not yet started, and 1.34% of the indicators were not conclusive.

<sup>74</sup> On 7 April 2021, the Constitutional Court held that the drafting of a criminal judgment subsequent to its delivery deprives the convicted person of the right of access to justice and the right to a fair trial (Decision CCR 233/2021 of 7 April 2021). On 12 May, a new law entered into force, which requires that the deliberation, drafting and pronouncing of a judgement in criminal cases should be delivered at the same time, within a given deadline after the end of the debates.

constructively on the draft justice laws published by the Ministry of Justice for a six months public consultation in September 2020:<sup>75</sup> the SCM did not present a public consolidated point of view before the end of the public consultation.<sup>76</sup>

Another example where the SCM has not been able to articulate a clear position and contribute to public debate is the reaction of the SCM to the draft law to dismantle the SIIJ. Although the draft law from the Minister of Justice was in line with the recommendations of the CVM, the Venice Commission and GRECO, the SCM gave a negative opinion on the draft and called for new safeguards, but despite the long-standing debate on this issue, it did not define what these should be. This meant that amendments to the draft made in the Chamber of Deputies, which were responding to the SCM by adding safeguards relating to the indictment procedure for judges or prosecutors accused of corruption, did not benefit from a prior public debate. When the proposed safeguards came to light, they brought critical reactions from within the SCM as well as civil society and the majority of judges and prosecutors (see also above).

The public communication of the SCM, in particular on the independence of the judiciary, has also been a source of concern. The January 2017 report had noted that a pro-active approach by the SCM on the independence of justice was an important element towards fulfilling Benchmark one. CVM reports have noted that the SCM has not been able to provide a strong stance on the matter. Since the last report, the activity of the SCM in defending the independence of the judiciary remains limited.<sup>77</sup> It made no comment after the landmark ruling from the European Court of Human Rights in May 2020, invoking the independence of the judiciary.<sup>78</sup> There has also been confusion of roles between the Plenum of the SCM – responsible under the Constitution for defending the independence of the justice system and for opinions on legislative proposals – and the sections. In many instances, the role of defence of the independence of the justice system has been taken up by the sections, instead of the Plenum.<sup>79</sup>

Nevertheless, there have also been cases where the SCM has been able to surmount its divisions and obtain results, such as in 2020, when Parliament abrogated the special pensions of judges and prosecutors,<sup>80</sup> or on salaries and pensions in 2021<sup>81</sup>. Similarly, the SCM contributed positively to a draft law in February 2021 to organise a competition for

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<sup>75</sup> <https://www.csm1909.ro/PageDetails.aspx?FolderId=8305>

<sup>76</sup> There has been no public document illustrating the positions of the courts or prosecution offices, nor of the SCM, before the end of the consultation in March 2021. The SCM sections for judges and prosecutors informed the Commission that they conducted consultation of the judges and prosecutors respectively, and that the separate letters were sent to the Minister of Justice. The letters were not made public.

<sup>77</sup> Since the last report, there have been only two cases admitted for the defense of the independence of the justice system by the Plenum of the SCM, both based on facts dating from early 2019. The number of requests and the number of request admitted for the defense of the independence or reputation of individual judges and magistrates also decreased with regard to previous years. Media criticism and pressure on judges and prosecutors from media outlets and on social media remains. The SCM has however modified its regulation to filter out cases which are obviously not admissible, so that the verifications of the Judicial Inspection can be accelerated.

<sup>78</sup> Only the prosecution section published a statement.

<sup>79</sup> The judges section, in particular, and the prosecution section in a few cases, have made a series of public statements with regard to possible pressure on judicial independence. When a request was rejected in plenum, it was sometimes requalified in the sections. There are also examples where public statements or actions were taken by the judges section, whereas the issues at stake concern both judges and prosecutors.

<sup>80</sup> The law was ruled unconstitutional.

<sup>81</sup> SCM Press statement of 18 February 2021.

admission into profession in 2021. It has also continued to work with the government to obtain resources for the court and prosecutions offices.<sup>82</sup>

The SCM has also modified its regulation to improve access to public information, and making public the drafts of the decisions to be voted by its Plenum or sections. Important projects financed by EU funds have progressed, including a Unitary Communication Strategy.<sup>83</sup>

*Concerns on the capacity and accountability of the SCM brought up in 2018 and 2019 CVM reports remain. The more consensual tone of the SCM leadership this year will contribute to rebuilding trust and unity in the judicial system and allowing the SCM to fulfil the role set out in the recommendation and in Benchmark One.*

### **The Judicial Inspection**

*2018 CVM Recommendation: The Superior Council of Magistracy to appoint immediately an interim team for the management of the Judicial Inspection and within three months to appoint through a competition a new management team in the Inspection.*

2018 and 2019 were marked by controversy about the approach of the SCM towards the position of the Chief Inspector, as the SCM effectively extended the term of the incumbent, despite the controversy relating to a temporary interim prolongation on the basis of a Government Emergency Ordinance. A preliminary ruling request was brought to the Court of Justice of the EU on the compatibility with Articles 2 and 19(1) TEU of the power for the Government to carry out interim appointments to management positions within the Judicial Inspection responsible for conducting disciplinary proceedings against judges and prosecutors. In its judgment of 18 May 2021, the CJEU ruled that national legislation cannot give rise to doubts that the powers of a judicial body responsible for conducting disciplinary investigations and bringing disciplinary proceedings against judges and prosecutors might be used as an instrument to exert pressure on, or political control over, the activity of those judges and prosecutors. The Court held that national legislation is likely to give rise to such doubts where, even temporarily, it has the effect of allowing the government of the Member State concerned to make appointments to the management positions of the body responsible for conducting disciplinary investigations and bringing disciplinary proceedings against judges and prosecutors, by disregarding the ordinary appointment procedure laid down by national law.<sup>84</sup> The judgment revives the purpose of the 2018 recommendation. The authorities with oversight on the Judicial Inspection, in particular the SCM, will have to take the judgment into due consideration, also in light of the repeated concerns raised with the activity of the Judicial Inspection.

In recent years, judicial institutions, including the SCM itself, have highlighted concerns with the lack of accountability of the Judicial Inspection, citing the high proportion of cases brought by the Inspection eventually rejected in court, the concentration of all decision making with the Chief Inspector and the limits on the oversight powers of the SCM.<sup>85</sup> More

<sup>82</sup> Several meetings have been organised in 2020, in particular on increasing auxiliary staff in courts

<sup>83</sup> This aims to support the communication activities of the institutions of the judiciary, courts and prosecutor's offices, and further develop the internal and external communication and transparency towards the citizen.

<sup>84</sup> Judgment of the Court of Justice of 18 May 2021 in Joined Cases C-83/19, C-127/19, C-195/19, C-294/19, C-355/19 and C-379/19 Asociația 'Forumul Judecătorilor Din România' and Others, paras 200-206.

<sup>85</sup> The Chief Inspector can only be subject to an external audit which is ordered by the Inspection itself, and then the audit report is examined only by a selected handful of members in the Council.

generally, these developments have raised questions on whether the provisions in the Justice laws for appointing the management of the Judicial Inspection and its accountability offer sufficient guarantees and achieve the right balance between judges, prosecutors and the SCM.<sup>86</sup> The new draft justice laws of March 2021 on which the Minister of Justice requested the opinion of the SCM, modifies the provisions on the appointment of the Chief and deputy Chief Inspectors, as well as the control mechanisms regarding the activity of the Judicial Inspection, giving stronger oversight powers to the SCM and involving the National Institute of Magistracy in the competitions for entering the Judicial Inspection.

In the reporting period, judicial institutions reported an overall reduction in the activity of the Judicial Inspection, namely fewer ex-officio disciplinary proceedings raising concerns about objectivity. However, there remain cases where disciplinary investigations and heavy sanctions on magistrates critical of the efficiency and independence of the judiciary have raised concerns.<sup>87</sup> The delays from the part of the Judicial Inspection in examining complaints are also seen as a way to maintain pressure on the judge or prosecutor as long as the investigation is ongoing.<sup>88</sup>

*Whilst focused on the particular circumstances at the time of the 2018 report, this recommendation refers to substantial concerns about the Judicial Inspection. This included a pattern of disciplinary proceedings against magistrates publicly opposing the direction of reform of the judiciary and leaks of documents – which were then used by politicians to attack judicial institutions – as well as the prolongation of the management team. These structural concerns remain to be addressed, including in the light of the recent CJEU judgment.*

***Progress on Benchmark One has now restarted. As set out in the detailed assessment of progress on each of the recommendations, the completion of the amendments of the justice laws, the criminal code and criminal procedure code, in line with the recommendations, will be key for measuring progress under Benchmark One. These laws are at the core to finding sustainable solutions for the judiciary and decisive progress will have an impact on the assessment of many of the recommendations.***

## **2.2. Benchmark Two: Integrity framework and the National Integrity Agency**

The National Integrity Agency (ANI) continues to investigate incompatibilities, conflicts of interest and unjustified wealth.<sup>89</sup> ANI's work should be facilitated by electronic submissions

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<sup>86</sup> The previous law from 2004 stipulated that both the Chief Inspector and the deputy Chief Inspector were selected by the SCM Plenum through by a competition including a written test, an interview and the presentation of the management project. Since 2018, the Chief Inspector is appointed by the SCM, following an interview before a commission composed of three judges, one prosecutor and one member of civil society. However the SCM plenum's formal decision can overrule the commission only on the grounds that the rules were not respected. The deputy Chief Inspector and the Directors of respective Sections are selected by the Chief Inspector, whose powers to organise the inspection have also been increased.

<sup>87</sup> Examples include disciplinary proceedings with proposal of preventive suspension from office until the finalisation of the disciplinary investigation and the decision of the SCM against judges from magistrate associations who have resisted the backwards changes of 2017-2019 and brought preliminary ruling requests to the European Court of Justice (the disciplinary investigation concern group conversations leaked from a private social network group) ; and a judge suspended for 6 months for publicly criticising the Judicial Inspection and the functioning of the SIIJ.

<sup>88</sup> Information received during the CVM missions.

<sup>89</sup> During 2020, the National Integrity Agency finalised 1.143 cases and 175 cases have remained definitive and irrevocable. In 2020, 204 administrative fines were applied, for failure to submit assets and interest

of assets and interest disclosures, which became operational in May 2021, following a July 2020 amendment of the law on integrity in exercising the public offices and dignities.<sup>90</sup> ANI reports that its 2020 budget was sufficient to carry out its tasks, as the initially reduced budget was supplemented later in the year.<sup>91</sup> ANI faces some uncertainty over its leadership positions. The position of the President has been vacant since December 2019 and the mandate of the Vice-President expires in 2021.<sup>92</sup> Selection procedures were eventually initiated in April 2021.

ANI had an active role during local and national elections in 2020, raising awareness of integrity rules for candidates and sharing information with the relevant authorities on candidates who are under interdiction to hold a public office. This is seen as one reason for relatively little controversy in the elections around the respect for integrity rules.<sup>93</sup>

The 2019 CVM report concluded that there was a risk of backtracking on Benchmark Two. A series of amendments modifying the integrity laws, notably in 2017-2019, had the effect of weakening the ability of ANI to carry out its work. Two proposals that entered into force in 2019 had further increased legal uncertainty as regards the applicable integrity regime. This risked backtracking on Benchmark Two if 'dissuasive sanctions' could no longer be imposed, despite a final court decision.<sup>94</sup> The report concluded that the legislative developments on the integrity laws should be clarified in order to avoid such a risk.

In 2020 and 2021, the High Court of Cassation and Justice clarified the interpretation of the law. The Court ruled that the sanction applies, even if the incompatibility concerns a previous mandate, and that a limitation period of three years should refer to the need for ANI to finalise an investigation within three years of the facts that determine the existence of a state of conflict of interest or incompatibility (rather than the sanction not applying after three years).<sup>95</sup> ANI has welcomed these decisions, which restore clarity and certainty in the possibility to impose sanctions after a final court decision.

ANI and stakeholders have highlighted the need to further improve the stability and clarity of the legal framework for integrity. The previous legislature was marked by a number of amendments remaining pending in Parliament despite a negative opinion from ANI. This uncertainty has been partly dispelled under the new Parliament, with five pending amendments raising concerns having definitely been rejected by the chambers of Parliament.

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disclosures in legal terms, for non-disciplinary sanctions applied after the ascertaining act remained final, and for failure to comply with the legal provisions.

<sup>90</sup> Amendment to the Law no. 176/2010 regarding integrity in exercising the public offices and dignities. From 2022 onwards, electronic submission will be compulsory.

<sup>91</sup> Initial budget was 34.802.000 RON, while the final budget was 37.432.000 RON.

<sup>92</sup> No competition was organized in 2020 as the National Integrity Council (CNI), the body that supervises the activity of ANI and has the competence to organise the competition for selecting the president and vice-president, could not reach a quorum as the Senate had not nominated new members since 2018. Eventually new members were appointed in March 2020, and the CNI could start preparing the rules for the competition.

<sup>93</sup> A number of problems of enforcement remain and the result was inconsistency. The authorities responsible for validating candidacies or mandates in the local elections disregarded the interdiction to occupy an elected office and allowed candidates to run in elections. There were also cases where a number of authorities invalidated the newly obtained mandates of persons under this interdiction.

<sup>94</sup> The first amendment set a prescription deadline of three years from the deeds that determine the existence of a state of conflict of interest or incompatibility, and resulted in the closure of a high number of ongoing cases and doubts on the possibility to impose sanctions. The second amendment introduced a lowered sanctioning regime regarding conflict of interests for local elected officials, which ANI considered does not allow for dissuasive sanctions.

<sup>95</sup> HCCJ Decision of 16 November 2020 and HCCJ Decision 1/2021

Removing all pending amendments with a negative opinion from ANI<sup>96</sup> would open the way for more orderly amendments and consolidation of the integrity legal framework. A consolidation of the laws on integrity, incompatibilities and conflicts of interest would allow case-law and corruption prevention policies to be taken into account and provide a stable basis for the future. GRECO could provide useful advice on this issue in the preparation of this law.

### ***The PREVENT System***

*2017 CVM Recommendation: 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 fully operational and ANI reports positive results.<sup>97</sup> In particular, ANI highlights a continued reduction in the number of conflicts of interests since the start of the PREVENT system, as awareness increases within public authorities.

*The November 2018 report considered this recommendation fulfilled and its continued effective implementation illustrates the sustainability of this system.*

### ***Follow-up of court decisions concerning Members of the Parliament***

*2017 CVM Recommendation: 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 last two CVM reports pointed at delays and apparent inconsistencies in the application of sanctions against Members of Parliament found to hold incompatible functions or to be in a state of conflict of interest by a final court decision following a report from ANI. The reports highlighted a possible divergent interpretation of the rules (notably when the integrity incident occurred in a previous mandate or position) and suggested a need for clarity in a way which fulfils the CVM benchmark of securing ‘mandatory decisions on the basis of which dissuasive sanctions can be taken’.

The cases disputed between ANI and the Parliament in the previous legislature remained unresolved by the Parliament, and the sanctions were never applied.

The approach of the current Parliament is significantly different. As part of the validation process following the elections, the Validation Committee of the Romanian Senate asked ANI to communicate definitive and irrevocable decisions issued by courts regarding incompatibilities or conflict of interests of the elected Senators. ANI found that none of the elected Senators were under the interdiction to occupy an office. The Chamber of Deputies has requested ANI’s point of view regarding the disclosure made by a series of deputies, with respect to their potential incompatibilities.<sup>98</sup>

<sup>96</sup> For example, a proposal to amend the Administrative Code, last discussed in May 2020, remains pending before the Chamber of Deputies.

<sup>97</sup> In 2020, the PREVENT system analysed 19,140 procurement procedures, in order to identify possible conflicts of interest. In 2020, the integrity inspectors issued 10 integrity warnings, representing some €11.1 million.

<sup>98</sup> The Statute of Deputies and Senators stipulates that they must disclose their state of incompatibility within 15 days and, within 30 days, resign from one of the offices that generated the incompatibility.

*The experience under the previous legislature cast doubt on the fulfilment of this recommendation. The new proactive cooperation under the new Parliament could mark a turn in the implementation of integrity laws and final court decisions regarding Members of Parliament. A similar approach when new cases of incompatibility or conflicts of interest are asserted concerning sitting parliamentarians would lead to the fulfilment of this recommendation.*

***The risk of backtracking on Benchmark Two identified in 2019 linked to modifications of the integrity legal framework have been mitigated. There are encouraging signs that the new legislature could set a clear path towards sustainability of ANI and the legislative framework on integrity and fulfilling the remaining recommendation.***

### **2.3 Benchmark Three: Tackling High-level corruption**

#### ***The National Anti-Corruption Directorate and the fight against high-level corruption***

In the November 2019 report, the Commission expressed strong concerns and reiterated its conclusion from November 2018 that the basis for the positive assessment reached in respect of Benchmark Three in January 2017 had been reopened by Romania. The 2019 report recognised that both the National Anti-Corruption Directorate (DNA) and the High Court of Cassation and Justice had continued to investigate and sanction high-level corruption and demonstrated professionalism in very difficult circumstances, managing to maintain a strong track record. The report also concluded that the attacks on their activities, the successive changes to the applicable legal framework and the possible challenge to the authority of final judgements raised questions about the sustainability of Romania's achievement in the fight against high level corruption.

The situation has improved since the 2019 report. The appointment of a new DNA Chief Prosecutor and other management positions in 2020 has brought new impetus and institutional stability. This has translated into an increased focus on ensuring the quality of the investigations and the files brought to court. In 2020, DNA managed to achieve better results than in 2019, with an increase in the number of indictments and a reduction in the backlog.<sup>99</sup> There was also progress at the level of the courts, with an increase in court decisions.<sup>100</sup> In 2020, the number of complaints from citizens and *ex-officio* complaints on alleged corruption crimes have increased, a change from the decreasing trend since 2015. The DNA sees this as a sign of renewed confidence from the public, which had been seriously affected by the attacks on DNA in the 2017-2019 period. The communication policy of the DNA was also changed in 2020, so that names of the suspects are no longer mentioned in the press releases when investigations are opened, limiting public exposure for suspects.

However, important challenges remain as to the sustainability of the DNA and the irreversibility of the fight against corruption. The 2018-2019 amendments to the justice laws represented a major impediment for the good functioning of the DNA, which will continue for as long as they are in force. The general problems faced by the judicial system (see

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<sup>99</sup> In 2020, the files mainly dealt with public procurement, bribery, EU funds fraud. DNA also registered 105 files of corruption in relation to combatting the COVID-19 pandemic.

<sup>100</sup> The increase reflects the results of all courts dealing with DNA cases. The High Court of Cassation and Justice solved less cases: in first instance 3 cases in 2020 and one in 2021, in last instance 4 cases in 2020. In 2020 8 cases were suspended. Overall the Court reports that fewer cases have been registered. DNA also reports a lower proportion of acquittals in 2020, though the number in 2019 was inflated due to the decriminalisation of offences.

above) have been particularly difficult for DNA.<sup>101</sup> DNA has faced a human resources deficit,<sup>102</sup> adding more pressure on prosecutors at a time when DNA faced the extra challenge of developing its own technical capacity to implement court orders using special investigation techniques.<sup>103</sup> In addition, the effective treatment of some high-level corruption cases continues to be adversely affected by the Section for investigating criminal offences within the judiciary (SIIJ), which continues to intervene in ongoing high-level corruption files investigated by the DNA, and to create delays which risk to negatively affect those cases.<sup>104</sup> SIIJ handling of complaints against prosecutors from persons convicted for corruption has also been seen as putting pressure on DNA prosecutors.

The other important challenge in the fight against corruption is the absence of policy and legislative solutions to the rapid succession of far reaching Constitutional Court decisions annulling or interpreting provisions of the criminal code and criminal procedure code since 2014. This situation has led to increased obstacles and legal uncertainty regarding the investigation, prosecution and sanctioning of high-level corruption cases. It has led to cases failing in court, legal uncertainty on the admissibility of evidence, as well as to the restart of investigations or trials.<sup>105</sup> The impact on ongoing high-level corruption cases of the Constitutional Court rulings regarding the composition of the 3-judges panels for high-level corruption cases and 5-judges final appeal panels at the High Court of Cassation and Justice has yet to unfold.<sup>106</sup> In its recent judgment, the EUCJ held that the principle of primacy of EU law precludes national legislation with constitutional status, which deprives a lower court of the right to disapply of its own motion a national provision falling within the scope of the CVM framework and which is contrary to EU law. Where it is proved that the EU Treaty or the CVM Decision has been infringed, the principle of the primacy of EU law will require the referring court to disapply the provisions at issue, whether they are of a legislative or constitutional origin.<sup>107</sup>

*While the leadership in the DNA and a supportive Government have improved the situation, some important challenges remain for the good functioning of the DNA to be sustainable and for the irreversibility of the fight against corruption. The Government's intentions to amend both the justice laws and the criminal code and criminal procedure code will be*

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<sup>101</sup> General issues regarding human resources for the judiciary also affecting DNA include restrictions to delegations, important number of retirements. Specific issues for DNA include that the seniority requirements for working in the DNA abruptly changed to 10 years, and the oral examination for non-management posts before the SCM is broadcast (contrary to other prosecution departments), which acts as a deterrent for candidates. The seniority requirement for heads of section is 15 years.

<sup>102</sup> In March 2021, DNA reports that only 75% of posts were filled (131 nominated and 14 delegated out of 145 positions), and that 2 leadership positions were vacant.

<sup>103</sup> A pending Government Decision should supplement the DNA with 90 police officers.

<sup>104</sup> See Benchmark One on Justice laws

<sup>105</sup> DNA estimates that in 2020, at least 45 suspects were acquitted as a consequence of the Constitutional Court decisions. A recent CCR Decision of 6 April 2021 further impacts at least 67 ongoing DNA investigations, as investigations will need to be restarted.

<sup>106</sup> Although the decisions of the Constitutional Court do not apply to past cases where a final judgement has been rendered, they may have consequences for ongoing cases. The 5-judges panel decision has allowed for extraordinary appeals of final cases in certain conditions, while the 3-judges panel decision could entail the restart of trial with a new designated panel. DNA reports that 8 cases involving 41 defendants are currently suspended at the High Court of Cassation and Justice, that 10 cases involving 107 defendants have restarted at first instance, and 5 cases with 90 defendants are restarted from the preliminary chamber. Preliminary ruling requests concerning certain cases are pending.

<sup>107</sup> Judgment of the Court of Justice of 18 May 2021 in Joined Cases C-83/19, C-127/19, C-195/19, C-294/19, C-355/19 and C-379/19 *Asociația 'Forumul Judecătorilor Din România' and Others*, paras 251-252

*important steps to putting the work against high-level corruption on a further consolidated basis.*

### ***Lifting of immunity of Members of Parliament***

*2017 CVM Recommendation: Adopt objective criteria for deciding on and motivating lifting of immunity of Members of Parliament to help ensure that immunity is not used to avoid investigation and prosecution of corruption crimes. The government could also consider modifying the law to limit immunity of ministers to time in office. These steps could be assisted by the Venice Commission and GRECO. The Parliament should set up a system to report regularly on decisions taken by its Chambers on requests for lifting immunities and could organise a public debate so that the Superior Council of Magistracy and civil society can respond.*

This recommendation concerns the accountability of Parliament in its decisions on requests from the prosecution to authorise preventive measures such as searches or arrests and on requests to authorise the investigation of a Member of Parliament when he/she is also or has been a Minister. The lack of reasoning of decisions taken by the Parliament – as well as the number of occasions when Parliament did not allow investigation to proceed – led to concerns about the objectivity of these decisions. The 2019 CVM Report welcomed that in June 2019, the Chamber of Deputies amended its rules of procedure and made specific reference to the criteria set out in the Venice Commission’s report on the purpose and waiver of parliamentary immunity.<sup>108</sup> The Report also encouraged the Senate to adopt similar rules, but there has been no development in this regard.

In the reporting period, the Chamber of Deputies approved the request to authorise the investigation of a former Minister and Deputy in October 2020; the Senate also approved the request to authorise the investigation of a former Minister and Senator, despite a first negative opinion of the Legal Committee.

*The approach in Parliament has evolved in a positive direction and continued steps in both chambers would allow for a re-assessment of the fulfilment of the recommendation.*

***The situation in respect of Benchmark Three has improved since the last assessment in 2019. The completion of the reforms mentioned above, both of the justice laws, including the dismantling of the SIIJ, and of the criminal code and criminal procedure code, will be important steps towards fulfilment of the benchmark.***

## **2.4 Benchmark Four: Tackling Corruption at all levels**

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<sup>108</sup> In its report of March 2021, GRECO notes that an informal requirement for prosecutorial bodies to submit the whole file when prosecuting a minister or a former minister who is also a member of Parliament has apparently been lifted by a letter. Greco RC4(2021)1

## ***National Anti-Corruption Strategy***

*2017 CVM Recommendation: 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).*

Progress on the National Anti-Corruption Strategy and thus on Benchmark Four is a key national priority on the political agenda of the Government. The 2016-2020 National Anticorruption Strategy came to an end in 2020, and the Ministry of Justice reports that it has achieved progress, although it has been uneven, in particular in vulnerable areas. The 2016-2020 Strategy ensured improved procedures to target high risk sectors with vulnerabilities to corruption, increase the institutional transparency and effectiveness of preventive measures accompanied by a decrease of integrity incidents and an improved service to citizens (including through digitalisation). An internal evaluation and an external audit (performed by the OECD) are currently ongoing, in view to informing the preparation of the new National Anti-Corruption Strategy (2021-2025). Key features of the 2016-2020 strategy are considered best practices among participating institutions and will be continued in the next strategy, notably the peer-review monitoring mechanism and the participatory decision-making process through the platforms. The Ministry of Justice has nevertheless pointed out that the effectiveness of the strategy relies on a specialised dedicated implementation, and in particular on the political will to give impetus for the implementation of the measures in all participating administrations and public institutions, including at local level. The evaluations are being finalised, and the Ministry of Justice organised a public consultation with the five anti-corruption platforms (regrouping stakeholders) on the new Strategy, and expects to propose the adoption of the new national Anti-Corruption Strategy by the end of 2021. The adoption of the new strategy for 2021-2025 will be the opportunity to translate the political priorities of the Government into concrete actions.

One of the objectives of the strategy is to improve performance in the fight against corruption by imposing criminal and administrative sanctions. Since the October 2019 CVM report, the General Prosecution Service has continued the effective prosecution of corruption and corruption-assimilated offences.<sup>109</sup> However, the challenges affecting the fight against high-level corruption (see Benchmark Three) also impact the investigations and trials under the competence of the prosecution in general. The General anti-Corruption Directorate (DGA) inside the Ministry of Interior carried out investigations under direct coordination of case prosecutors, and pursued corruption prevention projects within the Ministry.

*In summary, further work is needed on the national Anti-Corruption Strategy to ensure an effective implementation and step up the prevention and fighting of corruption in vulnerable areas and at local level. The evaluations of the strategy and strong political commitment will provide the basis to allow progress to be assessed under the rule of law mechanism.*

## ***National Agency for the Management of Seized Assets***

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<sup>109</sup> In 2020, more than half of the files concerned bribery, with a proactive focus in investigating corruption allegations concerning public administration officials (holding elective functions of mayor and vice-mayor, as well as statutory staff).

*Recommendation: 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.*

In 2021 the National Agency for the Management of Seized Assets (ANABI) entered into its fifth year of activity and is further developing its activity. Based on the lessons learned since it became operational in December 2016, ANABI is putting forward a National Strategy for Strengthening the Asset Recovery System for 2021-2025, which includes legislative proposals to extend its mandate and aims to increase the capacity to trace assets both nationally and internationally, enhance cooperation mechanisms, and provide new tools for police and prosecutors in order to better conduct financial investigations and setting up a National Fund for Crime Prevention.

*Previous CVM reports had concluded that this recommendation is fulfilled as ANABI is operational. ANABI continues to operate in line with this recommendation.*

***Progress on Benchmark Four could be accelerated and strengthened with the development of the new Anti-Corruption Strategy 2021-2025, and a strong commitment to translate political priorities into concrete actions on the ground including in vulnerable areas and at local level.***

#### **4. CONCLUSION**

Since the last CVM report in 2019, the situation within the parameters of the CVM benchmarks has seen a clear positive trend. The Commission welcomes the fact that a strong renewed impetus has been given in 2021 to reform and to repair the backtracking of the 2017-2019 period. The result is that there is progress across all the remaining CVM recommendations and many are on the path to being fulfilled if progress remains steady. The Commission looks forward to the Romanian authorities translating this commitment into concrete legislative and other measures. The judgment of the Court of Justice of 18 May 2021 provides a clear framework and direction in the ongoing reforms to satisfactorily fulfil the CVM benchmarks, in full respect of the rule of law and of EU law generally. It is essential that the judgement is duly reflected in the new legislation to be adopted. The Commission will continue to monitor developments closely through the CVM until the benchmarks are met, and, in parallel, will continue to work with Romania, as with all Member States, in the context of the general rule of law mechanism, a key building block in the common commitment of the EU and the Member States to reinforce the rule of law. As indicated in the Rule of Law Communication of September 2020<sup>110</sup>, once the CVM ends, monitoring will continue under horizontal instruments. The rule of law mechanism provides the framework for taking these issues forward in the future. The Commission is confident that Romania can fulfil the benchmarks of the CVM if it continues along the current positive trend and resolutely adopts and implements the reforms engaged. The Commission stands ready to help the Romanian authorities to this end.

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<sup>110</sup> COM(2019) 343