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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

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1. INTRODUCTION - CONTEXT AND METHODOLOGY

1.1. Objective:

When Romania joined the European Union in January 2007, a Co-operation and Verification Mechanism (CVM)[1] was set up to help the new Member State tackle the recognised need for far reaching judicial reform and the fight against corruption. The CVM is an autonomous Commission decision based on the Accession Treaty. It enables the Commission to work closely at political and technical level with the Romanian authorities to monitor and evaluate progress, to provide technical advice and financial support. The CVM enables all other Member States to follow and support developments in these areas in Romania and to provide both expertise and financial support. The interim and annual reports prepared by the Commission under the CVM assess progress and identify remaining shortcomings to help Romania set priorities for actions to be undertaken to fully meet the benchmarks set out at the time of accession.

This report sets out the Commission's assessment of progress in meeting the benchmarks since its last full report (23 July 2008). It also makes recommendations to Romania based on this assessment. The accompanying staff working paper sets out the Commission's detailed assessment of progress in each of the benchmarks. The report is based on regular input received from the Romanian authorities notably in response to detailed questionnaires from the Commission for each benchmark. The Commission has been assisted in its work by a number of high level experts from the Member States and has also drawn on documentation and input provided by a variety of other sources.

1.2. The benchmark methodology:

The Commission sees all the benchmarks as closely interlinked. In its dialogue with Romania ample evidence has been given that progress under one benchmark contributes to progress under another benchmark. The rationale for the CVM is not to establish a check-list, but to develop an independent, stable judiciary which is able to detect and sanction conflicts of interests, and combat corruption effectively. Therefore the Commission does not envisage removing the benchmarks one by one but rather working with Romania to the point where the CVM in its entirety is ended.

[1] Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the area of judicial reform and the fight against corruption (OJ L 354, 14.12.2006, p.56).

2. STATE OF THE REFORM PROCESS IN ROMANIA

Achievements

As in previous years a detailed assessment by the Commission of progress in meeting the benchmarks set out under the CVM can be found in the factual update annexed to this report. The main report summarises the key findings of the Commission and presents recommendations for action by Romania.

The Romanian government, supported by an alliance in the prosecution and judiciary, reacted effectively to the concerns expressed in the interim report of the Commission of 12 February 2009. A series of practical and legislative steps have been undertaken and a new momentum has been established to continue with the reform process. Nevertheless, changes still have to produce practical results for Romanian citizens. Moreover, this reform drive is not mirrored by an unequivocal commitment across political parties. In particular the Parliament should take consistent decisions to support the efforts of the executive on judicial reform and eradicating corruption.

The new Civil and Criminal Codes

The Romanian government made a clear public commitment to adopt new Civil and Criminal Codes in response to recommendations made by the Commission in earlier reports. The adoption of the two Codes in June 2009 is an important expression of political commitment and a significant step forward in terms of securing a more efficient legal system. However, the Codes are foreseen to enter into force only when the relevant Procedural Codes (presented at the same time by the government to the Parliament) have been debated and agreed in normal parliamentary procedure. The earliest expected date of entry into force for all four Codes is 2011.

An implementing law for the application of the Codes will be needed. It is important to ensure that this implementing law and also the adoption procedure concerning the Procedural Codes do not lead to the reintroduction of provisions that were contested in the past or new ones which would undermine the efficiency of meaningful investigations into high level corruption and subsequent court proceedings.

A good illustration of this risk will be the fate of Law 78/2000 which is the current legal framework for high level anti corruption investigations and the basis for the work of the National Anticorruption Directorate (DNA). In the run up to final adoption it will be important to ensure that this crucial framework is maintained without restrictions.

The new Criminal Code foresees a lowering of the maximum sentences for property related crimes, in particular corruption and related offences. The rationale offered for this provision was the wish to improve the coherence of the legal framework even if at first sight it might appear contradictory to efforts undertaken to tackle corruption.

A Working Group on the individualisation of penalties for corruption offences has reported on discrepancies in judicial decisions. The Working Group proposed concrete follow up recommendations: these should be taken forward notably by the High Court of Cassation and Justice (HCCJ) which has agreed to issue guidelines on

corruption penalties. The latter will be a considerable step forward to improve the consistency of jurisprudence.

Reform of the Judiciary

A new Human Resource Strategy for the judiciary was adopted but the situation remains a challenge for Romania in terms of the budgetary costs and in providing qualified personnel and support infrastructure. Despite these difficulties, some steps have been taken as regards the staffing situation in courts and prosecutors' offices at local level, however further improvements are needed. The Superior Council of Magistracy (SCM) has intensified judicial inspections to improve the quality of justice notably with respect to ensuring uniform application and consistency across the court system. Appointment procedures and new competitions have been undertaken in line with the objectives set to provide for objectivity and high qualification. Nevertheless, the SCM must intensify its activity so as to ensure an efficient and flexible human resource policy. The impact of the new strategy cannot yet be fully assessed but increased awareness and better anticipation of problems can already be seen.

Staffing constraints have been sharpened by the recent decisions of the SCM to alter the rules on secondments which in effect prevent the seconding institution to terminate the secondment of the judges or prosecutors concerned even if it faces a severe staffing problem. In addition the limited managerial possibilities of the General Prosecutor's Office with respect to promotion, disciplinary measures or transfer of staff render the restructuring of the prosecution service particularly difficult. Increased cooperation from the SCM is needed to re-organise the Prosecution Office effectively.

Unification of Jurisprudence

The General Prosecutor actively lodged appeals with the High Court of Cassation and Justice (HCCJ) challenging conflicting jurisprudence which have contributed to more uniform jurisprudence. The number of appeals in the interest of the law peaked in 2007 and the lower number in 2008 may indicate a certain success in unification.

The HCCJ rendered numerous decisions on appeals relating to the uniform interpretation and application of the law across the court system. However, the cumbersome and questionable procedure of two-thirds of the 120 judges having to participate to the decisions and agree to the reasoning (after having taken the decision) causes delays and sometimes leads to unclear statements of reasons. Further efforts to unify jurisprudence, through the systematic publication of case law and the organisation of meetings with judges of lower courts were undertaken. An important step in this context will be the issuing of guidelines on corruption penalties promised by the HCCJ for autumn this year.

It will be important for the executive to agree with the legislator to amend the law on the functioning of the Constitutional Court so as to abolish the suspension of cases where the exception of unconstitutionality is raised by a defendant. Likewise the procedural excesses involving the invocation of the illegality exception, which also leads to the suspension of the case, must be legally contained. These issues cause unacceptable delays. They should either be addressed in the upcoming discussions on

the procedural codes or more immediately by amending the relevant implementing rules.

The appointment of a new head of the HCCJ in the autumn will be an occasion to demonstrate commitment to reform, modernise and increase the transparency of the judicial system.

Fight against high level corruption

The Romanian Parliament's procedure of requesting to initiate investigations of former ministers appears to be neither uniform nor swift. Since the last report the Parliament had approved the opening of investigations in four cases but refused to do so in two other cases. In one of these latter cases the Parliamentarian resigned allowing the opening of the criminal investigation, while in the second case Parliament found it not admissible. It is important that the Parliament shows its full commitment to pursuing the fight against high level corruption.

The reappointment of the Head of the National Anticorruption Directorate (DNA) in February this year marked an important step in ensuring stability and continuity of the authorities in charge of the fight against corruption. The continued existence of a specialised and efficient anti corruption framework is of vital importance for Romania.

DNA has maintained its good track record of non-partisan investigations into high level corruption cases.

The National Integrity Agency (ANI)

ANI is now operational and has delivered good results by following up on declarations of assets of members of government, magistrates, officials with leading and control positions and all civil servants which will be further improved once the planned integrated IT system is completed. A certain preventive effect is ensured by the systematic follow up by ANI of all missing asset declarations via administrative fines and the possibility of subsequent court cases. These ex officio investigations by ANI are commendable. However, it will only be possible to fully assess the actual impact of ANI's work once the first cases regarding unjustified wealth, incompatibilities or conflict of interests, which are still pending in the relevant judicial or disciplinary bodies, will be decided upon. Finally, ANI and the National Integrity Council, which guarantees and controls it, should develop a stable working relationship built on mutual trust.

Fight against local corruption

By order of the General Prosecutor the different territorial prosecution offices have adopted strategies to fight corruption at local level. Regular exchanges of best practice and prioritisation of vulnerable sectors complement this commendable initiative. The initiative has raised awareness in the regional prosecution offices concerning low level corruption which seems to be widespread in some areas of activity (e.g. in education, healthcare). The intake of cases by the territorial prosecution offices is acceptable although probably not yet sufficiently based on ex officio, i.e. own initiative investigations. A lack of initiative in detecting corruption is also apparent in relation to local inspectorates of the healthcare or education

departments and the tax authorities, as well as other internal control bodies of public institutions.

In general, more emphasis could be given to preventive initiatives such as awareness raising campaigns aimed at the public and all levels of the administration, transparency of administrative procedures, enforcing the right of access to public documents, etc. In certain areas of activity where there is evidence of low level corruption, (public procurement, grants and permits, education, health, etc.), a structural preventive effort could yield more results in the long term than a case-by-case approach to law enforcement. Of course both are necessary, as individual cases show that abuses will not be tolerated and that they will be detected.

3. SAFEGUARD CLAUSES

In light of the assessment above, the question arises whether the safeguard clause should be triggered. In public discussion of the CVM there is often confusion between the likely duration of the Mechanism and the time limited safeguard clauses contained in the Treaty of Accession. There is no automatic link between the CVM and the safeguard clauses enshrined in the accession Treaty for Romania. Safeguard clauses are a standard feature included in accession treaties. The safeguard clauses were introduced to ensure the efficient functioning of the internal market and of the area of freedom security and justice. They can be triggered until the end of 2009 to allow for the temporary suspension of the application of the relevant Community legislation if that is necessary. The Commission is of the view, based on the above assessment, that the conditions for invoking the safeguard clauses are not fulfilled.

The CVM has now entered its third year. It was not introduced for a fixed period as it should only be removed when all the benchmarks it set have been satisfactorily fulfilled. It is clear that meeting the objectives set in the benchmarks is a long-term task: for instance, tackling the root causes of corruption will take time. The kind of deep seated changes that are needed can only come from within Romanian society. The CVM is a support tool in this endeavour; it is not an end in itself nor can it replace commitment that Romanian authorities need to make in order to align the judicial system and practice with general EU standards.

4. CONCLUSIONS AND RECOMMENDATIONS

Romania has taken a number of welcome steps since the Commission's 2008 report to re-launch the reform process: a new momentum has been established which has resulted in a series of positive steps. However, Romania is still struggling to overcome the fact that the Criminal and Civil Codes were never fully revised. This has led to a series of legislative amendments and numerous emergency ordinances. In this situation it is not surprising that the jurisprudence of the Romanian judiciary is contradictory, generating undue delays which, in turn, are addressed in a legislative patch work of emergency ordinances, implementing rules and practices. The ensuing complexity is the result of a politicised process and the broad based political consensus behind reform and the unequivocal commitment across political parties to ensuring real progress in the interest of the Romanian people is not yet there. There is a risk that an ever growing web of legislation, implementing rules and practices resulting from permanent political party in-fighting may cause all concerned to lose

sight of the main objective, i.e. to establish an independent, stable judiciary which is able to detect and sanction conflicts of interests, and combat corruption effectively.

Against this background, the positive results of concrete reform efforts at technical level remain fragmented, reforms have not yet taken firmly root and shortcomings persist.

In light of the above findings the Commission invites Romania to take action in the following areas:

Regarding the new codes:

- To carry out a thorough assessment of the impact of the four codes on the functioning of the judicial system and organisation of the courts and prosecutors' offices and to quantify the budgetary means needed to implement them;

- To carry out a public consultation on the Civil Procedure and the Criminal Procedure Codes and to adopt them as soon as possible;

- To facilitate the swift entry into force of the four codes through the adoption of an implementing law that will render the legislative framework coherent.

Regarding the reform of the Judiciary:

- To implement a flexible, priority driven approach to human resourcing, in the short term by taking emergency measures such as transferring vacant posts to where they are needed most (including transfers between different court levels); by transferring administrative tasks to auxiliary staff, introducing court managers; and in medium and long term by developing a personnel scheme tailored to the needs of the judicial system by carrying out simulations and forecasts with regard to appointments, transfers of staff, secondments and retirements;

- To strengthen the transparency and accountability of the Superior Council of the Magistracy, including through the Council assuming its responsibility for a more proactive approach to recruitments, promotions, disciplinary measures, transfers of staff and secondments, and by publishing the Council's reasoned decisions in a clear and accessible format.

Regarding the unification of jurisprudence:

- To provide an appropriate follow up to the recommendations of the working group on the individualisation of penalties for corruption;

- To strengthen the role of the High Court of Cassation and Justice in unifying jurisprudence, including through streamlining the procedure for appeals in the interest of coherent interpretation and application of the law and elaborating guidelines on penalties for corruption offences.

Regarding the fight against high level corruption:

- To ensure that the procedure for allowing criminal investigations of Parliamentarians who are former and current members of the government is applied in a uniform and swift manner by the Romanian Parliament;

- To monitor the efficiency of the judiciary system in trials of high level corruption cases;

- To ensure the stability of the legal framework for the fight against high level corruption including in the context of the new codes;

- To adopt a law removing the suspension of trials when exceptions of unconstitutionality are raised.

Regarding the activities of the National Integrity Agency:

- To continue to build upon the track record on verification of assets, incompatibilities and conflict of interest;

- To ensure timely follow up by judicial and disciplinary bodies to cases submitted by ANI concerning unjustified wealth, incompatibilities and the conflict of interest.

Regarding the fight against corruption at the local level:

- To improve the coordination of the National Anticorruption Strategy in order to allow better identification of vulnerable spots and risk areas so as to develop prioritized mitigation strategies at all levels;

- To continue the implementation of local strategies developed by the prosecution, adapted to local needs and increase their effectiveness;

- To step up preventive measures against corruption in vulnerable sectors in coordination with local and central bodies.

The Commission calls on Romania to move on with its reform process and to implement the recommendations it has made. The Commission will support and monitor progress on this basis next year. Continuous pressure for delivery is needed and the Commission also invites the other Member States to continue assisting Romania and help delivering progress. For its part the Commission will continue to support Romania's efforts through political and technical dialogue and the provision of appropriate expertise, where necessary.

Outlook:

This report demonstrates that important reform proposals have been tabled by the government and that the positive track record of the prosecution is starting to be complemented by action of the judiciary. Romania has regained its reform momentum, building further upon achievements that were already reflected in the July 2008 report of the Commission. However, in order for Romania to be able to demonstrate sustained progress, the judicial reform process should not be politicised. A consensus must be forged by all actors to allow the judicial system to work independently so that non-partisan investigations into corruption lead to swift and

effective decisions. In the view of the Commission, the Mechanism acts as a support tool which needs to be maintained until these reforms are achieved. The Commission will reassess further progress in summer 2010.