

# COOPERATION AND VERIFICATION MECHANISM(CVM) REPORT 2018 AND THE CHALLENGES OF THE JUDICIAL SYSTEM

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## Abstract

*Although it is an increasingly popular theme in the Romanian public space, justice, as a power in a state, faces European challenges and internal challenges. Current legislative changes impact or halt the progress made during the ten-year mechanism of cooperation and verification of Romanian justice. We wonder if the eleventh year is a crossroads one for the judiciary, or if it is a year of rearranging the progress made in the ten years of monitoring. We also raise the question of the effect of this public service and the impact it shall have on the population. If at this moment Romania has a black spot in the European filter regarding justice and if this public service serves the public interest are the premises from which we will go during this study. The obvious progress made so far can be jeopardized by this controversial period of the system, the period in which this state power is subject to political and public pressure. Could civil society influence the outcome of the latest Cooperation and Verification Mechanism (CVM) Report, or politics is the one that attracted this result, there are two other key questions for the context in which Romania is at this moment. Activating the famous Article 7 of the EU Treaty, dubbed the media "nuclear weapon" against Member States that violate the values of the Union, is one of the challenges that the Romanian state has to face.*

**Keywords:** *Judicial system, legislative changes, cooperation and verification mechanism, public service, justice*

## 1. Introduction

To begin with the starting point of the establishment of the Cooperation and Verification Mechanism (CVM), namely, with the date on which the Benchmarks Objectives were adopted as a part of the CVM, notable progress is being made, regarding the Case-law of the Court of Justice and the ECHR, standards, best international practices<sup>1</sup> and the availability of comparative information regarding the national judicial systems found in the EU<sup>2</sup> which also contribute to picturing the local landscape in an objective manner, the evolution of the judiciary system and the fight against corruption in Romania.

In 2017, the European Commission noted the progress which the Romanian state had had in ten years of monitoring by the cooperation and verification mechanism and at the same time provided twelve recommendations aimed at completing the monitoring process. The European authorities therefore considered that the recommendations of January 2017 are satisfactory and shall clearly lead to the conclusion of the CVM<sup>3</sup>, the only impediment being the national one, namely whether the evolution of the situation would have clearly reversed the meaning of progress. On this

subject, the Council's proposal was to put an end to the cooperation and verification mechanism for Romania when the four milestones in place shall be achieved in a sufficient manner<sup>4</sup>.

National challenges regarding judicial independence have had repercussions at the level of the Council and the Commission, which emphasized to the Romanian authorities, the importance of complying with the community legal framework and the obligations arising as a result of the statute of member and of adhering to the accession treaty.

From the theses of the latest CVM report, we know that the majority of the measures taken by the Romanian state have prompted the Commission to reconsider the basis on which the overall assessment has been built. In its actions, the Commission considered the negative opinions, which the Venice Commission issued, aiming the legislative changes made by the competent Romanian authorities.

In terms of the latest monitoring report, we need to realise whether current legislative changes have made an impact or stopped the progress achieved in these ten years of cooperation mechanism and verification of the Romanian justice and should realise whether we are witnessing an evolution or involution of the Romanian judicial system. In the following, we

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<sup>1</sup> The most important are developments in the case law of the Court of Justice in the field of judicial independence, the case law of the European Court of Human Rights (ECHR) on the right to a fair trial, the United Nations Convention against Corruption, Venice on European standards regarding the independence of the judiciary, as well as the indicators of the European Commission for the Efficiency of Justice (CEPEJ)

<sup>2</sup> Including Dashboard Of side to the EU On Justice: <http://ec.europa.eu/justice/effective-justice/scoreboard/>

<sup>3</sup> COM (2017) 44 - [https://ec.europa.eu/info/files/progress-report-romania-2017-com-2017-44\\_en](https://ec.europa.eu/info/files/progress-report-romania-2017-com-2017-44_en). Following the conclusions of the Council of Ministers of 17 October 2006 (13339/06), the mechanism was established by Commission Decision of 13 December 2006 (C (2006) 6569).

<sup>4</sup> 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). The four benchmarks that apply to Romania are presented in the accompanying technical report on page 1.

shall try to analyse the effects and recommendations of the report on the romanian system of justice.

## 2. Content

### 2.1. Current Premises

Not only the socio-political context, but also judicial and social factors shall be considered the most relevant for the romanian state's ability to perform reforms of its own judicial system. Thus, on an X-ray of the romanian national system, we find that the difficulties in stabilising consist of inadequate legislative practices, confrontations between the political system's actants, but also the difficult media context. At a simple reading, we would be tempted to emphasise that these shortcomings are not subject to the CVM report, but indirectly the impact on the progress of judicial reforms is felt strongly.

Following the report in year 2017, progress stagnated, and the up above mentioned factors did not suffer any changes, but on the contrary, attracted an unfavourable image and context to the progress of justice.

Thus, fundamental legislative changes, adopted hastily, without consultation, the media landscape, the press attacks on magistrates, the conflict between authorities, the pressure on civil society, the implications of the Constitutional Tribunal, public demonstrations are part of the factors that generated concern at the level of the European Union authorities and which attracted the involution of an independent judicial system and the reform of judiciary against high-level corruption.

With the entry into force of the GDPR, Member States are required to ensure the protection of freedom of expression and information in relation to the mass-media.

Facing the european authorities, the motivation to adopt legislative changes by speeding them up, namely the protocols of cooperation between judicial institutions, mainly the criminal prosecution bodies and the romanian intelligence service, were a source of systemic abuses, especially in Corruption cases, is not a solid foundation. Thus, the recommendations of the european assessors lead to conducting independent surveys to establish the implications of other entities and to determine whether systemic deficiencies have been recorded.

### 3. Progress towards the January 2017 report and the current context

The foundation of the previous report necessitated the reconsideration of two key areas, namely the judiciary acts and the legal safeguards for the independence of the judiciary. The Commission and has paid particular attention to the revocation of the chief prosecutor of the Anti-Corruption Directorate.

Thus, the three judiciary acts, drawn up and in force since January 2004, govern the judiciary, the statute of judges and prosecutors, the functioning of the courts and prosecution offices and the Superior Council of Magistracy. The CVM Report of January 2017, attracted the attention of the romanian authorities on the necessity for an open, transparent and constructive legislative process in which the independence of the judiciary is to prevail.<sup>5</sup> The reform of the romanian judicial system can ensure its durability if the opinion of the Venice Commission is taken into account.

Although the laws of justice are now amended, these amendments in force <sup>6</sup>, contain a number of measures which instead of strengthening the judiciary system, they weaken its independence, and are likely to undermine the independence of legal actors and therefore lead to a decrease in trust in the judiciary.

Among the most problematic legislative changes, include the creation of a special section of prosecution for investigating offences committed by magistrates, the new provisions on the material liability of magistrates for their rulings, restrictions on freedom of expression in the case of magistrates but also the new provisions on the revocation of members of the Superior Council of Magistracy<sup>7</sup>.

All these mentioned changes are not consistent with the recommendations of the last report, which involved legislative amendments to the procedure of appointing high-ranking prosecutors. Thus, the result of these changes materialised in the strengthening of the role of the Minister of Justice<sup>8</sup> and in weakening the character of independence of the judiciary. External observers, including the Venice Commission, the Group of States against GRECO corruption<sup>9</sup> noted that these changes could lead to the undermining of the independence, efficiency and quality of the judicial system.

All these assessments do nothing but highlight the constitutionality check and the socio-political context, which is an important factor in making these legislative amendments.

The judgment in the case *Baka/Hungary*, 23 June 2016 The European Court of Human Rights outlined

<sup>5</sup> The Council of Europe's Consultative Council of European Judges (CCJE), in its previous opinions, made the following recommendation: "Judicial authorities should be consulted and involved in the development of any legislation on the status and functioning of the judiciary." "The Position of the Judiciary and Its Relationship with the Other Powers of the State in a Modern Democracy", Opinion no. 18 (2015).

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

<sup>7</sup> Emergency Ordinance no. 92/2018 introduces further amendments to the revocation procedure.

<sup>8</sup> Concerning Romania, the Venice Commission highlighted the need to ensure greater independence for prosecutors (Opinion 924/2018).

<sup>9</sup> Greco-AdHocRep(2018)2, 23 martie 2018

that any interference with the freedom of expression of a Judge in a high position requires strict supervision and aspects of the functioning of the Judicial system must be rewarded a high degree of protection, in accordance with the right to freedom of expression.

### 3.1. Independence of the judiciary and judicial reform

Among the most important recommendations of the CVM report of 2017, the establishment of an independent system for appointing high-ranking prosecutors and the establishment of a code of conduct for parliament members.

Successive reports have revealed the inefficiency and the deficiency of the selection system of high-ranking prosecutors. The Commission notes the limited role of the Superior Council of Magistracy and the power given to the Minister of Justice in this procedure. Unlike the previous report, during the last period under analysis there was no progress to be achieved in this respect and the Romanian authorities avoided to ask for the advice of the Venice Commission. Instead, the Parliamentary Assembly of the Council of Europe notified the institution<sup>10</sup> referred to. The opinion of the Venice Commission specifically refers to the importance of making changes, so that the appointment and revocation process is neutral and objective, thus ensuring a balance between the functions of different institutions<sup>11</sup>. All amendments brought to the legal package of laws of justice led to the weakening of the role of the Superior Council of Magistracy and the role of the President of Romania in the process of appointing high-ranking prosecutors. This can only be noted as a regression in relation to this recommendation.

In The Code of Conduct for parliament members, where clear provisions on mutual respect between institutions and respect for the independence of the judiciary should have been included. However, this recommendation has also not been complied with and has not made progress. Thus, during the year 2018, the criticisms that covered the judiciary, as a whole was constant. These critics came from government and parliament representatives, and their effect translates into the weakening of the trust in the judiciary.<sup>12</sup>

Although the 2017 report took note of the adoption of a code of conduct by the Parliament and the Government, the socio-political context and the turning point recorded by the judiciary system in 2018, lead to a setback in this area. Thus, the Commission was misinformed of the cases in which proceedings were

initiated in Parliament, which could be the answer to a statement that prejudices the independence of the judicial system.

Recommendation 3 referred to the completion of the process of reform for the Code of Civil Procedure, and this evolution illustrates the lack of stability in the development of key legislative acts. Although in December 2016, a new deadline was set, namely 2019, for the implementation of the other provisions of this code. The CVM report of November 2017 noted that measures were being adopted to establish the necessary infrastructure to respond to the new system. However, in June the Parliament adopted amendments that made substantial changes to the code of Civil Procedure, namely the elimination of the Council Room stage in civil procedure. The High Court of Cassation and Justice challenged many of the amendments at the Constitutional Court.

The reform process also takes into account the conclusion of the current phase of the amendments targeting the Penal Code and the Code of Criminal Procedure. The amendments reflected the need to adapt to the decisions of the Constitutional Court and to transpose EU directives<sup>13</sup>. Nevertheless, commencing with the bill adopted in the year 2017, the amendments added before the debate of the law adopted in 2018 were contrasting as these radically changed the content of these norms.

These changes constitute a profound revision of the codes published in the year 2014, referring to the procedural aspects of criminal investigations and procedure, as well as to the balance between the public interest in sanctioning criminal offences, the rights of victims and the rights of suspects. At the same time, these changes restrict the scope of corruption as a criminal offence, which would lead to a setback of the recorded advances. However, these amendments have not entered into force at the time of the publication of the report, as they were being challenged by the Constitutional Court<sup>14</sup>. But not only constitutionality was the issue of these changes, they have also raised problems of a legal and political nature.

To these amendments, the Venice Commission<sup>15</sup> was very critical, stressing on concerns about the status of law by the fact that offences remain unpunished, the lack of quality of legislation at hand, the shortcomings in drafting and the contradictions with the case-law of the European Court of Human Rights and international obligations of the country, in particular, the fight against corruption. The Venice Commission recommends reassessing the changes made to criminal

<sup>10</sup> in April 2018, the Parliamentary Assembly of the Council of Europe requested the Venice Commission's opinion on changes to the laws of justice.

<sup>11</sup> Opinion no. 924/2018 of the Venice Commission, 20 October 2018. The Venice Commission admitted that it might be necessary to amend the Constitution in order to make changes to ensure a fair balance between the role of the different institutions.

<sup>12</sup> See Recommendation CM / Rec (2010) 12 of the Council of Europe about Judges: Independence, Efficiency and Responsibilities, paragraph 18: "If commenting on court decisions, the executive and legislator should avoid criticism that would undermine the independence of the judiciary or weaken trust the public in justice. "

<sup>13</sup> For example, the EU directives on the presumption of innocence and the freezing and confiscation of offenses.

<sup>14</sup> The decision regarding the Criminal Procedure Code of 12 October and the Criminal Code decision of 25 October 2018

<sup>15</sup> Opinion No. 930/2018 of the Venice Commission

codes in such a way as to draw up a robust and coherent legislative proposal.

Transparency and predictability of the legislative process for legislation regarding the reform of the judicial system and the fight against corruption is another problematic remark of the CVM report. Since most of the proposed provisions have not enjoyed a certain degree of transparency and clarity. The fact that in the opinion of the Commission of Venice on the laws of justice was found that major problems remain in these laws, also the concerns that changes to the Criminal Code and the Procedural Code may not be compatible with the legal obligations undertaken by Romania at EU level and also internationally, illustrates the risk of these accelerated procedures. Thus, it cannot be considered that this process is in line with the recommendation.

The efficiency of the judicial system translates also in compliance with the judgements and enforcement of these judgements given by courts<sup>16</sup>. Following a conviction handed down by the European Court of Human Rights in 2016, Romania proposed to the Committee of Ministers of the Council of Europe an action plan aimed at solving structural problems caused by non-enforcement of judgments against the State.<sup>17</sup> With regard to this action plan, steps are being made in order to make progress, thus a set of measures to be taken are being presented to the government. Proposals refer to amendments of the legal framework in order to ensure timely implementation and a mechanism to monitor and prevent the late execution of judgements in which the Member State is the debtor. The Ministry of Justice and the Superior Council of Magistracy also record further progress on the computerised register of Judgments in which the state is debtor or creditor.

Regarding the structural reforms that target the judicial system, the CVM report of 2018 noted the progress on the implementation of an action plan which establishes structural reform measures which are to be taken by 2020 for the development of the judiciary, noting that this should be an instrument that brings considerable advantages to users of the judicial system and to strengthen public confidence. The action plan also addressed issues such as the creation of a permanent mechanism for dialogue between the representatives of these three state powers and updating the informatic system in terms of data protection<sup>18</sup>.

Recommendation 7 referred to the Transparency and accountability of the Superior Council of

Magistracy, a measure that has no advance and no regression because the political context has put difficulties in the optimal functioning of this body.

The Superior Council of Magistracy encountered increasing difficulties in maintaining the approach described in its priorities, the government rejecting a number of its opinions. The report from year 2017, underlined the importance of presenting public reports by the Superior Council of Magistracy, regarding all activities carried out, in order to defend the independence of the judiciary and to protect the reputation, independence and impartiality of magistrates. However, the SCM has not publicly issued a firm measure even if the public opinion was quite hostile to this professional category.

### 3.2. Integrity framework and National Integrity Agency

The placing in service of the system PREVENT is one of the achievements of the current report, this system has the role of preventing conflicts of interest in public procurement procedures by creating an ex-ante verification mechanism and by providing the possibility for the contracting authorities to remedy the problems before awarding the contract. There are currently no shortcomings in the implementation of this project, the system being fully operational and the National Integrity Agency's (NIA) reports recording of positive results<sup>19</sup>.

In addition to warnings, PREVENT has led also to a greater awareness among contracting authorities. The preventive approach gains ground and the increasing will of the great majority of the contracting authorities to remove potential conflicts of interest before the signing of contracts, demonstrates its quality. The CVM report notes the legislative amendment regarding the possibility of imposing a fine on the contracting authority that does not respond to alerts received through the PREVENT system.

However, the report emphasises that, although the balance sheet of the agency remained constant regarding the cases of incompatibility and conflicts of interest of an administrative nature, the stability of the legal framework for integrity still faces challenges. In particular, two legislative proposals were adopted by the Parliament, which include mentions about a prescription period of three years for the facts leading to the occurrence of conflicts of interest or

<sup>16</sup> Guidance on Article 6 of the European Convention on Human Rights - Right to a fair trial (civil dimension), [http://www.echr.coe.int/Documents/Guide\\_Art\\_6\\_ENG.pdf](http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf).

<sup>17</sup> <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806dda63>

<sup>18</sup> The Superior Council of Magistracy, the National Institute of Magistracy, the National School of Clerks and the Judicial Inspection successfully applied for projects within the specific objective 2.3 of the Administrative Capacity Operational Program. The Public Ministry also implements several projects funded under the same strategic objective.

<sup>19</sup> From the start of operations in June 2017 to September 1, 2018, PREVENT analyzed 16,102 procurement procedures with a cumulative value of approximately EUR 15,470 million. Eight percent of the procedures under review related to EU funds. ANI issued 57 integrity warnings, some of them on high-value purchases. The total amount of the value of the procurement procedures for which an integrity alert has been reported is EUR 112 million. In 48 cases, contracting authorities eliminated possible conflicts of interest. In 9 cases, the potential conflict of interest was not addressed. ANI launched a conflict of interest investigation in two of these cases.

incompatibilities<sup>20</sup> and the regime of penalties for conflict of interest in the case of local elected officials. The report also notes the challenge of financial resources of the National Integrity Agency, these becoming increasingly limited<sup>21</sup>.

The implementation of judgements relating to Parliament members has since 2016 been the concern of the International Observers, whereas it is necessary to clarify the rules on incompatibilities and conflicts of interest in such a way as to meet the CVM reference objective concerning the adoption of 'binding decisions that can lead to the application of dissuasive sanctions.

The Commission considers that there is significant progress as long as functioning of the Prevent System is ensured and as long as the clarity of the rules issue is solved.

### 3.3. Fighting corruption at a high level

The various movements that took place since the last report, evolution which occurred since the CVM Report from November 2017 led the Commission to reexamine its evaluation. This practice of putting pressure on institutions that have a central role to play in the fight against corruption raises concerns about their ability to continue to achieve results and therefore to the irreversibility of the fight against corruption.

The Commission underlines in a critical sense, the pressure to which the National Anti-Corruption Directorate (NAD) was subjected, pressure that affects its independence. Harsh criticism from the media and high-ranking politicians, but also the failed attempts to appoint the chief prosecutor, have attracted many doubts about the process. Thus, regarding the legal framework, the amendments to the Criminal Code and the Code of Criminal Procedure, adopted by Parliament before the summer period, could also undermine the fight against corruption. The impact of corruption has been highlighted in widespread, frequent criticism about these changes. Therefore, investigations, prosecutions and convictions were put into danger and the facts considered corruption offences were restricted. Moreover, also noted by the opinion of the Venice Commission<sup>22</sup> that emphasizes: "Taken separately, but in particular, having the view of their cumulative effect, many changes will severely affect the effectiveness of the criminal justice system in Romania with regard to combating different forms of criminality, including corruption-related offences, offences committed with violence and organised crime.

Recommendation 10 is centered on the Parliament's responsibility for its decisions referring to applications for the authorisation of preventive measures and also on applications for authorisation to investigate a Member of Parliament when he/she holds

or has held the function of minister. Provision, which was provided by the fundamental law reflecting many parliamentary systems where immunities exist for the protection of members of parliament in the exercise of their mandate for which they were elected. The recommendation relates to the application of this competence.

During the year 2018, there was no follow-up action in relation with the Government's invitation to amend the legislation in order to enlighten the fact that ministerial immunity applies only to actions undertaken by ministers during their term of office.

The recommendation also proposed the presentation of reports regarding decisions and organising a public debate. A starting point in this direction is that the debates held in parliamentary committees and plenary sessions are transmitted live and can be viewed online also in a later stage.

With regard to this recommendation, the Commission reconfirms its conclusion in the year 2017, namely the need for further efforts in this area. In order to close this benchmark, Objective 3 from the current report of the Commission proposes additional recommendations.

### 3.4. Fighting corruption at all levels

Starting from the latest report, in 2017, referring to the national anti-corruption strategy, progress has been made, by organising thematic evaluations of public institutions with the aim of verifying how these institutions define the risks of corruption in key areas and the measures in place to prevent incidents like these. The Commission appreciated the publication of the first monitoring report<sup>23</sup> done by the Technical Secretariat of the Ministry of Justice, in March 2018.

Among the objectives of the strategy is to increase the performance terms of the fight against corruption by imposing criminal and administrative sanctions.

Since the establishment of CVM reports, a key point has also been the development of the National Agency for Administration of Divested Goods (NAADG). It is currently fully operational and continues to develop its work. The Commission notes the progress made in the development of a national integrated system for monitoring the measures taken by the authorities at each stage of the process of recovering the goods. The Commission recommends the agency to develop activities regarding the public and social reuse of confiscated property, where the legislation provides support for the civil society projects such as those in the field of legal education, prevention of crime, assistance to victims and other public interest projects.

<sup>20</sup> Law for Completing Law No. 176/2010 on Integrity in Exercise Functions and Public Officials

<sup>21</sup> From about 33 million RON in 2016, to 22.5 million RON in 2017. In 2018, the budget was subsequently reduced to 18 million lei (ANI requested an additional 1.5 million lei but was not approved).

<sup>22</sup> Opinion No. 930/2018 of the Venice Commission

<sup>23</sup> Report of Progress on Implementation of the National Anti corruption Strategy 2016-2020 in Year 2017 <https://sna.just.ro/Rapoarte+de+monitorizare>.

As with the other benchmarks, also in this case it proposes further efforts in order to make progress towards concluding this benchmark. Corruption prevention is hampered by the political developments which undermine the credibility of progress.

#### 4. Conclusions

Even though during the year that has passed since the last report, Romania has taken steps to implement some of the recommendations, the negative measures are questioning the progress made and implemented successfully in the decade of monitoring.

If initially, through the draft of amending the legislation regarding the judiciary it was attempted to discover the most effective legislative solutions that can improve the work and organisation of the judicial system, activity, quality of which is directly influenced by the quality of the human resources that perform justice, in all its shapes: professional knowledge, balance, maturity, seriousness and dedication, currently by the entry into force of the revised legislation the advances that by far seemed implemented, had been cancelled.

Instead of shutting down the justice monitoring process now acquires new valences and new recommendations. Thus, the remedies to which the report for the year 2018 refer to are the revision of legislation by complying with the recommendations of the international observers. The Commission also

recommends suspending the implementation of the current legislation.

The sensitive recommendations of the current report also take into account appointments and revocations in the judiciary, but also to remedy deficiencies in codes and their implementation, which must be in terms of compatibility with the European law and other international instruments to which Romania is a party.

Faced with the latest challenges, Romania may face activation of Article 7, a rather difficult situation for its economic position. Often qualified as an "institutional nuclear weapon", Article 7 may eventually lead to the suspension of certain rights of a Member State, in particular its right to vote in the EU Council.

Strengthening reforms and enhancing legislation appears as a necessity to the multiple analyses carried out by various internal and international entities. Even if the organisations in the field criticize these draft laws, the revision is essential, and completion of the system's institutional reform process cannot be achieved otherwise. Political actants need to assume responsibility and clarify these dysfunctions. We can define them as dysfunctions, as Romania's multiple convictions to the ECHR are an indirect consequence of this situation. The conclusion of the reform process and the remediation of all shortcomings in the justice system will lead to the lifting of the measures put in place for Romania as in Bulgaria's situation.

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