

# THE EVOLUTION OF ROMANIAN JUDICIAL SYSTEM SEEN THROUGH THE LAST MONITORING REPORT

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## Abstract

*Even though great strides have been made in this direction, Judicial reform and fighting corruption continue to represent major points in the evolution of Romanian society, in the context of compliance with European standards. Mechanism for cooperation and verification will be continue to be an incentive for Romania in the maintenance and evolution of results counted by the European Commission.*

**Keywords:** *European Commission, Corruption, judicial reform, MCV, Monitoring report.*

## 1. Introduction

Introduced in 2007, the Cooperation and Verification Mechanism (CVM) was set up at Romania's accession to the European Union<sup>1</sup>. Although it was introduced and created for Romania and Bulgaria<sup>2</sup>, the mechanism is also a good example for other countries that have similar shortcomings. At the accession's time, it was considered the need for additional efforts in the key areas, to address the remaining deficiencies in the judicial reform and fight against corruption. Throughout time, the CVM reports assessed the progress made by Romania in these hotspots and the efforts' targeting was searched by issuing specific recommendations. Being a functional lever, established by the European Commission, this mechanism has exceeded even the internal expectations on how to influence major decisions in the fight against corruption in Romania.

Further, hotspots for a company in full transition, such as the one from Romania, judicial reform and fighting against corruption are those that maintain the European Commission's attention, exactly for no register a setback. Why a regress? Exactly because that this led to public demonstrations, with broad participation.

The Commission completely supports that CVM continues to be essential for Romania, being a key factor for the reform and an incentive in order to conserve the positive results on the long term, and also their augmentation.

The Commission's analysis and the methodology used in the CVM were joined by a strong support from the Council<sup>3</sup>, as well as the

cooperation and contributions of many Member States.

The actions and efforts of the Romanian State, through the judicial and integrity institutions in order to combat high-level corruption and increasing the professionalism of the judiciary system, were considered, by the Commission, as sustained and sustainable progress. Thus, CVM Report highlighted the need to strengthen the achieved progress and substantiate them on more solid bases. In the monitoring process are found also many outstanding legislative issues and a doubtful political consensus that supports the reform.

The Council noted that it is also necessary an ongoing global political commitment for sustained reforms. The necessity to respect the independence of the judiciary system is essential to ensure the progress sustainability towards achieving CMV<sup>4</sup> objectives.

Reform is analyzed in this Report in terms of both trends, exactly to study in depth the bases and the elements of this reform. Analysis is performed through an intense process based on the cooperation between the Commission, the Romanian authorities, the civil society and the other stakeholders. The progress sustainability will be reviewed also through a series of tests that will take place during 2016. Thus, following these tests, the utility of maintaining a CVM type monitoring mechanism will be proved. In conclusion, will try to show in this article the utility and also try to underline the progress made and the recommendations.

The Commission paid a particular attention to the issues mentioned in the monitoring activity from this year and will continue to support Romania in order to achieve CVM objectives. In many areas, Romania already benefits from the support provided

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

<sup>2</sup> Radu Carp, *Dreptul public, perspectiva comparata si analiza politica*, Editura Adenium, Iasi, 2015.

<sup>3</sup> [http://ec.europa.eu/cvm/key\\_documents\\_ro.html](http://ec.europa.eu/cvm/key_documents_ro.html)

<sup>4</sup> <http://data.consilium.europa.eu/doc/document/ST-7281-2015-INIT/ro/pdf>

through the European Structural and Investment Funds. In addition, in 2015, the Commission introduced a new instrument as a support service for structural reforms (Structural Reform Support Service - SRSS), whose aim is to provide technical assistance to the reform efforts of EU Member States into a wide range of areas. The Commission encourages Romania to fully use the possibilities offered.

## 2. Content.

### The stage of justice reform

#### 2.1. Independence of the judiciary.

The monitoring report 2015, as last CVM reports, had in the center of attention, the evolution and the actions of the key institutions of the magistracy - High Court of Cassation, the Public Ministry and the National Anticorruption Directorate and the Superior Council of Magistracy. But not only, it was taken into account the solid actions and results obtained by the mentioned institutions but also their management. This is why, through this report, for the appointments in management positions of these institutions, transparent selection and merit based procedures<sup>5</sup>, are recommended, because with these procedures a stable leadership without political interference can provide. Also, as known, the lack of political interference ensures the independence of the judiciary, namely the judicial system.

Appointments to those positions are considered by the Commission as important tests for Romanian authorities. For example, the appointment of a new chief prosecutor of the Directorate for Investigating Organized Crime and Terrorism<sup>6</sup>, for which the procedure has been completed, characterized by greater transparency and predictability (publication of the vacancy, the public definition of criteria, publication of the names of candidates) through collaboration and cooperation between relevant actors, Ministry of Justice and the Superior Council of Magistracy. The procedure was launched during 2015, as the former Chief Prosecutor has been investigated and taken into custody for corruption charges. The applied method in this case is the clear proof of how clear and rigorous procedures, with the full involvement of the

key authorities, may be the most important factor in an appointing credible process. The procedures are recommended to be also used in the other key functions, namely the posts of President of the Supreme Court of Cassation and Justice, General Attorney and chief prosecutor of the National Anticorruption Directorate<sup>7</sup>. Why is this recommended? Since, at legislative level, there are no criteria to ensure the highest level of professional competence and integrity, and the current appointment procedure involves a strong political component, given the role it has within it the minister.<sup>8</sup>

However, when it comes to judicial independence, we also refer to the justice and the judicial process respect. Thus, CVM report for 2015 takes note the corruption's high level cases solved by condemning a large number of well-known Romanian politicians. This is a strong argument regarding the independence of the judiciary and ensures that the constitutional principle according to which any person who commits an offense is not situated above the law.

But the report scores negatively the record of an increase number of requests for the defense of the judicial independence, following some media attacks and from politicians, but also, the lack of respect for the compliance of the judicial decisions<sup>9</sup>. Criticisms from the media and politicians have targeted, personally, both the head of DNA and also of the head of the High Court of Cassation and Justice (HCCJ)<sup>10</sup>. The requests were solved by the Superior Council of Magistracy (CSM) and the Judicial Inspection, who continued to defend the judicial independence and the professional reputation, the independence and the impartiality of the judiciary.

Another point highlighted by the Commission is the important role in the rule of law and in strengthening the independency of justice, which the Constitutional Court (CCR) plays. In 2015, the court's jurisprudence included 24 decisions on the new Criminal Code and Criminal Procedure Code provisions, as well as some important decisions related to the powers balance and the respect for the fundamental rights. Most of CCR decisions regarding the Criminal Code were aimed at strengthening the right to a fair trial and the rights of the parties in accordance with the jurisprudence of

<sup>5</sup> COM(2015) 35 final, COM(2014) 37 final; COM(2013) 47 final, COM(2012) 410 final.

<sup>6</sup> Former chief prosecutor of the Directorate (DIICOT) is in custody on corruption charges, which highlights the need to bring out any issue of integrity.

<sup>7</sup> Procedure for appointing the Chief Prosecutor of DIOCT applies also to all senior prosecutors, their deputies and heads of departments including the Public Ministry and DNA. In total, there are 15 prosecutor positions for which the Minister of Justice must make appointments this year.

<sup>8</sup> The Venice Commission was specifically concerned about the work of finding a balance report in this regard (see Technical Report, Section 2.1, p. 6-8).

<sup>9</sup> Technical Report, Section 2.1, p. 5.

<sup>10</sup> For example, in a public letter addressed to the President of Romania, President of the Senate, referring to a person paid in the first instance, but remand for 6 months, requested revocation ICCJ President and the Chief Prosecutor of DNA. Technical Report, Section 2.1, p. 5.

the European Court of Human Rights (ECHR). Such decisions enhance legal security and individuals rights, and the decisions regarding the legislation interpretation also play an essential role in the in the control system and the institutional balance<sup>11</sup>.

## 2.2. Judiciary Reform

Following the entry into force, on 1 February 2014, of the New Criminal Code and the new Code of Criminal Procedure, it appears that the recommendation contained in CVM report published during the 2015 regarding the legislative environment stability for their application, has not been reached. The problem lies on the parliamentary procedures codes inconsistency. Even if the Government has proposed changes designed to remedy the problems identified since the spring of 2014, they have not yet been adopted by the Parliament. The judicial authorities, the civil society and the Member States have criticized the controversial amendments made on their own by the Parliament, arguing that it would harm the fight against corruption and reduce the ability of law enforcement authorities and courts to conduct prosecutions and apply sanctions. Commission's recommendations in this regard provide the development of amendments by Parliament in strict accordance with the will and wishes of the judicial authorities.

Although there are discussions on the legal framework, the codes implementation in the form in which they were adopted continued, and practitioners have issued favorable opinions regarding the new legal framework and judicial institutions through the judges and prosecutors, as well as through clerks involved which have continued to implement the reform.

Continued reform and efforts filed by: the High Court of Cassation and Justice, the General prosecutor, the Superior Council of Magistracy, the National Institute of Magistracy and the Ministry of Justice.

At Ministry of Justice level, measures have been taken in order to increase the number of posts, especially clerks and judicial inspectors, but also by training institutions in this field.

CVM report notes that as regards the implementation of the Civil Code and the Code of Civil Procedure, the transition period necessary to resolve the new codes previous cases in parallel with

the new cases is largely completed, an increased effectiveness of the act justice<sup>12</sup> been registered.

In terms of justice consistency, the High Court of Cassation and Justice (HCCJ) holds the main responsibility and also has the role of interpreting uniformly the legislation and the practices. This court has two legal mechanisms to develop the jurisprudence consistency and to provide a uniform interpretation: prior decisions and law<sup>13</sup> interest appeal. Although these measures and some signals in the direction of consistency are implemented, there are still frequently reported inconsistent decisions. While some issues related to the new codes should be resolved with the passing of time, some structural issues require more attention from the courts managers and each magistrate, as well as continuing training, with lawyers' participation also.

Judiciary system development strategy 2015-2020, is being finalized and for its implementation, several consultations with all the stakeholders took place. This action plan will be commonly assumed, effectively, with all the stakeholders. The action plan will have to clarify to what extent the new Superior Council of Magistracy sees this as a model for its own actions. And the elections for the new council will be a new opportunity for continuing the reform.

## 2.3. Integrity

Another key point on the Commission agenda was also the activity of the National Integrity Agency and the National Integrity Council. Although there were problems related to the two institutions management, they still handled a large number of inquiries during the reporting period.

In 2015, the execution of final ANI decisions and their confirmation through final decisions has remained a problem. For example, two cases inform the Parliament have registered significant delays before the final decisions regarding the incompatibility to be executed, conducting to the cessation of a parliamentary mandate. ANI had to resort to fines application or criminal prosecution notification.

In order to achieve legislative consistency and clarity in integrity field, CVM 2015 report takes note that the encoding tests were postponed because of some fears related to the fact that the existing rules could be diluted<sup>14</sup>. Thus, this year's elections according to the Commission will be an important test for Romanian authorities and for the functioning of these institutions.

<sup>11</sup> For example, decisions to determine whether doctors in public hospitals are public servants or not. Technical Report, Section 2.1, p. 4.

<sup>12</sup> Technical Report, Section 2.2, p. 12.

<sup>13</sup> In criminal matters in 2015 were submitted 35 questions and 33 were solved, compared to 2014, when the questions were submitted and 31 were solved 28. There is a significant increase in the number of questions in civil and administrative : 2015 were submitted 51 questions and 47 were solved, compared to 2014 when 17 questions were submitted and 25 were solved 13. In 2015, 18 were introduced civil remedies and were 19 resolved; in criminal matters were introduced six appeals have been settled and 7. This mechanism can be used also for procedural questions, which is not the case in prior decisions.

<sup>14</sup> CSM elections scheduled for autumn 2016, the new Board will come into office in January 2017. It is unclear whether the elections will be made to renew all or only those members who have completed their six-year mandate.

#### 2.4. Fighting Corruption

The main reason for which was established the CVM report, was the fight against corruption, is still the central point of the analysis. Thus, the reporting took into account the activity balance of the institutions involved in fighting corruption. The activity of these institutions is a strong point of the monitoring, thus there were taken to end a large number of cases involving politicians and senior civil servants<sup>15</sup>. 2015, reporting year for Monitoring National Anticorruption Directorate, reported an increase in complaints from the population<sup>16</sup>, but also an activity comprising a total of 1,250 defendants prosecuted. Among the cases investigated by DNA are: the Prime Minister, former ministers, parliamentarians, mayors, county council presidents, judges, prosecutors and a wide range of senior officials.

We most underline an important issue: , the fortunes unavailable during 2015 by the National Anticorruption Directorate worth 452 million euros. The activity of this institution concentrated also on the local authorities' corruption.

In the procedural stage, the competent courts solved with the same rhythm as the criminal investigation competent bodies. Most of these cases were prosecuted by the HCCJ, whether as a court of first instance or as a court of last instance. In terms of solving period, the report underlines the relatively short period in which the judiciary solved the cases, thus, the cases solved in 2015, were recorded in 2014 and 2015 and the oldest one dates from 2011.

In fighting corruption, the Parliament played and plays a key role, refusing a third of DNA's requests of lifting the parliamentarians' immunity, in order to allow the normal course of judicial investigations. The criteria for which these requests have been refused or accepted cannot be identified, reason why there is a lack of practice consistency at this level. Although, most reports so far notified this fact and slow steps are made for accomplished change.

Corruption has affected and affects the judiciary system and the relevant bodies actions were directed also in this area, the number of cases has increased in the recent years, and the proofs are the magistrates' convictions. At the same time, we can take note about the system's ability to impose its integrity standards.

Romanian authorities' efforts were focused, as the Commission takes note, also in terms of fighting corruption at all levels.

The 2015 CVM report highlights also the effects that corruption has on long term and the impact on society. Thus, the areas of risk include: education, health, public procurement.

Regarding the National Anticorruption Strategy, CVM report indicates the importance that the preventive measures taken by the government have, both national and local level. Prevention projects implemented over the years, both at central and local public administration's level have demonstrated their effectiveness and will continue to bring their contribution in the hard fight against corruption<sup>17</sup>. However, there are situations where these preventive measures are applied fragmented due to the institutions incapacity to understand and apply these provisions/recommendations. The incapacity is caused, firstly, because of political interference in the management of these institutions. The strategy should be extended for the next two years, and this should remedy the deficiencies noted in the review. The removal of these shortcomings will be done by control bodies.

To the corruption fight will also contribute the administrative reform proposed by the Government, but also sustained efforts of the General Prosecutor and the General Anticorruption Department from the Ministry of Interior.

Corruption strategy proposes the setting up of an agency that could handle the administration of the seized goods originating from criminal activities and to recover the damages, this aspect representing a big problem of the judiciary system. In this regard, a law draft has been submitted in the Parliament, and was approved in December of 2016 by the Parliament. In this manner, the Commission's recommendation regarding the enforcement of assets confiscation will be implemented.

Also, the anticorruption strategy refers also to the links between the alignment with the public procurement system are made.

### 3. The Commission recommendations for 2016

As each CVM report, so far contained recommendations, even if progress had been registered, the 2015CVM report contained the Commission's recommendations for 2016. The Commission's recommendations to the Romanian authorities include necessary measures related to the reported key areas.

In terms of judicial system independency, the Commission recommends that the nominations in the system's important leadership posts to be made by using clear and robust procedures and based on merit, in this manner there are offered equal opportunities for all the actors in the field. Transparency represents the center of these procedures. But the recommendations do not just

<sup>15</sup> Technical Report, Section 3.1, p. 22-23. ANI overall results obtained were stable compared to 2014.

<sup>16</sup> DNA reports that 85-90% of cases based on complaints from citizens, 5-10% based on referrals from office or complaints from other institutions and less than 5% of cases are based on notifications from the intelligence services.

<sup>17</sup> <http://sna.just.ro/>

stop to the senior posts' appointments but also refer to the need to strictly observe the independence of the judiciary by parliamentarians<sup>18</sup>.

The second Commission's recommendations agenda point consists of judicial system reform. It will have to go on the same upward trend and, thus, to strengthen the magistrates professionalism. By developing a favorable legal framework to the reform development, the preservation and the stability of the achieved results will ensure so far. Also, the controversial amendments that target the new codes, already entered into force, will be made by the professionals and practitioners' contest, not by MPs, without a preliminary investigation of the impact that they may have. The impact will study both at system and citizens level, as the ultimate beneficiary of legislative measures.

Integrity is another area where the Commission has made recommendations, because it is necessary to implement the rules in terms of incompatibility and conflict of interest. Regarding the integrity, the recommendations addressed to the Parliament are to respect the court suspension from office decisions, related to its members.

Regarding the fight against corruption, the recommendations contained in the CVM report refer primarily to the consistent application at all levels of the legislation regarding corruption. Although there are notable progresses in this area, the results should be consolidated, exactly to not record a setback. By using structural funds, the Romanian authorities have the possibility to initiate programs to prevent corruption. Commission's attention for the next reporting period will be focused on the functioning of the Agency seized assets management and on the strategy and action plan regarding the corruption prevention in terms of public procurement. According to the Court of Auditors report, in 2014, the damages caused are around 1, 8 billion.<sup>19</sup>

#### 4. Conclusions

Even if the Cooperation and Monitoring Mechanism was one of the conditions of Romania's accession to the EU, it is questionable whether the institutional and functional evolution reached has been achieved without the external pressure instruments. CVM reports have been criticized over

the years by those for whom work is a tool, such as practitioners, researchers and representatives of nongovernmental organizations. However, these reports were not criticized for their utility or their results, but for the evaluation methods applied by the European Commission, which are not objective and clear criteria, that can allow a longitudinal verification.

Long time, it were compared with progress reports, established before 1 January 2007, and then CVM reports, have gradually become European control pressure instruments in the internal decisions. Although they not attract major penalties as the safeguard clauses, they are reflected more on the company's image, both internally and externally, a corrupt state is a state with low credibility in the face of external partners. Indirectly, we can consider this mechanism as a tool of formal pressure on the internal decision makers but not the Commission interference in the national decisions, such as the pressure from the citizens, the opinion makers, political leaders from the opposition setting up the context of a clean society development.<sup>20</sup>

In the last two years, the CVM reports quantified a number of areas where the reform was strengthened by achieving positive results which have been preserved. As an overview, the judiciary system grown into a system that proves professionalism, independence and transparency, characteristics considered to be controversial before implementing this mechanism. The last report, analyzed also by us, provides that the essential objectives of the Cooperation and Verification Mechanism lies on a progressive trend in terms of their achievement, but underlines also the preservation of the almost same recommendations, over several reporting periods, can be identified some gaps in efforts to preserve necessary sustainable progress. Although without term, the mechanism will be kept until European Commission's experts will consider that the objectives set up will be achieved and will submit to vote to the European Parliament the removal of this safety net, moment when it will be considered that the fight against corruption will no longer be a danger to Romania's national security and shall not affect in any way the integrity of the European Union.

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<sup>18</sup> Sergiu Gherghina, Mihail Chiru, *Perspective românești asupra politicilor europene*, Editura Adenium, Iasi, 2014, 57-95.

<sup>19</sup> <http://www.curteadeconturi.ro/Publicatii/Raport%20Public%202013.pdf>

<sup>20</sup> Sebastian I. Burduja, *Intre speranta si deziluzie*, Editura Humanitas, Bucuresti, 2015.

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