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REPORT FROM THE COMMISSION

TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

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

In July 2012, the Commission reported on Romania's progress since 2007 under the Cooperation and Verification Mechanism (CVM).¹ The report looked at the sustainability and irreversibility of the reforms put in place. As the report was issued at a time when important questions were raised with regard to the rule of law and the independence of the judiciary in Romania, it included specific recommendations to restore respect for these fundamental principles. It was also decided to report six months later, with a focus on the Commission's recommendations in this area.

Over the last six months, the situation in Romania has been dominated by the run-up to the recent elections. The Commission believes that the nomination of the new government after the elections provides a fresh opportunity to ensure respect for the rule of law and judicial independence and ensure stability. Loyal cooperation between institutions and stability in the separation of powers are important foundation stones to provide the right platform for making progress on the issues of judicial reform and the fight against corruption.

This report takes stock of the specific recommendations issued by the Commission on the respect for the rule of law and the independence of the judiciary. It also reports on the CVM benchmarks on the other aspects of reform of the judicial system and the fight against corruption.

1. Respect for the rule of law and the independence of the judiciary

The Commission issued ten specific recommendations to help resolve the controversies on the rule of law and judicial independence. The Romanian government confirmed to the Commission that it would implement these recommendations.² The Commission has been closely monitoring progress on these points, in the light of the benchmarks set in the CVM decision.

The assessment shows that Romania has implemented several but not all of the Commission's recommendations aiming at restoring rule of law and the independence of the judiciary. While the Constitution and the Constitutional Court's role and decisions have been respected, commitments regarding the independence of the judiciary and regarding the response to integrity rulings have not been adequately implemented. At the same time, the appointment of a new leadership for the prosecution and the DNA is still outstanding.

The Romanian Constitutional order

One of the primary concerns expressed by the Commission in July was the stability of the Constitutional order.

The role of the Constitutional Court is of particular importance here. The powers of the Constitutional Court to check the constitutionality of the decisions adopted by the Parliament have effectively been reinstated by means of the Constitutional Court's judgments, and Emergency Ordinance 38 is therefore "de facto" inapplicable.³ The repeal of Emergency

¹ COM(2012)410 final. Its analysis and recommendations was endorsed in conclusions adopted by the General Affairs Council in September.

² Letters of 16 July and 17 July 2012

³ Emergency Ordinance 38/2012 has not been formally repealed. However, the decisions of the Constitutional Court no.727 of 9 July 2012 and no.738 of 19 September 2012 found the Emergency Ordinance 38

Ordinance 41 ensured respect for the Court's rulings on the quorum for a referendum. The fact that the final Constitutional Court ruling on the validity of the 29 July referendum⁴ was respected was a key signal that Constitutional norms were no longer being put in question.

Another source of concern had been the recourse to emergency ordinances, a concern shared by the Venice Commission of the Council of Europe.⁵ The use of this power in early July played an important role in the concerns about by-passing Constitutional norms. The Romanian government committed to use emergency ordinances strictly for the situations set out in the Constitution, and only in case of emergency. There has been less concern on this issue in recent months, and the start of a new Parliament with a clear majority should help to consolidate the ordinary legislative procedures as the right way to legislate.

The Commission notes that all acts, including decisions of the Constitutional Court, appear to have been published in a timely fashion in the Official Journal.

The Parliament appointed the new Ombudsman in January 2013. The fact that the new Ombudsman received the full support of the ruling coalition but not the opposition will make it particularly important for him to show in his actions that he can rise above party lines. The Ombudsman has an important role in safeguarding the checks and balances of the system, and in particular to control the powers of the executive to legislate through ordinances.

In summary, the place of the Constitution and the Constitutional Court has been restored in line with the Commission's recommendations. It is however essential that the President, the new government and parliament ensure the stability of the constitutional order, and all political parties should work to reduce the polarisation of the political system

In the run-up to the elections, there has also been a discussion about possible Constitutional change. What is important is that the process of constitutional reform progresses in full respect of fundamental values such as respect for the rule of law and the separation of powers. This includes continued respect for the Constitutional Court as the guarantor of the supremacy of the Constitution, as well as the independence and stability of judicial institutions including the prosecution. It is also important that the debate about possible reform allows enough time and openness to secure through the appropriate constitutional procedure the widest possible consensus. It is also essential in this context to reassure judicial institutions that their independence is secured, and to avoid speculation creating a climate of instability.

Independence of the judiciary

One of the major concerns over the summer was the clear evidence of pressure on judicial institutions and lack of respect for the independence of the judiciary. This remains a major source of concern. The Commission received numerous reports of intimidation or harassment

unconstitutional. Formally, Emergency Ordinance 38 should be repealed to comply with the ruling of the Constitutional Court.

⁴ Ruling no. 6 of the Constitutional Court of 21 August 2012. Followed the approval by the Senate on 19/09/2012 of the Law amending Government Emergency Ordinance no. 41 for amending Law no. 3/2000 concerning the Organization of the Referendum

⁵ The Venice Commission considered that the issue of the excessive use of government emergency ordinances should be addressed: [http://www.venice.coe.int/webforms/documents/CDL-AD\(2012\)026-e.aspx](http://www.venice.coe.int/webforms/documents/CDL-AD(2012)026-e.aspx)

against individuals working in key judicial and anti-corruption institutions, including personal threats against judges and their families, and media campaigns amounting to harassment.⁶

Unfortunately, the Commission's recommendation has not been fully implemented. Politically motivated attacks on the judiciary have not ended. A critical point is the acceptance of judicial decisions: this requires the whole of the political class to form a consensus to refrain from discrediting judicial decisions, undermining the credibility of magistrates or putting pressure on them.

The Commission would also like to draw attention to the role of the media. There have been numerous examples of the media exercising pressure on the judiciary, as well as particular doubts whether the National Audiovisual Council is proving an effective watchdog. The situation suggests the need for a review of existing rules, to ensure that freedom of the press is accompanied by a proper protection of institutions and of individuals' fundamental rights as well as to provide for effective redress.

A specific issue was that the Commission was concerned that previous judicial decisions could be overturned through pardons in the particular circumstances of an interim presidency last summer. The interim President respected this recommendation in full.

A final aspect of judicial independence is the commitment of the executive and legislature to the quality of appointments to key posts in judicial institutions. The Commission considers that the track record of Romania against high-level corruption has been one of the important advances under the CVM. An effective and impartial prosecution must be maintained under future leadership. The Commission therefore considers that it is essential to put in place a new leadership in the prosecution and the National Anti-corruption Directorate (DNA) which can demonstrate the independence, integrity and professionalism needed to enjoy the confidence of the public and continue to deliver effective results.

The report highlighted in this context the nomination of a new General Prosecutor and Chief Prosecutor of the DNA, in terms both of an open and transparent process and of choosing candidates with expertise, integrity, and a track record of anti-corruption action. The process was initially rushed and did not inspire the confidence of the magistracy. The Minister of Justice then extended deadlines and made a number of procedural improvements,⁷ but only a limited range of candidates applied. The two candidates who emerged from the process failed to secure positive opinions from the Superior Council of Magistracy (SCM), and they were eventually rejected by the President. The Commission considers that a sufficient number of high quality candidates in an open and transparent process and, as far as possible with support from the SCM are essential elements to secure a leadership able to command public confidence.

⁶ For example the allegations of pressure and intimidation of judges of the Constitutional Court which have been brought to the attention of the Commission. Letter from President Barroso to Romanian Prime Minister Victor Ponta of 10/08/2012: http://europa.eu/rapid/press-release_MEMO-12-621_en.htm

⁷ Some of the changes followed discussions with both the European Commission and the Superior Council of Magistracy.

Integrity

Those in positions of power must demonstrate high standards of integrity. In addition, where judicial authorities find that this is not the case, failure to respond to judicial decisions also implies a lack of respect for the rule of law. In its July report, the Commission was concerned that both the government and the Parliament did not fully respect this principle.

In November, National Integrity Agency (ANI) reports⁸ against ministers and senior officials did not lead to their resignations.⁹ The new government reiterated its goal of tackling corruption, but amongst the new Ministers are three under criminal investigation for corruption. In its July recommendations, the Commission set out its expectation that Ministers set an example in respect of integrity issues: the same should be expected in respect of corruption charges. It is essential for the credibility of a government that those in charge of ministerial functions enjoy the confidence of the public, for example by stepping down when there is an integrity report from ANI against them. Constitutional requirements, including suspension from Ministerial office on indictment, will need to be applied in full.

Similarly, the credibility of the Parliament would benefit from clearer procedures concerning the handling of cases where Members of Parliament face rulings on integrity issues or face corruption allegations. The presumption should be that, within the established Constitutional rules, the prosecution can conduct its work in the same way as faced by other citizens. Clarity and automaticity are the best ways to offset previous concerns that there has been a degree of subjectivity in parliamentary proceedings in this area.

The Parliament adopted in January 2013 amendments to the statute of the Members of Parliament, changing the procedure for lifting immunities in the cases of the search, arrest or detention of parliamentarians and the prosecution of former Ministers. Further steps are foreseen, including a Code of Conduct. These will need to include a deadline for each stage of the procedure, and that where the Parliament refuses to lift the immunity, it provides a full justification. It is also important to clarify that ANI remains the sole authority tasked with the verification of potential incompatibilities of elected and appointed officials.

In terms of Parliament's approach, the broader challenge made to judicial decisions in one case was a major concern: the SCM had to appeal to the Constitutional Court to ensure that the Parliament effectively implemented a High Court ruling in final instance.¹⁰ It is hoped that the new procedures will prevent a repetition of such problems.

⁸ ANI reports have a direct effect unless challenged in courts within 15 days. It should also be noted that only around 5% of ANI reports are successfully challenged in Court.

⁹ None of these four individuals are part of the new government.

¹⁰ The Constitutional Court ruled on the constitutional conflict between the judiciary and the Senate in a case where a final High Court of Cassation and Justice decision had confirmed an incompatibility decision on a senator (Decision of the Constitutional Court no.972 of 21 November 2012). The Constitutional Court ruling had still not been applied when the term of office of the Senate came to an end.

Recommendations

The Commission welcomes the positive steps taken since July, but considers that much remains to be done to fully implement its recommendations. The entry into function of a new government and a new Parliament offers an excellent opportunity to consolidate these steps and address the still outstanding points. The principles underlying the Commission's recommendations of protecting the rule of law and protecting the ability of the judiciary to reach decisions without interference will remain central to the Commission's approach in the future

It will be important to continue to respect the responsibilities and decisions of the Constitutional Court, and ensure full compliance with all constitutional requirements to ensure the pluralist functioning of Romanian democracy and reduce its polarisation. It will also be important to ensure that the process of constitutional reform fully respects the rule of law, the separation of powers and judicial independence and stability, while being based on the widest possible consensus

The new government has already signalled its commitment to the independence of the judiciary and the supremacy of rule of law in the Institutional Collaboration Agreement between the President and the Prime Minister. This should now be followed up in particular through the following:

- Introduce a clear framework¹¹ of requirements to refrain from discrediting judicial decisions and undermining or putting pressure on magistrates, and ensure effective enforcement of these requirements. The Superior Council of Magistracy should be invited to give an opinion on the relevant provisions;
- Review existing standards to safeguard a free and pluralist media while ensuring effective redress against violation of individuals' fundamental rights and against undue pressure or intimidation from the media against the judiciary and anti-corruption institutions. The National Audiovisual Council should be assured of its effective independence, and play fully its role by establishing and enforcing a Code of Conduct in this regard;
- Ensure that the new leadership in the prosecution and the DNA are chosen from a sufficient range of high quality candidates after an open and transparent process, meet the criteria set out in the Institutional Collaboration Agreement, in particular professional expertise, integrity and a track-record of anti-corruption action. A positive opinion from the Superior Council of Magistracy will be an important step in securing public confidence;
- The new Ombudsman will need to show uncontested authority, integrity, and independence, as well as a non-partisan approach;
- Take the necessary steps to ensure that Ministers subject to integrity rulings step down. Ensure swift application of the Constitutional rules on suspension of Ministers on indictment;

¹¹ For example, a code of conduct

- Parliament should build on the new rules to adopt clear, and objective procedures to suspend parliamentarians subject to negative integrity rulings or corruption convictions; and to fix swift deadlines for processing requests from the prosecution to lift immunity of parliamentarians. Full justification should be given if Parliament does not let normal law enforcement take its course.

2. Reform of the judicial system, integrity, fight against corruption

This section reviews progress against the background of the benchmarks set out in the co-operation and verification mechanism and previous Commission recommendations. These remain valid and will be assessed in the next report.

Reform of the judicial system

The first recommendation in the July report on reform of the judicial system related to the implementation of all four legal codes¹². The planning for the implementation of this key reform remains uncertain. The entry into force of the Code of Civil Procedure is still planned for February 2013. The entry into force of the Criminal Code and the Code of Criminal Procedure is tentatively scheduled for February 2014. More clarity is needed on how to avoid these dates slipping still further.

Since the last report the Ministry of Justice has set out a multiannual strategy for the implementation of the Codes, including resources aspects. Assessing possible impacts only after the adoption of the Codes by the Parliament creates extra uncertainty, and a full assessment of the impact on human resources aspects is only foreseen for 2014.¹³ This process will be complicated if the text of the Codes is frequently reopened: the overall objective of ensuring that justice can be pursued and realised more effectively and quickly should not be lost, for example in the presentation of evidence in court on corruption cases.

The second Recommendation related to the overall workload pressures on the Romanian judicial system, and the need to restructure the court system and prosecution offices, rebalancing staff and workload. The government is tackling some of the particular causes of a wave of new cases at source, through legislative change.¹⁴ Such efforts to reduce the workload on points of pressure in the system may be more effective than trying to solve the problem by increasing the number of judges and prosecutors – which could also risk jeopardising recent improvements in the quality and training of new entrants into the profession.

¹² The new Civil and Criminal Codes and the accompanying procedural codes were adopted in 2009 and 2010, but only the Civil Code has entered into force so far. There is no certainty about when the remaining Codes will enter into force but the authorities have recently confirmed that the Civil Procedure Code will enter into force on 1 February 2013.

¹³ The July 2012 CVM report pointed to the need to distinguish between the impact of the Codes on resources and broader issues about the workload on the judiciary.

¹⁴ For example, replacing a judicial procedure with an administrative procedure for handling questions related to taxes on first registration of a car – which is expected to relieve the courts of some 100.000 files.

The last recommendation related to the creation of an overarching monitoring group for judicial reform. This reflected the need to create a consensus for reforming the judicial system. Since the July report, there has been no progress in bringing together the key players in an effective way.

Accountability of the Judicial System

The new legal framework for the Judicial Inspection adopted in 2011 has allowed the Judicial Inspection to deliver more effectively, resulting in 21 new disciplinary actions taken in its first few months.¹⁵ The Ministry of Justice has supported the new Inspectorate with a number of practical measures, including arranging for a new headquarters building. More general lessons learned from individual cases could feed into the joint policy recommended by the Commission for the Superior Council of Magistracy (SCM) and government to promote accountability and integrity.

Another essential element of the reputation and the accountability of the judicial system is the procedure for the appointment of magistrates. The new arrangements for promotion to the High Court of Cassation and Justice seem to have introduced a new rigour into the system: it seems more important to maintain the quality of competition rather than to redress perceived shortages which may prove short-term.

Consistency and effectiveness of judicial action

The consistency and transparency of the judicial process is a key element in its credibility and its effectiveness. Since the July report, the High Court of Cassation and Justice has continued to take concrete steps to unify jurisprudence and improve its quality, ensuring the transmission of decisions to lower courts and improving online access. Gradually transforming the High Court of Cassation and Justice in a fully-fledged court of cassation, with fewer responsibilities for appeal, would also assist the concentration on the unification of jurisprudence on points of law. The procedure of appeal in the interest of the law is already helping to progress in this direction. It will be important to ensure that these steps forward are not jeopardised by extra workload via the new procedure on preliminary rulings, whilst the existing number of judges on panels at the HCCJ seems to offer the right balance.

An important issue for the unification of jurisprudence is the updating of the outdated IT system. This limits judges' knowledge of parallel judgements. Two projects are underway. The Ministry of Justice intends to implement a strategy to have a simple and quick access to ECRIS (the main judicial database) and the SCM also tries to improve in parallel the existing "Jurindex" system (an alternative system). It would be useful to progress these initiatives in tandem.¹⁶

¹⁵ A particularly important case over the summer resulted in the suspension pending investigation of a prosecutor who is also a member of the Supreme Council of the Magistracy.

¹⁶ The Ministry of Justice has also launched a medium-term project to help codify legislation, with possible changes to speed up the process of updating.

Effectiveness of judicial action

The High Court's approach towards high-level corruption cases has continued to be characterised by a welcome degree of proactive case management. The HCCJ reported significant progress in the handling of high level corruption cases with a decrease from 28 to 10 open cases, as well as a rise in the number of cases solved in first instance. Where defendants have been convicted, there has also continued to be a more proportionate and consistent approach to penalties. The result is that justice is seen to be performing its dissuasive role more effectively.

Effectiveness also requires law enforcement to be working effectively and fairly throughout the system. The HCCJ has continued to make progress with setting standards and guidelines for lower courts.

The past few months have seen the Public Ministry, the Directorate-General for Anti-Corruption and the High Court all continuing to work professionally and impartially, sometimes under extreme pressure. The resilience of these institutions so far reinforces the conclusion that their track record on high-level corruption is one of the most significant signs of progress achieved by Romania under the CVM. It is essential that this advance is maintained under new leadership. It must also not be undermined by other restrictions on the ability of law enforcement agencies to pursue justice.¹⁷

Integrity

Since the last report, the National Integrity Agency (ANI) has continued to develop its track record and to develop its operational efficiency¹⁸. ANI has started an ambitious IT project aiming at collecting data on elected and appointed officials, allowing for a cross-check with other state databases, such as the registry of commerce or the tax office, to detect conflicts of interest. This will however need additional resources to work in full.

It remains a major concern that ANI's decisions are under frequent question. This is despite the fact that when challenged, it has a strong record of winning appeals against its rulings in court. Both the Agency, the National Integrity Council (NIC) and their personnel have been subject to frequent political and media attacks. Parliament failed to enforce ANI reports, even when backed up by final court decisions (see above). In November 2012 ANI issued four incompatibility reports against Ministers and senior officials. All four have been challenged in court and none stepped down from office on these grounds.¹⁹ Together with the frequent suggestions to amend ANI's legal framework, this creates an uncertainty which hinders Romania's ability to show that a robust integrity framework is in place.

¹⁷ For example, a recent suggestion that evidence gathered by law enforcement while investigating other crimes could not be used in corruption trials

¹⁸ It is also helpful that an appeal from ANI to a decision by a Wealth Investigation Commission has been admitted in Court.

¹⁹ The three Ministers concerned appealed the reports. Another senior official stood down for other reasons (and also appealed)..

Fight against corruption

DNA has continued to investigate and bring forward corruption cases successfully. The number of final convictions issued based on the prosecutions launched by DNA has doubled in 2012 in comparison with the previous year. These have concerned politicians of all main parties. There has also been a constant increase in indictment and conviction in EU fraud cases led by DNA. This can serve as an important example for the prosecution as a whole, where there are signs of wide discrepancies in the results achieved by different prosecution offices.

The CVM also requires strong efforts to tackle corruption at all levels of Romanian society. Surveys consistently show high levels of public concern about the prevalence of corruption.²⁰ In this context, the July report welcomed the National Anti-Corruption Strategy. There have been some important steps taken by some departments, and the participation of local authorities seems to progress²¹. The Ministry of Justice has put in place structures to help make this work, which seem to be taken the process forward in spite of their small numbers. Field missions and a search for best practice are showing a welcome degree of proactivity. It is important to ensure that adequate resources are being secured for the smooth implementation of the Strategy. In addition to this, EU funds are financing a number of anti-corruption projects, including in the Ministries of Education, Health and Regional Development and Public Administration. Implementation is progressing and results are now awaited.

Another important element is the prosecution of money laundering and confiscation. The new legal framework on extended confiscation was put in place in 2012, but it is too early to yet assess its effectiveness. As regards money laundering as a stand-alone offence, an important case is now before the HCCJ. The Asset Recovery Office has seen an increase in the requests it is handling and notably on requests issued by Romanian authorities. There are currently no comprehensive statistics with exact amounts of confiscated assets, but the estimates tend to be low. There are also no comprehensive statistics available on the amounts that were actually recovered following the confiscation orders.

Finally, progress seems very limited in the prevention and sanctioning of corruption related to public procurement. The advances made against high-level corruption have not been matched in public procurement. Cases seem to take a long time, partly due the need for specific financial expertise, leading to the particular problem of contracts concluded before court judgement on the offence. The penalties for officials involved in fraudulent public procurement cases continue to be very low and the law does not foresee a possibility of a cancellation on the grounds of conflict of interest of projects that have already been executed. There are also major doubts on the effectiveness of prosecution handling of these cases.²²

²⁰ Cf. Eurobarometer n° 374 of February 2012, http://ec.europa.eu/public_opinion/archives/ebs/ebs_374_en.pdf and the Transparency International 2012 Corruption Perceptions Index, <http://www.transparency.org/cpi2012/results>

²¹ In January 2013, 1874 city halls and 20 county councils had registered with the NAS Secretariat

²² Cases emerge through the Commission's monitoring of public procurement legislation where strong evidence of wrongdoing seems to have received no follow-up by the prosecution.

Recent proposals seem to call into question the stable independent institutional basis essential for real progress. A more systematic approach to ex ante checks, most logically a role for ANI (with new resources) that would also ensure a uniform and systemic implementation, would offer a useful way forward.

3. Conclusion

This assessment shows that Romania has implemented several, but not all, of the Commission's recommendations aiming at restoring rule of law and the independence of the judiciary. While the Constitution and the Constitutional Court's role and decisions have been respected, commitments regarding the protection of the judiciary against attacks, the stepping down of Ministers with integrity rulings against them and the resignation of Members of Parliament with final decisions on incompatibility and conflict of interest, or with final convictions for high-level corruption have not been fully implemented. At the same time, the appointment of a new leadership for the prosecution and the DNA remains to be done.

The Commission believes that the election of a new Parliament and the appointment of a new government provide the opportunity to deliver fully and rapidly on these recommendations. It urges the new government to take the necessary steps.

The Commission also notes the need to accelerate progress on its recommendations of the reform of the judiciary, integrity and the fight against corruption. It will monitor progress closely, in a constant dialogue with the Romanian authorities, and will report at the end of 2013 on the reform process.