

Safeguarding the Rule of Law in an Enlarged EU

The Cases of Bulgaria and Romania

CEPS Special Report/April 2009

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Abstract

This report assesses the needs and options for monitoring and reinforcing the rule of law in an enlarged EU. It looks at the existing mechanisms for monitoring in the EU, the Council of Europe and the UN and identifies the gaps before suggesting solutions. The report includes case studies on Bulgaria and Romania that focus on the ways in which the two most recent member states of the EU have responded to the Cooperation and Verification Mechanism imposed on them at accession while giving an overview of the very different issues faced by each country in the context of the rule of law. These country reports feed into the overall analysis of the need for effective monitoring of the rule of law in the EU in general.



The purpose of the research project on *Safeguarding the Rule of Law in an enlarged EU: The Cases of Bulgaria and Romania* was to provide an independent assessment of domestic government and rule of law in an enlarged EU, taking as case studies Bulgaria and Romania. The project looked at general issues on how the EU could monitor the performance of judicial and administrative systems in

all its member countries, and puts forward a set of policy recommendations as to the ways in which the EU can better safeguard the rule of law in the EU. This paper was produced by the CEPS CHALLENGE programme (Changing Landscape of European Liberty and Security), which focuses on the implications of the new security practices being implemented throughout Europe for civil liberties, human rights and social cohesion in an enlarged EU.

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SAFEGUARDING THE RULE OF LAW IN THE EU: SYNTHESIS REPORT

SUSIE ALEGRE*

1. Introduction

During the accession process over the past decade, the rule of law has been primarily an export item for the EU through technical assistance to accession countries, but little consideration has been given to what respect for the rule of law really means for member states. The rule of law is an extremely broad topic covering issues ranging from the professionalism of the police to political corruption, from legal certainty in legislation to access to justice, from effective prosecutions to the protection of individual rights. The European Union itself is based on the inseparable principles of respect for the rule of law, democracy and human rights.¹ As the area of freedom, security and justice (AFSJ) in the EU has developed, the principle of mutual recognition that relies on the notion that there is mutual trust between member states' justice systems based on common standards of respect for the rule of law, democracy and human rights has been at the heart of AFSJ policy. Mutual recognition instruments have blossomed in the criminal justice sphere without any serious consideration of the foundations of mutual recognition. Safeguarding the rule of law in the EU requires a closer and more critical study of the basis for mutual trust between member states and this report will look at whether such trust exists, whether it is based on verifiable common standards and what should happen when the requisite standards are not met. It is hard to see how the EU can claim to be made up of states with common standards if it cannot identify what those standards actually are.

The accession process over the past five years has placed the monitoring of the standards of respect for the rule of law higher up the political agenda. Concerns about the rule of law in Bulgaria and Romania at the time of their accession led to the establishment of a cooperation and verification mechanism (CVM); a new model designed to ensure that improvements in the rule of law that were observed and promoted throughout the accession process would continue once both countries became full members of the EU. The CVM singles out Bulgaria and Romania for special treatment amongst EU member states, no other member state sees its political and justice systems subjected to EU level scrutiny and criticism in this way. But in the preparation of the next stage of development of the area of freedom, security and justice – the Stockholm Programme – it is time to consider the need for EU member states to take stock and assess whether or not they can really trust in each other's systems. This report draws on the findings of the national reports on Bulgaria and Romania as well as EU level proposals and discussions to identify issues and opportunities for safeguarding the rule of law across all EU member states. Crucially, the report will identify existing monitoring mechanisms and explore the possibilities for enforcement in such a sensitive area as the rule of law.

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¹ Article 6 TEU.

2. Why safeguard the rule of law in the EU?

2.1 Defining the rule of law

In identifying the reasons for safeguarding the rule of law in the EU, first one needs to consider what exactly we mean by ‘the rule of law’. The concept of the ‘rule of law’ is one without a legal definition and subject to a wide variety of interpretations according to legal and philosophical traditions.² A common thread throughout the ‘rule of law’ is that it is a means of restraining public and political power by subjecting it to a set of principles such as the principle of legality.³ On one understanding of the rule of law, however, formal and procedural requirements are emphasised whereas on another, substantive qualities such as the protection of human rights are key. As the EU is founded on the principles of democracy, human rights and respect for the rule of law, three principles that are intrinsically linked, it must be the deeper, more substantive concept of the rule of law that is of concern in this context. While procedural guarantees are crucial safeguards to the rule of law, the EU must address both the procedural level and the qualitative level of the respect for the rule of law as it is applied in member states if it is to give effect to the principles on which it is founded. In addressing the rule of law in an EU context, it is important to bear in mind the EU’s own legal framework and the importance of the principle of subsidiarity in the political and democratic make-up of the Union. It is not in overstepping its own legal and democratic boundaries that the Union will help safeguard the rule of law within its territories. That said, in the same way that the rule of law in the criminal justice systems of member states relies on the twin requirements to conduct effective prosecutions and to guarantee the rights of the defence, the EU can no more ignore its legal provisions for combating failures in the rule of law in member states, such as Article 7 TEU, than it can sidestep the principle of subsidiarity.

2.2 The position of the EU in Europe

The EU is one of a number of overlapping European and international organisations that address ‘the rule of law’ on the European continent. All EU member states are equally members of the Council of Europe (CoE), the Organisation for Security and Cooperation in Europe (OSCE) and the United Nations (UN) – all of which work in the policy areas of justice, democratisation, human rights and combating corruption; core components of the rule of law. Within this complex inter-institutional web, the EU has its own particular institutional and political identity, which provides both opportunities and obstacles to safeguarding the rule of law in an EU context.

Safeguarding the rule of law in the EU is important for a number of reasons, not least the need to provide EU citizens with a safe and secure environment in which they can move freely and set up businesses and trade with each other safe in the knowledge that their business and personal interests will be protected and that they will not be discriminated against. In the absence of the rule of law, crime flourishes and legitimate businesses fail, a breakdown in the rule of law in the EU would undermine the development of the EU as a united economic power. A key part of the EU’s development over the past two decades has been the establishment of the ‘area of freedom, security and justice’, through cooperation between judges, prosecutors, police and border agencies resulting in fast track surrenders of fugitives between member states under the European Arrest Warrant and the disappearance of border controls in the Schengen area. These developments have often been controversial and viewed with suspicion on the national

² See Erik O Wennerström, “The Rule of Law and the European Union”, Uppsala, 2007, pp 61-76.

³ See “The Council of Europe and the Rule of Law: An Overview”, 16 September 2008, GR-J(2008)11 para 31.

level, in part because they touch on sensitive areas of national sovereignty such as criminal justice and border controls and in part because it is an area where there is a perceived accountability and transparency gap in the EU's actions, in particular due to the limited involvement of the European Parliament in the criminal justice sphere and the absence of binding instruments designed to protect the individual.

2.3 The third pillar

A cornerstone of judicial cooperation in criminal matters in the EU is the principle of mutual recognition⁴ of decisions based on mutual trust between judicial systems which supposedly share the same standards with respect to human rights and the rule of law. Mutual recognition, however, can only function as a principle for cooperation where such mutual trust genuinely exists and where that trust is grounded in reality. If, for example, a judge in one member state were to surrender a person to another member state on the basis of mutual trust despite clear evidence that the prison conditions facing the person on surrender would likely amount to inhuman and degrading treatment in breach of Article 3 ECHR, the executing judge would be acting in breach of legal obligations under the ECHR⁵ and failing to apply sufficient judicial scrutiny to meet the requirements of the rule of law and the protection of human rights. Mutual recognition is only compatible with respect for the rule of law insofar as it allows for sufficient judicial scrutiny to ensure the protection of human rights and provides judges with the possibility of refusing cooperation where there are serious grounds for believing that to cooperate would lead to a violation of human rights protected by the ECHR and/or by national, constitutional provisions.

In the field of European Community law, the European Commission, as the guardian of the treaties, has a particular role to play in safeguarding the rule of European law and ensuring that member states comply with EU standards and regulations by initiating infringement proceedings against member states that fail to implement Community law. The European Court of Justice also has a crucial role in enforcing European Community law. The recently formed Fundamental Rights Agency is tasked with monitoring the way in which fundamental rights are affected in areas governed by Community law in member states. Under the current Treaty framework, issues relating to criminal justice (otherwise known as the third pillar), however, are not susceptible to infringement proceedings and can only be considered by the European Court of Justice to a limited extent and insofar as member states opt into ECJ jurisdiction in this field.⁶ EU policies on freedom, security and justice cover a wide range of topics touching on the rule of law including asylum and migration policy, fundamental rights, civil aspects of judicial cooperation and police and judicial cooperation.⁷ But it is the sensitive area covered by the third pillar that is currently in a black hole of accountability at EU level and that most urgently needs safeguard mechanisms. The EU has set itself up as an exporter of the rule of law throughout the accession process but little thought has been given to what the respect for the rule of law really means in the EU. This report, while recognising the breadth of issues engaged by the rule of law in the EU, will focus on the most urgent area of criminal justice in exploring the ways in which

⁴ Set down by the EU Council in the Tampere Programme – October 1999. For a detailed assessment of mutual recognition to date, see “Study: Analysis of the future of mutual recognition in criminal matters in the European Union”, Gisèle Vernimmen-Van Tiggelen and Laura Surano, Institute for European Studies, ULB and ECLAN, Final Report, 20 November 2008.

⁵ See *Soering v UK* for example.

⁶ TEU Article 35.

⁷ See Commission Communication on Evaluation of EU Policies on Freedom, Security and Justice, COM (2006) 332 of 28 June 2006.

the EU can put its house in order. In particular it will look at criminal justice issues, related fundamental rights and the impact of corruption on these matters.

3. How can we monitor the rule of law in the EU?

3.1 National v thematic monitoring

The national reports on Bulgaria and Romania highlight the important differences in the type of issues that member states face. A thematic approach to monitoring may well result in misleading statistics. Member states may have good standards in one area such as the independence of the judiciary while they are in crisis in terms of execution of sentences and prison conditions or vice versa. A thematic approach to monitoring would not reveal the bigger picture and recommendations to a member state on a specific point for improvement may be useless if they are not placed in a broader national context. If the goal of monitoring is to address lapses in the rule of law in the EU, a narrow thematic approach will not provide the solution. If, however, the goal of monitoring is to identify areas of divergence or convergence in member states practices and standards, a deeper thematic monitoring may reveal trends within the EU that demonstrate either a need for greater approximation in standards or areas where a European standard cannot reasonably be expected to be agreed upon but where the lack of a European standard needs to be borne in mind in terms of policy making at the EU level.

3.2 Identifying an EU standard

One problem identified in the national reports on Bulgaria and Romania is how to establish the 'norm' in EU member states in order to set a concrete benchmark as to the standards that EU member states expect from each other in any given field. If, for example, we take the age of criminal responsibility in EU member states, this varies from 8 years old in Scotland⁸ to 18 years old in Belgium with everything in between. In terms of juvenile justice, therefore, it is difficult to see how any genuine EU standard could begin to be developed. The Bulgarian report highlights the fact that in Bulgarian criminal courts there is a 1% acquittal rate (see below), which adds to the problem of the length of proceedings as any good defence lawyer will try to string proceedings out as long as possible in the knowledge that acquittal after a fair trial is a practical impossibility, so delay is the best tactic. The Crown Prosecution Service in England and Wales had a conviction rate overall of 85.1% in 2006-7.⁹ This difference begs the question – what is the average conviction rate for cases coming before criminal courts in the EU? Are higher conviction rates a result of better standards of evidence or do they indicate that the presumption of innocence is not applied? Statistics obtained from monitoring of justice systems must be carefully analysed before any conclusions can be drawn here.

Broader monitoring on issues that reflect and affect the respect for the rule of law in member states on a regular basis could highlight issues in particular member states that warrant a deeper assessment and follow up. The type of monitoring carried out by the EU Network of Independent Experts on Fundamental Rights,¹⁰ for example, allowed for a snapshot of the issues in all member states that could, with political will, lead to action on the part of the EU to address acute or systemic problems revealed in a particular member state. Monitoring could, in this model, take place on two levels, the first a general assessment of the situation with regard to a broad range of issues affecting the rule of law in EU member states and the second an

⁸ Soon to be raised to 12. The age of criminal responsibility in England and Wales is 10.

⁹ <http://www.cps.gov.uk/publications/reports/2007/summary.html>

¹⁰ http://ec.europa.eu/justice_home/cfr_cdf/index_en.htm

enhanced monitoring, possibly similar to that used in the CVM to address issues of particular concern in specified member states.

There are a number of ways in which issues relating to the rule of law in EU member states are already being monitored at national, EU, Council of Europe or UN level. In looking at options for monitoring the rule of law in the EU, it is imperative that a thorough ‘état des lieux’ is carried out as to all of the existing monitoring mechanisms and readily available sources of data. Monitoring the rule of law in the EU in such a way as to duplicate what is already happening would lead to reporting fatigue in member states by adding to the administrative burden that they are already under and could compromise existing mechanisms by establishing a parallel system leading to confusion and double standards. Any system that established or applied double standards would itself undermine the rule of law and legal certainty rather than acting as a safeguard.

3.3 Existing mechanisms in the EU

3.3.1 The Co-operation and Verification Mechanism (CVM). In relation to Bulgaria and Romania there is already a mechanism for monitoring the rule of law.¹¹ CVM is assessed in detail in the two national reports which highlight positive and negative aspects of the CVM. On the positive side, the CVM is a useful tool for putting political pressure on the two member states concerned to maintain the momentum of improvements that they had demonstrated prior to accession to the EU. On the other hand, it seems that the CVM is a relatively weak implement with limited powers to press states into reform.

The CVM identifies a set of benchmarks relating to the rule of law in each country. The difference in the benchmarks indicates fundamental differences in the nature of the rule of law problem each faces. The fact that even neighbouring countries with similar recent historical backgrounds experience failures in such a different way with Bulgaria suffering from acute problems arising from organised crime while in Romania the principle problem is one of corruption, demonstrates how hard it is to establish a ‘one size fits all’ approach to the monitoring and evaluation of the rule of law. On an EU wide basis, the issues faced by member states will be extremely varied and this point needs to be borne in mind.

Another lesson that can be learned from the CVM is the risk of creating a disconnect between evaluation and monitoring on a national level and reporting at the EU level. In the Bulgaria report, the problem of national authorities applying different parameters to national reporting than those applied to the CVM was highlighted as a problem that reduces the impact of the CVM on the ground. National evaluation mechanisms are crucial for guaranteeing the rule of law and it is, perhaps, through assessing and potentially harmonising national evaluation mechanisms across the EU in order to produce comparable data at the EU level that the EU could have the most positive impact on monitoring the rule of law in the EU.

The CVM, while unpopular with the governments that are subjected to it, is generally perceived as a good thing by the populations of those countries. The popularity of the CVM is linked to the process of accession and the perception of EU accession as a boon to the country and a step forward. While this type of mechanism may be accepted in new and acceding EU member states, in some of the older member states where populations are more ambivalent about the desirability of EU interference in their domestic affairs, a mechanism with such a politically high profile as the CVM may undermine rather than boost public confidence in the EU area of freedom, security and justice by confirming suspicions that the ‘tentacles’ of Brussels are reaching right into the heart of national sovereignty. The CVM is particularly tailored to the

¹¹ http://ec.europa.eu/dgs/secretariat_general/cvm/index_en.htm

challenges of recent accession and the political process of accession and should be considered in that context rather than as providing a model for general application.

3.3.2 Peer review. Peer evaluation of the national implementation of EU criminal justice instruments is already carried out at EU level,¹² most recently in the peer evaluation of the implementation of the European Arrest Warrant.¹³ Peer evaluation that is limited to the functioning of EU level instruments does not stray over the boundaries of subsidiarity and has a clear legal base, but it is limited in its ability to get to the heart of problems in the criminal justice system more broadly which may ultimately affect the functioning of those instruments according to the rule of law. In addition, the thrust of the peer evaluation seems to be an assessment of the speed with which warrants can be executed rather than an examination of the systemic problems that may lead to bottle-necks in the system.

It is interesting, for example, to look at the assessment of delays and difficulties arising from the execution of European Arrest Warrants (EAWs) from Poland in the UK. Criticisms are levelled at the UK authorities¹⁴ for reticence in executing warrants for minor offences while Poland is praised for making good use of the EAWs as it produces 20% of EAWs that circulate in Europe. The question of proportionality in issuing EAWs is mentioned in the Polish report but not enough emphasis is placed on the human rights implications of using the heavy-handed measure of an EAW to address minor offences such as the attempted theft of a bicycle or on the crippling effect on the EAW system of flooding it with a large number of requests relating to insignificant offences. While the UK was praised in its evaluation for the quality of the EAWs that it issues, the report goes on to criticise the UK for expecting equally high standards from other member states when it receives EAWs.¹⁵ This type of observation adds to the arsenal of critics who claim that EU cooperation in the criminal justice system will lead to a lowering rather than a raising of standards. It is counter-intuitive that in protecting the rule of law in the EU, a member state should be asked to lower its expectations and accept the lowest common denominator rather than to share its experience to encourage best practice. Both the issue of disproportionate interferences with human rights such as the right to liberty and the right to family life and the issue of inefficient use of resources impact greatly on the rule of law and when they are applied to cross-border criminal justice measures they have a direct impact on the rule of law in the EU in general.

The peer evaluation mechanism is not strictly independent. While it provides a useful snapshot of the way in which the EAW is being implemented across the EU, the reports are by nature limited as they must be agreed by unanimity, which means that they will not be published unless the member state under review itself agrees to the content of the report. This is a serious limitation in relation to transparency and public legitimacy of the review. This does not, however, prevent the process of evaluation itself highlighting issues beyond those that appear in the final report, which may give rise to some political pressure between member states in

¹² Joint Action of 5 December 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organised crime (97/827/JHA), OJ L 344/7 of 15 December 1997.

¹³ The majority of national reports are now available on the Council Register.

¹⁴ Evaluation Report on the Fourth Round of Mutual Evaluations “The practical application of the European Arrest Warrant and Corresponding Surrender Procedures between Member States” Report on Poland, Doc 14240/2/07, 14 December 2007, para. 7.3.2.2.

¹⁵ Evaluation Report on the Fourth Round of Mutual Evaluations “The practical application of the European Arrest Warrant and Corresponding Surrender Procedures between Member States” Report on the United Kingdom, doc 9974/2/07, 28 November 2007 para. 7.2.1.2 at p. 60.

Council. This is an important tool in monitoring aspects of the rule of law in the EU but is not enough to tackle the heart of the issues.

3.3.3 Commission monitoring. The Commission has also been responsible for monitoring the implementation of Framework Decisions in the third pillar. The way in which this monitoring has been carried out, however, raises two particular concerns. Firstly, the Commission's approach to monitoring implementation is very formalistic and does not address the underlying issues. The way in which the Commission has criticised the implementation of the European Arrest Warrant, which incorporates judicial scrutiny of human rights in the execution of a European Arrest Warrant¹⁶ indicates a disregard for safeguarding the rule of law more broadly and the principles that underpin it. Secondly, member state compliance with reporting to the Commission on the implementation of framework decisions has been patchy,¹⁷ which highlights the importance of member state engagement with a process of monitoring in order for it to be effective. If member states are suffering from reporting fatigue, having to put together reporting on similar themes but in different formats for various international monitoring mechanisms will not only be perceived as a waste of scant resources but may also result in conflicting results and recommendations emanating from different bodies, which itself would undermine legal certainty and the rule of law.

3.3.4 Justice Forum. The Commission has recently established a 'Justice Forum'¹⁸ to bring together European practitioners' organisations to discuss issues relating to EU criminal justice. This type of exchange forum may assist the institutions in identifying issues that are manifest on the ground but which may not appear obvious from an assessment relying on information provided by governments. The Justice Forum is a very new mechanism and currently has a relatively ad hoc membership. Whether or not it will develop into a body that would have a consistent role in monitoring remains to be seen.

3.3.5 European Court of Justice. In the EU context, the European Court of Justice is perhaps the most important guardian of the rule of law. Currently there is limited jurisdiction for the ECJ in the third pillar¹⁹ but the ECJ is increasingly willing to take a principled stand on rule of law issues as could be seen from the recent Kadi judgement,²⁰ which made it clear that respect for the rule of law and due process must be at the heart of EC legislation allowing for the establishment of lists of terrorist suspects whose assets must be frozen at EU level. The limited jurisdiction of the ECJ, however, means that the impact of ECJ judgements on the rule of law in the third pillar will not be felt as strongly as it is in the anti-discrimination field for example.

3.3.6 Eurojust and Europol. Eurojust and Europol are primarily concerned with coordinating cooperation between member states. Both produce annual reports²¹ that highlight successes and failures in cooperation and identify trends. While the reports of both bodies may be useful in identifying practical problems in member states' engagement in cooperation such as a lack of

¹⁶ Report from the Commission based on Article 34 of the Framework Decision of 13 June 2002 on the European Arrest Warrant and Surrender Procedures between Member States COM (2006) 8 Final, Brussels 24.1.2006 at para 2.2.1.

¹⁷ 16/02/2004. COM (2004) 54 final/2. Report from the Commission on the basis of Article 18 of the council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings

¹⁸ http://ec.europa.eu/justice_home/news/information_dossiers/justice_forum/index_en.htm

¹⁹ Article 35 TEU.

²⁰ Kadi v Council and Commission, Case C402/05 P, Judgement of 3 September 2008.

²¹ <http://www.europol.europa.eu> and http://www.eurojust.europa.eu/press_releases/annual_reports/2007/Annual_Report_2007_EN.pdf

continuity or resources provided to national members or issues such as delay or suspicion of corruption that might undermine international operations, their ability to monitor wider questions of the rule of law in member states is minimal.

3.3.7 OLAF. The mission of the European Anti-Fraud Office (OLAF) is to protect the financial interests of the European Union, to fight fraud, corruption and any other irregular activity, including misconduct within the European Institutions.²² OLAF is an administrative rather than a strictly criminal law agency and that distinction, along with its narrow mandate linked directly to the financial interests of the EU allows it to be targeted and effective in its investigations. OLAF annual reports may reveal problematic trends in particular member states which may be reflected more generally in national systems beyond the sphere of the financial interests of the EU. The OLAF report from 2007 states that “A significant share of OLAF’s new case records relates to a small number of countries: Approximately 60% of all new case records created in 2007 originated in 5 member states (Belgium, Bulgaria, Germany, Italy and Romania). In proportion to population, and with the exception of Belgium and Luxemburg, the highest occurrence of cases was to be found in Bulgaria, followed by Romania and Greece”.²³ This finding merits further exploration in relation to the standards of respect for the rule of law in those member states identified other than Bulgaria and Romania who are already subject to the CVM.

3.3.8 Fundamental Rights Agency (FRA)²⁴. The way in which the mandate of the FRA was limited²⁵ so that it cannot monitor fundamental rights in the third pillar is symptomatic of the problem in the EU of separating the intrinsically linked issues of fundamental rights and the rule of law. Although monitoring access to justice is within its list of strategic priorities, this cannot extend to criminal justice. The FRA is a new agency and the disputes over competence in its establishment indicate an unwillingness on the part of member states to give it sufficient powers to make waves where problems arise. The FRA is currently in its infancy but its monitoring remit has produced useful reports on homophobia and on discrimination against Roma in member states. Its efficacy will ultimately depend on its resources and its mandate – both in the hands of the member states.

3.3.9 The EU Network of Independent Experts on Fundamental Rights could be considered as a precursor to the FRA and the value of its reports is worthy of note. The Network did monitor the implementation of all aspects of the EU Charter of Fundamental Rights including those that touched on the third pillar and issued thematic reports and opinions²⁶ on specific points from an EU perspective. The quality and depth of the work of the Network is unquestionable but the absence of follow-up to the findings in those reports points to the heart of the problem of monitoring fundamental rights and rule of law issues in the EU – what exactly is the monitoring for?

3.3.10 The European Parliament. As the democratic overseer of developments in the EU, the European Parliament plays a crucial role in monitoring and raising awareness of failings in the respect for the rule of law in EU member states. The European Parliament can provide political

²² http://ec.europa.eu/anti_fraud/index_en.html

²³ http://ec.europa.eu/anti_fraud/reports/olaf/2007/en.pdf - Executive Summary.

²⁴ http://fra.europa.eu/fraWebsite/home/home_en.htm

²⁵ See criticisms from Amnesty International at <http://www.aieurope.be/static/html/pressrelease.asp?cfid=7&id=298&cat=4>

²⁶ See “The human rights responsibilities of the EU member states in the context of the C.I.A. activities in Europe” (“extraordinary renditions”). May 2006. Reference: CFR-CDF Opinion 3.2006.

drive for the assessment of the rule of law as well as democratic oversight of the quality of the monitoring and the follow-up mechanisms.

3.4 Existing mechanisms – Non-EU

3.4.1 United Nations. The United Nations, of which all EU member states are members, has a number of monitoring mechanisms that are relevant to the rule of law. The system of Universal Periodic Review (UPR) requires states to report to the Human Rights Council regularly on the respect for human rights within their jurisdiction and to respond to questions arising from their reporting. Thematic Special Rapporteurs on matters such as the independence of judges and lawyers, arbitrary detention, torture or human rights in the fight against terrorism also produce independent national reports that are a useful source of material on the general respect for the rule of law and human rights in member states.

The UN treaty bodies that hear individual petitions relating to alleged violations by member states of human rights treaties also provide information on the respect for the rule of law in EU member states. Recent examples include the Human Rights Committee ruling on violations by Belgium arising from its implementation of UN listing mechanisms for freezing terrorist assets²⁷ and the Human Rights Committee and Committee against Torture rulings on the violations of Sweden's human rights obligations in relation to its collusion in the rendition of Egyptian nationals to Egypt by United States and Egyptian security services.²⁸ Both sets of circumstances highlight severe breakdowns in the respect for the rule of law in 'old' EU member states. If the EU is serious about safeguarding the rule of law within its borders, it will need to monitor and act on the findings of such UN bodies.

3.4.2 Council of Europe. On a regional level, all EU member states are equally members of the Council of Europe. The rule of law including human rights and the efficiency of justice are at the heart of the Council of Europe's mandate. The EU cooperates closely with the Council of Europe in relation to acceding member states providing funding for technical assistance, but it seems that once a country joins the EU, cooperation between the organisations is very limited in practice despite the agreement of a Memorandum of Understanding on cooperation in 2007.²⁹ Although practical cooperation and detailed knowledge between institutions of each other's work is strikingly limited, the Council of Europe continues to monitor and evaluate all of its member states in various different fora and the vast amount of information it gathers on EU member states should not be overlooked in assessing the requirements for safeguarding the rule of law at EU level. The following is a non-exhaustive list of Council of Europe monitoring mechanisms that are relevant to safeguarding the rule of law in the EU:

3.4.2.1 European Court of Human Rights. The ECHR is a part of the EU *acquis*. Violations of the ECHR are therefore violations of the constitutional principles upon which the European Union is founded. Many EU member states, both 'old' and 'new' regularly find themselves the subject of rulings by the European Court of Human Rights including rulings that reveal systemic problems in their legal systems or penitentiaries. A recent judgement on Poland³⁰ singled out the overcrowded prison conditions in Polish gaols as being capable of amounting to a violation of the prohibition on inhuman and degrading treatment or punishment, in particular in relation to people with mental illness. A slew of judgements on the length of proceedings in

²⁷ Sayadi and Vinck v Belgium CCPR/C/94/D/1472/2006 of 9 December 2008.

²⁸ Alzery v Sweden, CCPR/C/88/D/1416/2005 of 10 November 2006 and Agiza v Sweden CAT/C/34/D/233/2003 of 20 May 2005.

²⁹ 23rd May 2007.

³⁰ Slawomir Musial v Poland, Chamber Judgement of 20 January 2009.

both criminal and civil trials in Italy in breach of the right to a fair trial³¹ demonstrate that serious issues relating to the rule of law are not a problem unique to recently acceded member states. Both national reports on Bulgaria and Romania reveal endemic problems in relation to the respect for the right to a fair trial and the right to property. Increasingly the European Court of Human Rights is using the Pilot Judgement Procedure (PJP)³² to identify systemic problems that arise from individual applications but which will affect a whole class of applicant. PJPs include recommendations to the government to address the problem and are designed to prevent the court being overwhelmed with individual applications arising from the same systemic problem. Violations of the ECHR based on systemic problems are exacerbated by a failure to execute the judgements of the Court despite, in many cases, political pressure and recommendations from the Council of Europe Committee of Ministers on the steps required for execution of judgements. The execution of judgements is crucial to the respect for the rule of law in the ECHR system and the EU could have a part to play in ensuring that its member states do execute judgements and address systemic problems giving rise to violations.

The respect for human rights is a core element of the respect for the rule of law, not a separate issue. Where EU member states are consistently having findings of violations in the European Court of Human Rights in relation to rights touching directly on the criminal justice system such as the right to a fair trial, the right to liberty, the prohibition on retrospective penalties or the prohibition on torture, inhuman and degrading treatment or punishment, this should be flagged at EU level as an indication of a problem relating to the rule of law which needs to be addressed. If there is an added value in monitoring at EU level, it may be in the additional political pressure that the EU can exert on its member states. The EU must, however, ensure that any steps taken at EU level to address problems identified by ECtHR violations and failure to execute judgements in a member state are not in conflict with recommendations and measures taken in the Council of Europe Committee of Ministers. Increased transparency in the workings of the Committee of Ministers has led to the creation of an annual report on the supervision of the execution of judgements,³³ which gives a clear picture of thematic and national problems arising from a failure to execute judgements as well as a list of recommendations made by the Committee of Ministers. The EU could be a useful forum for additional political persuasion or technical assistance for a member state but in approaching the issue of human rights protected by the ECHR, it must ensure consistency with the Council of Europe bodies responsible institutionally for enforcing the ECHR. Particular attention needs to be given to ensuring that protection for rights is optimised, not undermined by any EU measures taken in this field.

3.4.2.2 **CEPEJ.** The Committee for the Efficiency of Justice (CEPEJ)³⁴ conducts qualitative research on the justice systems of all 47 member states of the Council of Europe and produces biannual reports analysing the information gathered from a harmonised questionnaire as well as posting additional information gleaned from member states on its website. The information gathered by the CEPEJ is extremely wide-ranging, touching on a number of sensitive and complex issues that impact on the rule of law in member states, from evaluation mechanisms for

³¹ See “The European Convention on Human Rights – Achievements, Problems, Prospects”, S. Greer, (2006) Cambridge University Press: Cambridge, p. 103.

³² PJP or variants thereof have been used, inter alia, in cases against Poland, Slovenia, Slovak Republic and Italy - for a thorough explanation of the innovative development of PJPs see: <http://www.echr.coe.int/NR/rdonlyres/43C75D00-0F57-4176-8A7C-0AE28DBD4EE8/0/StockholmdiscoursFriborgh0910062008.pdf>

³³ http://www.coe.int/t/e/human_rights/execution/CM_annreport2007_en.pdf (next report due to be published 22 April 2009).

³⁴ http://www.coe.int/T/dghl/cooperation/cepej/default_en.asp

court users on a national and local level, through to the remuneration of judges and prosecutors to levels of legal aid and access to court per capita of population. Any monitoring of the rule of law at EU level should draw on the information gathered by the CEPEJ and not duplicate this already very detailed work. The breadth of data available from CEPEJ is astounding and could be used at EU level to identify standards that are common to EU member states or areas where there are serious difficulties in certain member states as well as issues where the divergence of practices makes it impossible to establish a level playing field at EU level.

The statistics and information obtained in the CEPEJ reporting process provide a good source of data as a starting point for EU level analysis of the situation in member states.

3.4.2.3 GRECO and Moneyval. The Council of Europe has two specialised monitoring mechanisms, GRECO³⁵ which monitors the situation relating to corruption in EU member states while Moneyval³⁶ monitors money-laundering provisions in those member states that are not members of the Financial Action Task Force (FATF). The reports of both of these mechanisms provide useful information for EU level follow up. Of particular interest is the experience of MONEYVAL in monitoring implementation of EC measures, the Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing. MONEYVAL actively monitors implementation of this EC Directive and applies the standards set out in the Directive even beyond the borders of the EC. Such scrutiny does not extend to EU member states that are members of the FATF.

3.4.2.4 Committee for the Prevention of Torture³⁷ and Commissioner for Human Rights.³⁸ Both of these bodies have a mandate to carry out country monitoring and regularly issue reports on EU member states as well as issuing general recommendations and thematic statements. The national reports of these two monitoring bodies provide an invaluable snapshot of the human rights issues in a member state and, in particular in relation to the CPT give a clear picture of the reality of detention conditions on the ground. If the EU wants to monitor the rule of law within its borders, it should have a close eye on reports from these mechanisms on member states and be prepared to draw information from those reports that is relevant for EU level action or would assist in identifying areas in which the EU should develop instruments.

At present it does not seem that there is sufficient coordination or awareness between the EU and the Council of Europe in relation to monitoring mechanisms despite the fact that the rule of law is one of the areas of cooperation highlighted in the Memorandum of Understanding (MOU) signed by the Council of Europe and the European Union in May 2007. In addition, there is a tendency in the EU to view human rights and the rule of law as distinct doctrines so that many of those working in the field of criminal justice will not be aware of the information available on human rights violations in the criminal justice sphere which undermine the respect for the rule of law and vice versa.

3.4.3 *NGOs* – In addition to regional intergovernmental mechanisms and agencies, many non-governmental organisations including human rights organisations and associations of legal professionals produce reports and briefings on national and thematic areas of concern. An additional benefit of NGO reports is that they may reflect the views and experiences of court users rather than the government focused view that can be seen in the reports of international

³⁵ Group of States against Corruption - http://www.coe.int/t/dghl/monitoring/greco/default_en.asp

³⁶ Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL) - <http://www.coe.int/t/dghl/monitoring/moneyval/>

³⁷ <http://www.cpt.coe.int/en/>

³⁸ http://www.coe.int/t/commissioner/default_en.asp

organisations. These reports should be considered as useful source materials for any monitoring carried out at EU level.

3.5 Opportunities for future mechanisms

3.5.1 Opportunities in the Lisbon Treaty – The Lisbon Treaty opens up new legal bases for monitoring in this sensitive area, but the current position regarding ratification of the Lisbon Treaty in Ireland means that the Lisbon Treaty cannot, at this stage, be relied upon to provide the answers to the question of monitoring of respect for the rule of law. If the Lisbon Treaty were to come into force, it would provide a clear legal basis for evaluation linked to mutual recognition through Article 70 of the Treaty on the Functioning of the Union. That evaluation would be based on cooperation between the Commission and the Council for in-depth assessment based on current practices in the field of economic and employment policy. Article 19(1) of the TEU would additionally establish minimum procedural guarantees and allow for an assessment of those guarantees in the field of judicial cooperation in criminal matters. Both of these provisions, however, would be limited for the first five years following the entry into force of the Lisbon Treaty.³⁹

The incorporation of the EU Charter on Fundamental Rights and Freedoms into the treaties through Article 6(1) of the TEU would provide another angle for assessing the rule of law in EU member states through compliance with the provisions of the Charter. This type of assessment could follow a similar format to that used by the EU Network of Independent Experts on Fundamental Rights in their reports. Monitoring could also be measured against the Charter on a thematic basis so that monitoring of rule of law related issues or criminal justice alone could be studied through the prism of relevant fundamental rights provisions.

3.5.2 Stockholm Programme. The Stockholm Programme provides a golden opportunity to take the next logical step in the creation of the area of freedom, security and justice to establish a mechanism for safeguarding the rule of law, both in terms of ensuring effective prosecutions and effective access to justice and protection of the rights of the defence. In addressing this issue, if the Stockholm Programme is to move forward from the past practices of paying lip service to fundamental rights by stressing their importance in the development of the area of freedom, security and justice, it will need to set out clear benchmarks and mechanisms for taking forward this agenda in practice. There are two pitfalls that the Stockholm Programme must avoid in this field if it is to provide an effective and practical roadmap. If it attempts to encompass everything in the remit of monitoring, it will overload the system and any resulting analysis will be likely to be superficial. If it is too narrow in its remit, there is a risk of missing the bigger picture and overlooking genuine problems that particular member states are facing. Any monitoring mechanism needs to be able to provide a global overview that can be followed up with a more in-depth analysis of issues that arise from that overview. The Stockholm Programme should also grasp the nettle of what to do with problems in respect of the rule of law that are identified through monitoring. A first step would be to re-open discussions on the use of Article 7 TEU or the establishment of safeguard provisions allowing for the suspension of instruments in relation to a member state where a particular problem in the rule of law or fundamental rights would make it unconscionable or illegal for other member states to continue to cooperate in a particular way with that member state.

3.5.3 Benelux initiative on peer evaluation of rule of law. The Netherlands has produced a provisional proposal with regard to enhanced rule of law assessment in the run up to the Stockholm Programme and this is the most elaborated proposal so far. It starts with an inventory

³⁹ Lisbon Treaty Protocol 36 on transitional provisions.

that gives rise to a selection of the main institutional and procedural obstacles to the functioning of the AFSJ, clearly linking the process into EU cooperation in criminal justice. This is followed by analysis and reporting with concrete recommendations to member states and a final stage of review of implementation of the recommendations with follow-up. The Dutch proposal is a welcome contribution to the debate and provides a very useful background to the issues of scope, methodology and response that arise out of considerations around evaluation of the rule of law in this field. Although the Dutch proposal stresses the importance of follow up and of avoiding duplication, particularly with the Council of Europe, it has not yet reached the point of clarifying how these two goals will be achieved. In particular the question of follow-up is crucial to the credibility and added value of the process. Follow up will require both time and action on the part of member states and the Union as a whole. Crucially, follow up may involve sanctions for failure to implement recommendations and this is the thorny political question that the Dutch proposal does not quite address head on.

3.5.4 Ongoing CVM. As the national reports on Bulgaria and Romania emphasise, there is an ongoing value in the use of the CVM in Bulgaria and Romania. The modalities of the CVM and in particular the strength of safeguards could be reassessed in considering how to apply similar mechanisms to future accession countries. A model similar to the CVM could also be applied to existing member states where particularly grave failures in the rule of law are identified through general monitoring. The nature of the CVM as a mechanism that is used in relation to states suffering from particular problems rather than a mechanism applied across the board adds to its strength. The CVM should, therefore, continue to be used in exceptional circumstances and tailored to meet the requirements of a particular country rather than being applied in a blanket approach to the rule of law in all member states. The exceptional nature of the mechanism is a crucial part of its potential for leverage and should not be diluted.

3.5.5 Enhanced cooperation with the Council of Europe. The Memorandum of Understanding⁴⁰ between the EU and the Council of Europe calls for closer cooperation between the organisations taking account of their comparative advantages, searching for added value and making better use of the existing resources, fostering synergy and avoiding duplication.⁴¹ This cooperation requires concrete steps to be taken to ensure that it is a practical development rather than a political goal. Any monitoring of the rule of law at EU level should use the data collected at the Council of Europe level as the basis for an initial assessment. This requires thorough knowledge of and regular exchange with all the relevant bodies and mechanisms at Council of Europe level rather than an ad hoc recognition of the existence of the Council of Europe and its valuable work.

The EU institutions and the Council of Europe institutions should engage in a dialogue at a technical level on the practicalities of enhanced cooperation. A number of issues need to be explored in this context. The Council of Europe monitoring bodies may need additional funding to assist them in carrying out their work. EU funding for Council of Europe technical assistance in relation to a country should not automatically cease on that country becoming a member of the EU if there is a real ongoing need for technical assistance. There is a danger that recommendations issued by the Council of Europe Committee of Ministers may be contradicted in the context of the EU – coherence and consistency is a crucial part of the rule of law. Political pressure exerted at EU level may serve to further the goals of the Council of Europe and help to push states to meet Council of Europe standards. The Council of Europe has traditionally been a standard-setting organisation in many fields relating to the rule of law. While it is legitimate for the EU to explore commonalities and shared standards amongst its member states that justify

⁴⁰ Dated 23 May 2007.

⁴¹ Ibid, Para 12.

the increased cooperation that they enjoy, there is a danger that if the EU strays into the realm of standard-setting in this field, EU standards that are subjected to the requirement of unanimity may be lower than the standards imposed on member states by the ECHR according to developing jurisprudence. Enhanced cooperation between the Council of Europe and the EU should explicitly recognise the principle of non-regression, that is that any standards relating to the protection of rights and procedural safeguards that are set at EU level are only valid insofar as they provide added protections to the individual over and above those afforded by the ECHR and its developing jurisprudence. Human rights instruments are living instruments and there is a danger that in trying to pin down human rights standards linked to the rule of law at any one time, the progressive development of protections will be frozen in the EU context.

The experience of the Council of Europe in monitoring the rule of law and related issues should be both recognised and nurtured by the EU in its quest to safeguard the rule of law within its own narrower borders. One clear way in which the EU can support the work of the Council of Europe in this way is by reinforcing decisions taken by the Council of Europe Committee of Ministers in relation to the non-execution of judgements of the European Court of Human Rights.⁴² Two recent examples of Interim Resolutions of the Committee of Ministers recommending changes of law or judicial and administrative practices directly concern EU member states.⁴³ The EU should be aware of such measures in the Committee of Ministers and be prepared to provide political follow-up where failures are identified in EU member states.

3.5.6 Enhanced mandate of FRA. It is early days to assess the efficacy of the FRA, but if the EU decides that there is a need to monitor the respect for the rule of law in the third pillar, it would seem perverse to prevent the FRA from fulfilling that role by creating a new and parallel monitoring system. Duplication is the bane of every international organisation whose remit overlaps with others, but creating duplication at the heart of the EU itself would be unforgivable. The abolition of the pillar structure should the Lisbon Treaty come into force would put an end to the restricted mandate of the FRA. If a decision is taken to move forward with monitoring on the rule of law in the area of criminal justice, it would be patently ridiculous to stand on ceremony and prevent the FRA from taking on that role pending ratification of the Lisbon Treaty by all member states. Such nit-picking could only bring the EU area of freedom, security and justice into disrepute. If there are concerns about the strength of the FRA as an agency to address this issue, it is in the hands of member states to strengthen the powers and the resources of the FRA to meet any perceived need in this area.

3.5.7 NGOs. Civil society can provide a wealth of independent information on the state of the rule of law and the protection of human rights in EU member states but there is a need for capacity building supported by funding from the EU to optimise the potential for NGO monitoring and help in the development of NGOs on the national level. NGOs not only provide invaluable monitoring material but are crucial in the process of holding states to account and driving for change on the national level.

4. What can the EU do to enforce respect for the rule of law within its borders?

It is all very well to discuss monitoring of the respect for the rule of law in the EU, but there is no point in finding out what is happening on the ground if there is no intention of doing anything about a problematic situation if it is discovered. If the aim of monitoring the rule of

⁴² More information can be found here: http://www.coe.int/T/E/Human_Rights/execution/

⁴³ CM/ResDH(2009)42 concerning the length of proceedings in Italy and CM/ResDH(2009)44 assessing the adequacy of investigations into deaths in Northern Ireland in which the security forces were involved.

law in member states is to enhance mutual trust, there must be a means of addressing issues which, once uncovered, undermine that trust. It is naïve to believe that monitoring of the situation will confirm that the mutual trust underpinning mutual recognition was well-founded. There is a distinct danger that in pulling back the veil, the reality of the Union that we have entered into will come as a terrible shock. Just as a company director will share the criminal responsibility if he turns a blind eye to the criminal wrongdoings of a co-director, a judge executing an EAW cannot legally ignore the risk of violating the prohibition on inhuman and degrading treatment, given the prison conditions in a state requesting a person's surrender. Monitoring of the rule of law in the EU without a mechanism for addressing problems would be more likely to demolish the system of mutual recognition than to reinforce it.

The Dutch proposal on the monitoring of the rule of law in the field of criminal justice places a lot of emphasis on 'follow-up' but it is not clear what such follow-up would involve. The following are some ways in which the EU could provide useful follow-up.

4.1 Political pressure

Political pressure may be put on member states that are failing to respect minimum standards through naming and shaming in Council but without any real prospect of action beyond that, it is difficult to see how this would improve greatly on the current situation or why that kind of pressure would be any more effective than the political pressure applied in the context of the Council of Europe Committee of Ministers. Where issues of non-execution of judgements of the European Court of Human Rights are raised by the Committee of Ministers, EU level political pressure for change could provide additional weight but should not be seen as an alternative to the Committee of Ministers. While criticism in the CVM context of Bulgaria and Romania creates political pressure from the press and public at a national level, it is not certain that such pressure would arise if all member states were subject to such monitoring. The pressure created by the CVM on the governments of Bulgaria and Romania arises, in part, from the stigma of being singled out from the other 25 as well as the political linkage made between the CVM and funding from the Commission. In the absence of these two factors, naming and shaming based on monitoring would be unlikely to make a significant difference to the status quo. One area where the EU could assist in increasing political pressure on member states to improve respect for the rule of law and human rights is through capacity-building initiatives for NGOs to raise awareness of the issues, offer technical assistance and push for change on a national and European level.

4.2 Accountability

Follow-up requiring states to account for the improvements that they have made in response to criticisms or recommendations arising from monitoring will only be effective if member states really buy into the process and if there will be some form of response from the EU if adequate measures have not been taken. Many issues arising from the respect for the rule of law require a long-term approach to resolution. Improving the professionalism of judges, prosecutors and lawyers or addressing serious infrastructure problems in courts, prisons and police stations will require commitment over many years and cannot be addressed with a quick fix. Changes in legislation may appear to address an issue but failures in judicial culture may mean that the amendment has little impact on the practice. Just as the national reports identify the need for a long term approach to the problems of Bulgaria and Romania through extension of the CVM, follow-up to monitoring rule of law issues in all member states will require a serious commitment of time and resources on the part of the EU.

4.3 Financial support and technical assistance

Many of the problems faced by states in the context of the rule of law are based on underlying problems of a lack of resources or professional development rather than on bad faith. Some problems such as prison conditions may be addressed on the one hand through exploring alternatives to pre-trial detention or sentencing practices to reduce prison populations or training prison staff to incorporate adequate procedures and respect for human rights into their practices, but on the other hand, may require significant funding to build new prisons and address the problem at a basic infrastructure level.

The EU needs to explore ways of providing significant amounts of financial support to states to address major infrastructure problems that may undermine the state's ability to adequately safeguard the rule of law and human rights. Funding for training or for twinning projects will not be enough to address problems such as the need for new court buildings or a significant increase in the legal aid budget. The reality of respect for the rule of law, efficient and effective policing and prosecutions and the guarantee of a fair trial is that it costs a lot of money. Providing funding for criminal justice infrastructure in a country, however, would need to be dependent on a positive assessment of the state's ability to manage resources.

The Bulgarian government recently suggested⁴⁴ that one way of tackling its problems with the rule of law would be to hand over the responsibility for improving departments to foreign officials who would be seconded to the Bulgarian government as a form of technical assistance. This idea goes against the notion of state sovereignty, democratic governance and accountability that go hand in hand with the rule of law – a government cannot simply be taken over by foreign experts to resolve its problems. The suggestion does, however, reflect the need for ongoing technical assistance in some states where officials do not yet feel confident in their ability to put in place systems and procedures to guarantee the rule of law. The EU should explore ways in which it could provide technical assistance and peer support in addressing failures in the rule of law in a State without overstepping the appropriate boundaries of subsidiarity and state sovereignty, which are crucial to the legality and legitimacy of EU activities in this field. Technical assistance may also be useful in assisting a state to manage EU funds.

4.4 Financial penalties

Although not legally an element of the CVM, the political decision to suspend Commission funding to Bulgaria because of failures in progress under the CVM has proved to be a useful tool for leverage under the CVM. In relation to OLAF's work, where investigations have demonstrated irregularities in the use of EU funds in a particular area, states have, on occasion, returned those funds. Clearly, where EU funding is directly involved in an area where major irregularities are found, it is legitimate for the EU to suspend that funding or demand a refund. It is less clear, however, where suspension of EU funding is being used as a stick to push for improvements in an unrelated area. The use of financial penalties in general should be treated with caution in the rule of law sphere as suspending funding may exacerbate problems that are themselves related to limited resources.

4.5 Suspending the application of EU instruments

The possibility of introducing safety mechanisms into EU instruments so that the application of a particular instrument is suspended in relation to a member state where problems identified in

⁴⁴ *The Economist*, 19 March 2009 – “Bulgaria and the EU – A new colonialism” http://www.economist.com/world/europe/displaystory.cfm?story_id=13334121&CFID=51989800&CFTOKEN=38230557

that State make the functioning of the instrument impossible or would compromise the legality of cooperation with that State could be considered. In relation to asylum policy in the first pillar, the suspension of the Dublin II Convention by some Member States in relation to Greece because of concerns about the way in which Greece was handling asylum applications⁴⁵ and subsequent proposals from the Commission⁴⁶ to amend Dublin II to allow for temporary suspension of the Convention could provide a model for suspending criminal law cooperation instruments.

There are particular problems associated with suspending criminal law instruments, however. The principle of reciprocity and the need for cooperation tend to push states towards more rather than less cooperation. If, for example, the Framework Decision on the European Evidence Warrant was suspended in relation to a member state because of failures in that member state's ability to address organised crime so that its evidence collection procedures were compromised, other member states would be impeded in their own investigations into organised crime networks with links to the suspended member state. A more pragmatic approach would require technical assistance to improve internal procedures in the requested state and an enhanced scrutiny by the requesting state's authorities rather than a straight suspension of the instrument.

A 2005 decision by the German Constitutional Court⁴⁷ suspending the European Arrest Warrant in relation to the surrender of German nationals due to the Court's concerns that the way in which the EAW had been implemented in German law had not gone far enough in protecting the constitutional right to German nationals not to be extradited in accordance with the Framework Decision, resulted in the suspension of the EAW in relation to requests from Germany by both Spain and Hungary on the basis of the principle of reciprocity until the matter was addressed by new implementing legislation in Germany. This case was met with concern from the EU about Germany's implementation of the EAW but not by any assessment of the standards of respect for the rule of law in other countries, which formed the background for concerns in Germany that some EU member states' systems provide a lesser standard of procedural safeguards. The grounds for suspending a member state from the application of an instrument would need to be clearly considered – does the problem for cooperation lie with the state that refuses surrender on the grounds of human rights concerns, or with the requesting state whose standards give rise to those concerns? The credibility of any mechanism that allowed for the suspension of an instrument of mutual recognition in relation to a particular member state would depend on the criteria for suspension being clearly based on the principle of respect for human rights, rather than respect for the principle of mutual recognition.

4.6 Article 7 TEU

The ultimate tool for addressing failures in the rule of law in a member state is found in Article 7 TEU, which contains both a preventive mechanism where there is a clear threat of a serious breach of the common values of the Union (including the rule of law) and a remedial measure, including the possibility of penalties or a diplomatic solution where there is a serious and persistent breach.

The Article 7 mechanism was clearly designed to address the problem of serious failures in the respect for the rule of law and human rights in member states and was deemed necessary for the credibility of the EU in this sphere. Unfortunately there has been very little serious discussion as

⁴⁵ See AI letter of 28 March 2008 at www.amnesty-eu.org

⁴⁶ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0820:FIN:EN:PDF> Article 31 in particular.

⁴⁷ Judgement of 18 July 2005 2 BvR 2236/04.

to the conditions in which Article 7 action, whether preventive or remedial would be appropriate. The reluctance to discuss the possibility of using Article 7 in serious terms gives the impression that Article 7 is really a dead letter in the EU legislative framework. Any serious approach to safeguarding the rule of law in the EU that goes beyond window-dressing must explore the ways in which both the preventive and remedial aspects of Article 7 could be used to address serious failures if they are identified. A first step down that road would be a response from the Council to the Commission Communication of 2003⁴⁸ which remains, so far, unanswered.

5. Conclusions and Recommendations

5.1 Conclusions

The Stockholm Programme provides a golden opportunity to tackle the gap between rhetoric and reality in relation to the rule of law within the EU. There is a need for an assessment of the rule of law within the EU, in particular in the criminal justice sphere where policy developments are not accompanied by accountability mechanisms. The EU needs to take a look at the standards applied in member states to identify the norms that are generally assumed and to make sure that those standards are met in all member states. The credibility of the development of the area of freedom, security and justice and the ongoing project to protect the rights and freedoms of people within the EU requires the EU to take stock of the internal situation as it is, before continuing the expansion of the EU. It is crucial that the valuable support for the rule of law, the protection of human rights and the careful scrutiny of standards in accession countries is not simply a hoop to jump through to obtain membership, only to be dropped abruptly on accession. Safeguarding the rule of law in the EU will require a commitment to steps to address failures in the rule of law where they are identified in member states, both ‘old’ and ‘new’.

The Dutch proposal for enhanced rule of law assessment in the criminal justice sphere provides a useful platform for discussion of the complex question of how to assess the rule of law in the EU. While the proposal stresses the need to avoid duplication, it needs to ensure that any assessment uses the resources and information available from the Council of Europe and UN monitoring bodies as well as NGO reports as a starting point for EU level monitoring, not simply as an additional tool. The experience of the CVM in Bulgaria and Romania demonstrates the need for tailored benchmarks to address rule of law issues in member states with very different problems, enhanced assessment of the rule of law cannot usefully apply a ‘one-size-fits-all’ approach. Enhanced assessment of the rule of law in the EU will need to be a rolling process, assessing information and reports on particular member states as they are published in order to identify country specific acute problems. Monitoring of the rule of law in the EU should take a twin track approach, being able to identify and address acute failures in the rule of law in member states which need to be addressed (perhaps through a more in depth assessment such as the CVM mechanism) and also monitoring for thematic issues that could benefit from EU level policy development. The benefits of a CVM style approach can only be maintained if the mechanism is used to address specifically identified failures in particular member states but not as a general monitoring mechanism for all member states.

Monitoring of the rule of law in the EU cannot coherently be separated from the monitoring of human rights. The Fundamental Rights Agency is the obvious body to take EU level monitoring forward. If the EU decides to establish a system of enhanced assessment of the rule of law, it

⁴⁸ Communication from the Commission to the Council and the European Parliament on Article 7 TEU. Respect for and promotion of the values on which the Union is based. Brussels, 15.10.2003, COM (2003) 606 final.

will need to expand the mandate of the FRA. This will also require adequate resources to allow the FRA to develop a systematic, effective and independent monitoring system.

There is no point in monitoring the rule of law in the EU unless there is the political will to address deficiencies if they arise. The EU needs to consider the possibility of providing significant resources and technical assistance to states that encounter systemic problems. Ultimately, assessment that identifies failures has to be capable of leading to sanctions. A serious consideration needs to be given in the context of the Stockholm Programme to the use of Article 7 TEU both as a preventive mechanism and as a punitive mechanism. If the time is ripe for identifying the EU's common standards in concrete terms, it is also time to identify the consequences of the failure to meet those standards.

5.2 Recommendations

- To avoid the dissipation of resources, monitoring of the rule of law in the EU should focus on criminal justice as this is an area with limited accountability mechanisms in the EU institutional framework.
- Assessment of the respect for the rule of law should use information from existing monitoring mechanisms, particularly the Council of Europe and United Nations mechanisms as a starting point for gathering information on the rule of law in the EU.
- More detailed and systematic technical level cooperation and exchange of information between organisations should form the basis for developing EU level assessments.
- The mandate and resources of the Fundamental Rights Agency should be expanded to allow it to take the lead on compiling reports based on an assessment of the respect for the rule of law in the EU.
- The Commission should develop the role of the Justice Forum as a source of additional information and debate on issues that arise from monitoring.
- Monitoring should aim to identify EU level common standards against which member states' performance may be assessed.
- Standardisation of national monitoring mechanisms could assist in gathering comparable data from all member states.
- Monitoring should identify areas of divergence or convergence in member states' practice that could give rise to or rule out EU level policy making.
- Monitoring should be able to identify serious systemic failings in a member state.
- Enhanced mechanisms similar to the CVM should be reserved for exceptional circumstances where serious failings are identified in a member state.
- The Council should respond to the Commission Communication on the implementation of Article 7 TEU.
- The European Parliament should further consider its role in implementing Article 7 TEU.
- The Council of the EU and the European Parliament should monitor the execution of judgements of the European Court of Human Rights through the work of the Council of Europe Committee of Ministers and exert political pressure on member states that are failing to fulfil their obligations.
- EU funding should be made available to assist member states in addressing structural shortcomings in the criminal justice system.
- Technical assistance should be provided to member states where failings in the respect for the rule of law are identified.

SAFEGUARDING THE RULE OF LAW IN AN ENLARGED EU: THE CASE OF BULGARIA

IVANKA IVANOVA*

1. Introduction

Over the past decade, Bulgaria has seen the most dynamic economic growth in its entire history. The country now has stable financial institutions and, as of 2008, was still an attractive place for foreign investment. Bulgaria remains the poorest country in the EU, but its citizens are richer than they were 10 years ago. Levels of unemployment in 2008 were still very low, despite the global financial crisis. Between 1997 and 2008, unemployment dropped by almost 10%. Despite this overall positive picture, at the time of its accession to the EU in 2007, Bulgaria was regarded as the most corrupt member state,¹ with reform of the judiciary and law enforcement institutions incomplete and amid growing concerns that organised crime and corruption influence its political and economic development.

1.1 Public perceptions of the rule of law and trust in the judiciary and law enforcement institutions

Public perceptions of the performance of national judiciary and law enforcement institutions correspond with international evaluations. Public confidence in national institutions is very low; the courts and parliament compete for the lowest ranking. Some 75% of Bulgarian citizens do not trust the National Parliament (compared to an average of 54% for the EU25).² Only 20% say they trust the national judiciary (compared to an average of 48% for EU25). Public confidence in institutions seems to be declining progressively in inverse proportion to economic growth and foreign investment trends.

One reason is that the judiciary and law enforcement are perceived as corrupt and ineffective. Corruption indexes³ as far back as 2000-2002 already showed an interesting dynamic: whereas people previously had seen lower- and middle-ranking public officials as the most corrupt, nowadays they saw the judicial and top political office-bearers as the worst offenders.

In 2000, judges and prosecutors were perceived as corrupt, but much less than doctors, police officers and customs officers who traditionally top such lists. In 2000-2002, even university professors were considered more corrupt than members of the judiciary. Teachers were at bottom of the list. At the time, the court administration was also perceived as very corrupt; the number of bribes demanded by court administration officials in 2000 was almost three times that by judges, prosecutors and investigators.

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¹ Transparency International corruption perceptions index for 2008 (www.transparency.org).

² Quoted from article of Boryana Dimitrova in *Sastoyanie na obshtestvoto*, Open Society Institute – Sofia, 2008, p. 17.

³ Corruption and Anti-Corruption Policy in Bulgaria, OSI, EU MAP, 2002, Tables 3 and 4, pp. 88-89 (http://www.eumap.org/topics/corruption/reports/international/sections/bulgaria/2002_c_bulgaria.pdf).

Subsequent developments in public perceptions⁴ (from 2000 to 2002) show a marked decline in perceptions of corruption among police officers, municipal employees, tax officials and the court administration. No change was registered with regard to corruption among doctors, while there was a visible increase in perceived corruption among judges, prosecutors, investigators, ministry officials (almost three times higher) and members of parliament (more than double).

As of 2007, perceptions⁵ of corruption in the judiciary and law enforcement were the only ones to increase sharply compared to all occupations monitored; in the 2007 rating, judges ranked as the second-most corrupt occupational group after customs officers. Prosecutors, police officers and lawyers occupied, respectively, 3rd, 4th and 5th. These professions already were perceived as more corrupt than doctors and tax officials.

These trends confirmed the European Commission's conclusion that in the period before EU accession, the Bulgarian government had given more priority to steps against small-scale corruption than to curbing high-level political corruption. Before 2007, corruption in the tax administration, traffic police and municipal administration had been brought under control and even curtailed; but nothing was done to curb corruption in public health, and the government deliberately tolerated the gradual increase in high-level corruption in politics, the judiciary and law enforcement.

Corruption within the judiciary can only partially explain the low public confidence in institutions. The relationship between the public and the judiciary in Bulgaria is rather complex. A survey⁶ of administrative and civil law issues that Bulgarian citizens had to resolve in the past three and half years showed that 46% of Bulgarians had been faced with what they would describe as "an important legal issue". Most of these issues (22%) involved disputes over purchased goods and services (some of them typical consumer protection cases, others related to contractual law). The second-most important group of legal issues (15%) involved disputes between neighbours and condominium property cases. The third-largest group was legal issues involving vulnerable social groups attempting to access welfare and social security benefits they were entitled to. In more than 25% of these cases, the wronged party took no legal action. This passive attitude can be explained, on the one hand, by a strong conviction that nothing can be done to solve the problem, and on the other, by a lack of financial resources (in 13% of the cases), and doubts about the courts' impartiality (in 11% of the cases). Only 7% of all issues reached the courts. This shows that, apart from corruption, Bulgarians also face problems arising from the accessibility and efficiency of the justice system.

Public perceptions that the judiciary is corrupt and ineffective are not necessarily based on first-hand experience of courts. In the past year, only 14% of Bulgarians have turned to the courts, either to access administrative services or to appear in litigation.⁷ We could assume that public perceptions about the quality of the justice system are strongly influenced by the dominant public discourse, the media and the government's attitude towards courts. Judges seldom make public statements, but politicians often do. The government, however, is also a litigant like any other party. One of the most distinctive features in the post-communist development of Bulgaria's legal system is the increasing importance of administrative justice and the growing number of government decrees and regulations reviewed in court. Judicial review is neither

⁴ Ibid.

⁵ Center for the Study of Democracy (CSD), *Spread of Corruption in Bulgaria in 2006 – 2007*, Table 2.

⁶ Data collected through a public opinion survey in 2007, published in *Pravni problemi na bulgarskite grajdani*, OSI – Sofia, 2009.

⁷ Data from a public opinion survey of Open Society Institute – Sofia in 2008 (unpublished).

popular, nor well received by the government, and this should be taken into account in every analysis of the poor public image of Bulgaria's courts.

1.2 Anti-corruption activities – national institutions, international evaluations and perceptions

Before EU accession, Bulgaria developed a set of legislation, strategic planning instruments and national institutions to address corruption and promote good governance. Among the most important legislative amendments were those removing judiciary members' immunity from prosecution,⁸ obliging those in top political and administrative positions and members of the judiciary to disclose their assets, and regulating conflicts of interest in the state administration. Parliament, the government and the Supreme Judicial Council (SJC) each established an anti-corruption commission. The first two have mostly monitoring and coordinating functions. The institution of the Ombudsman was created with the deliberate aim of promoting good governance. All this was included in two national strategies against corruption and two additional strategies (adopted in 2004 and 2009 by the SJC) to fight corruption in the judiciary.

As stated above, these measures were mostly declarative in nature and affected only petty corruption. International monitoring organisations recorded worsening corruption at high political levels and in the judiciary. First, in 2008 Transparency International reported a decline in the corruption perception index for Bulgaria.⁹ Then in January 2009, Freedom House¹⁰ reported that political rights in the country were deteriorating because of persistent problems with corruption and organised crime.

On the national level, the relative weight of corruption against other social problems in 2007 and 2008 increased, becoming the most important social problem. The other major social problems of concern were poverty and unemployment. In 2006, corruption ranked second, in November 2004 and in 2005 it ranked third, while in March 2004 it was even fifth in importance. These results were widely interpreted as indicating an actual increase in corruption in Bulgaria in the years after EU accession.¹¹ However, if these findings are compared with available data on economic growth and low unemployment, it would be more realistic to say that the relative weight of corruption increased because other problems became less pronounced. One would assume that in a relatively well-off society, justice and security would increasingly dominate the list of important social problems and would therefore increasingly influence the political agenda.

An actual breakthrough against corruption can be marked only in 2008 when, at last, steps were taken to redistribute the balance of power in law enforcement and to strengthen the investigative functions of police and the prosecution. A new agency (the State Agency for National Security – SANS) was created to investigate organised crime and high-level corruption. The Agency has mainly intelligence functions, but its participation in joint investigations with the police and prosecution allows it to contribute effectively to most current high-profile investigations. This was accompanied by a restructuring of the Prosecutor-General's Office to set up a new

⁸ Amendment to Art.132 of the Constitution of the Republic of Bulgaria, published in the State Gazette No. 85/ 2003. Further amendments to the same text published in the State Gazette No. 12/ 2007.

⁹ Transparency International corruption perceptions index for 2008 (www.transparency.org).

¹⁰ Freedom House, Nations in Transit report 2008 (http://www.freedomhouse.hu/images/fdh_galleries/NIT2008/NT-Bulgaria-final.pdf).

¹¹ See the analysis of Radostina Angelova "Predizborni urotzi", published in *Capital Newspaper*, issue 33 of 15 August 2008 (<http://www.capital.bg/show.php?storyid=538761>).

specialised division to monitor and provide guidance in high-profile corruption and money laundering cases.

A newly established Inspectorate within the Supreme Judicial Council monitors the development of high-profile criminal cases and analyses the reasons for delays in court proceedings. This type of internal monitoring and reporting procedure can contribute in a very positive way to the disciplinary practice of the SJC and to the quality of future legislative amendments related to the criminal process.

1.3 Adherence to international instruments to prevent corruption and protect the rule of law

Bulgaria signed and ratified the Council of Europe's Criminal Law Convention on Corruption¹² and the Civil Law Convention on Corruption,¹³ as well as the Additional Protocol to the Criminal Law Convention on Corruption and the GRECO Statute. The latest available GRECO evaluation for Bulgaria dates from 2005. It includes 11 recommendations to Bulgaria, and as of 2008 most of them were implemented by the government.

In 2003, Bulgaria signed the United Nations Convention against Corruption and the United Nations Convention against Transnational Organised Crime. Thus, Bulgaria is a party to the main international legal instruments in the area of fighting corruption and organised crime. This was an explicit requirement for membership in the Council of Europe, and also a specific recommendation of the European Commission to EU candidate countries.

1.4 Engagement with the EU to support the rule of law, pre- and post-accession

In the period before and immediately after EU accession, Bulgaria undertook complex and, in some areas, profound legislative reforms. Three amendments to the Constitution were justified by EU accession goals. New criminal, administrative and civil procedure codes were adopted. New laws on the structure of the judiciary and the Ministry of the Interior were approved.

During the pre-accession period, the European Commission, the United States and some EU member states (the United Kingdom, France, the Netherlands, Spain and Germany) played an important positive role in reforms to build the rule of law in Bulgaria. They managed a dynamic process to transfer knowledge and good practice that triggered reforms in the Bulgarian judiciary and police service. This was done with the support of the EU PHARE Programme or through international cooperation programmes of the respective governments.

During the EU accession of Bulgaria, official negotiations with the European Commission included the monitoring of political criteria for membership (including rule of law) and strict scrutiny of progress in adopting the *acquis communautaire* (Chapter 24 of the *acquis* deals with justice and home affairs issues). The last reports of the European Commission on the advancement of Bulgaria towards EU accession already showed obvious concern that, while Bulgaria was performing satisfactorily in adopting the *acquis communautaire* under Chapter 24, corruption and organised crime were a growing threat to the rule of law and to the successful integration of the country into the EU.

¹² Ratified by the Bulgarian parliament on 12 April 2001, published in the State Gazette No. 73 of 26 July 2002.

¹³ Ratified by the Bulgarian parliament on 10 May 2000, published in the State Gazette No. 102 of 21 November 2003.

These concerns led to the inclusion of specific safeguard clauses in Bulgaria's EU Accession Treaty. Article 37 contains provisions that can be enacted during the first three years of accession if Bulgaria manifests shortcomings in the transposition or the implementation of EU instruments for mutual recognition in criminal law. In such a case the European Commission can take measures, including temporarily suspending the application of specific EU instruments for Bulgaria.

With relation to the above-mentioned safeguard clauses, the European Commission and the Bulgarian government agreed on a Cooperation and Verification Mechanism (CVM) aimed at tracking developments in judicial reform and in the fight against corruption and organised crime in the first three years after accession. Developments are measured against six benchmarks:

- Adopt constitutional amendments removing any ambiguity regarding the independence and accountability of the judicial system.
- Ensure a more transparent and efficient judicial process by adopting and implementing a new Judicial System Act and the new Civil Procedure Code. Report on the impact of these new laws and of the Penal and Administrative Procedure Codes, notably on the pre-trial phase.
- Continue the reform of the judiciary in order to enhance professionalism, accountability and efficiency. Evaluate the impact of the reform and publish the results annually.
- Conduct and report on professional, non-partisan investigations into allegations of high-level corruption. Report internal inspections of public institutions and on the publication of assets of high-level officials.
- Take further measures to prevent and fight corruption, in particular at the borders and within local government.
- Implement a strategy to fight organised crime, focusing on serious crime, money laundering as well as on the systematic confiscation of assets of criminals. Report on new and ongoing investigations, indictments and convictions in these area.

The main declared goal of the benchmarks is curbing graft and organised crime and putting high-profile figures from the political and/or the criminal underworld in jail. Indicators include arrests, criminal charges and convictions against the said figures. An additional indicator is the forfeiture of criminal assets.

These indicators in fact only register developments in the integrity and reliability of Bulgaria's judiciary and law enforcement institutions. From the perspective of successful EU integration, this is, of course, very important. Bulgaria can accomplish the potential of its EU membership only if its judiciary and law enforcement institutions prove their integrity and professionalism. At the same time, political debate as to what exactly constitutes Bulgaria's problem suggests that organised crime and corruption are not regarded as criminal justice issues alone. The European Commission and other EU member states repeatedly have expressed concern that organised crime and corruption in Bulgaria have reached such a scale that they influence the political process and distort the workings of institutions in a representative democracy. Various signals from within and outside the country also indicate that the problem transcends being a mere criminal justice issue.

The CVM was agreed on to serve two purposes simultaneously – monitoring and cooperation. Cooperation is given mainly outside of the CVM, through advisors from other EU member

states who work on a temporary basis with specific administrations¹⁴ in Bulgaria. This approach constitutes to a certain extent a continuation and replication in multiple small scales of the approach used with the PHARE Programme. However, there are three problems with it. First, with reform goals defined as broadly as “fighting corruption and organised crime”, such advice risks being too general, and useless unless it is based on detailed knowledge of local circumstances. Second, the Bulgarian administration is very selective in following advice, especially when high-ranking political leadership has to take unpopular or painful decisions. This was also true during the pre-accession period, but PHARE projects had the comparative advantage of providing knowledge and good practice to a large number of medium-level decision-makers as well. Third, even if we assume that advice is followed, the question remains whether there is a coherent and clear concept of the rule of law that the European Commission is exporting, and how this is defined. The pre-accession thinking relies on a mechanical ‘export’ of the rule of law: Bulgaria gets advice from various EU member states on how to reform its institutions, based on the organisation of the equivalent institution in the respective member state. This notion of the rule of law assumes that if one puts together the police service and the Supreme Judicial Council of Spain, the German border police, the Bavarian Prosecution Service and Her Majesty’s Customs Services, the result will somehow amount to a rule of law country. This is yet to be proven.

The method of monitoring under CVM seems also to replicate the monitoring method that was used before EU accession to register progress in adopting the *acquis communautaire*. Periodically, the Bulgarian government submits reports, and experts are sent to investigate developments; very little consideration is paid to critical analysis of reports produced by national institutions and other international monitoring systems as the World Bank, the Council of Europe and Freedom House. The final versions of monitoring reports are less expert and more political. They are influenced by developments in political relations between the European Commission and Bulgaria. As a consequence, the CVM creates no incentives for Bulgarian institutions to improve their own internal reporting systems, and in fact establishes a parallel reporting practice where people in the Bulgarian administration produce reports solely for the purposes of EU monitoring.

The CVM does not contain an actual reform programme in the same way that the *acquis communautaire* did for the pre-accession period. The actual planning instruments are the actions plans that the government adopts periodically in response to the findings of the European Commission under the CVM. These are voluminous documents and as a general rule they lack motivation and strategic orientation and contain piecemeal measures targeted at different institutions. In practice Bulgaria does not have a real internal mechanism for planning and monitoring the reform of the judiciary and law enforcement, nor a risk assessment of the spread of organised crime and corruption. The reports of the European Commission under the CVM substitute these two internal planning and reporting systems. They are seen by legal practitioners and civil society actors as the only point of reference and an actual reform engine. This fact indicates that Bulgarian institutions still fail to realise their leadership role in fighting corruption and organised crime in the country.

The safeguard clauses in Arts 35-37 from Bulgaria’s EU Accession Treaty were conceived as the main sanctions associated with the failure of Bulgaria to meet the benchmarks and to stay on the reform path after accession. However, triggering Article 37 may have a negative impact not only on the Bulgarian criminal justice system, but also on effective prosecutions in other

¹⁴ As of the summer of 2008, such advisors worked with the office of the prime minister, the prosecutor general, the deputy prime minister responsible for EU Funds management and the National Fund “Road Infrastructure”.

member countries as far as they depend also on the cooperation of Bulgarian authorities. The implementation of the safeguard clause requires the agreement of all other member states. These conditions are making the safeguard clause a difficult and unlikely instrument to be implemented against Bulgaria. The two years of implementation of the CVM, however, reveal that this is not such a big risk as it may seem. The European Commission has competences and general powers as guardian of the Treaty of the European Union (TEU) and the EU funds and they were used successfully in relation to the developments under CVM. As a matter of fact, the CVM reached its actual reform potential in Bulgaria only after the Commission associated the monitoring under the CVM with the investigation by OLAF (the EU's anti-fraud unit) into EU funds embezzlement in Bulgaria and suspended large amounts of funds dedicated to the country.

1.5 Rule of law issues identified by the European Court of Human Rights (ECtHR)

Bulgaria is not among the most notorious violators of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), such as Turkey, Russia, Ukraine or Italy. About 2.2% of all cases pending in the ECtHR in 2008 were filed against Bulgaria. In real terms, this amounts to 2,250 cases, much fewer than the cases pending against Romania (9,000), slightly fewer than those against France and slightly more than cases pending against the Czech Republic.

Recurring problems in the implementation of the ECHR are part of Bulgarian reality. Frequently, human rights violation complaints arise from disproportionate lengths of pre-trial detention and lengthy court proceedings in both civil and criminal law cases; the so-called 'obligatory' detention (challenged as a violation of Art. 5, paras 3 and 4); and police abuse of force, and failure to investigate such allegations; and discrimination.

Within the framework of this analysis, it should be noted that the ECtHR systematically registers shortcomings in the preliminary phase of criminal investigations and failure to properly investigate crimes by policemen. The most notorious cases are related to alleged discrimination and abuse of police power, but on this basis it may be said that the Bulgarian judiciary has trouble in general in investigating police crime and misconduct. This is also true when it comes to investigating and prosecuting corruption and improper connections between police and organised criminals.

An important concern of Bulgarian human rights groups is that the Bulgarian government, even when found guilty in violation of the ECHR, does not take subsequent measures to reform the national legal provisions identified as contradictory to the Convention by the ECtHR. This leads to a situation where one and the same problem is repeatedly referred to the ECtHR. Only 2008 marks a positive development in this regard. Upon the initiative of the Ministry of Justice (MoJ), an independent analysis was conducted and in early 2009 the government voted a detailed programme for reducing the number of Bulgarian cases before the ECtHR. The programme provides for strengthening the capacity of the national judiciary to better implement the ECHR, and envisages the creation of an independent body within the MoJ that will analyse ECtHR decisions against Bulgaria and will make specific proposals for legislative amendments or administrative measures. This approach is highly commendable. Given the actual backlog in the ECtHR, every step to ensure compliance with the ECHR through national courts will have faster and better effect on the rights of citizens.

2. Politics and Legislating

2.1 The role of the legislature and executive power in providing rational and predictable regulations

In the last several years, distinguished legal scholars, legal practitioners and representatives of business organisations alike have advocated¹⁵ the need to conduct comprehensive regulatory reform in the country. The transition from a socialist to a market economy, and later on the EU accession process in Bulgaria were accompanied by intensive regulatory activity on behalf of the parliament and the Executive Branch. Laws were drafted and voted in within very short timeframes, with scarce and often non-existent expert assistance. The legislative framework of the regulatory process itself is frequently being violated and allows for very limited public participation. As a consequence, Bulgaria has abundant and contradictory regulations that pose an obstacle to economic development and impede the uniform implementation of laws by the judiciary and the state administration. The most dangerous consequence of the unreformed regulatory framework is that it creates many opportunities for tailoring legislation to suit private interests. It is still possible to ‘buy’ legislation in Bulgaria. Trade-offs between political circles and shadow business interests are facilitated by the fact that the political party financing system is not transparent, legislative procedures are complicated and cumbersome, and administrative decisions are often taken in flagrant situations of conflict of interest.

2.2 Conflict of interest in state administration

Procedures to avoid conflict of interest in state administration have been part of the early stages of administrative reform in Bulgaria. Already the Civil Service Act¹⁶ included legal provisions against conflict of interest; the regulation creates an obligation to disclose and report conflicts of interest when they arise. In 2008, a number of public scandals revealed that the Civil Service Act does not forestall corruption; the most notorious case involved the head of the National Road Infrastructure Agency who contracted his brother’s company for major work. The Civil Service Act applies only to state servants. The top positions in agencies and ministries are political appointments, and ministers, deputy ministers and heads of agencies do not have the status of state servants. To address this problem, a new Conflict of Interest Prevention and Disclosure Act was adopted in 2008; it requires top political figures and members of the judiciary to submit annual declarations describing potential conflicts of interest. This act is not yet effective. The top political figures failed to submit declarations on time. Currently, the Act is to be amended because it is considered completely ineffective.

2.3 Purchases of legislation, transparency and effectiveness of legislative procedure

Deficiencies in the way that legislation is drafted in Bulgaria allow corrupt private interests to influence state affairs. The Law on Normative Acts¹⁷ regulates the process for legislative bills and regulations initiated by the government. Parliament’s Rules and Procedures govern legislation initiated by MPs. The procedures for drafting regulations are not transparent and the process is limited to a small circle of officials within the regulating authorities. There is no public access to all the bills drafted by the government, and even less so to minor proposed

¹⁵ For the most comprehensive analysis of the problem, see Prof. Krasimira Sredkova, “Katchestveno li se podgotvjat bulgarskite zakoni?”, *Obshtestvo I pravo*, issue 5 for 2008.

¹⁶ Published in the State Gazette No. 67 of 27 July 1999.

¹⁷ Published in the State Gazette No. 27 of 03 April 1973.

regulations. Some of the bills submitted by MPs are also not publicly accessible. Bills drafted by the government are scrutinised only for legality (by a Legislative Council within the Ministry of Justice), but no checks are made as to whether they are necessary or not, who the affected parties are and what their interest is. Bills proposed by MPs do not even go through a legality test. Annually about 500 bills (both new laws and proposed amendments to existing legislation) are tabled in parliament, half of them submitted by individual MPs or by a group of MPs. These bills rarely are accompanied by a consistent rationale. It is common practice to include only a half-page motivation, which quite often refers to general principles or even claims that the proposal is made in the name of the “the country’s successful European integration”. When such bills are adopted, as a rule there is no follow-up procedure to monitor their implementation and verify whether they have achieved their stated goals. The Ministry of Justice does ex post facto review of the implementation of the new Criminal and Civil Procedure Codes, but this can hardly qualify as a real expert evaluation. This non-transparent, non-inclusive and very irrational process of drafting all sorts of regulations in Bulgaria provides a safe haven for corrupt private interests. Examples include draft laws on taxation in gambling and exclusion of national foreign debt management from public procurement, which have been introduced only to satisfy specific private business interests. It is important to note that this process is left entirely outside the scope of monitoring currently conducted by the European Commission in Bulgaria.

2.4 Transparency of financing of political parties

Bulgaria has a relatively modern Political Parties Act.¹⁸ It provides for funding through state subsidies for political parties represented in parliament, somewhat restricted possibilities for funding through donations from individuals and legal persons, and legal limits on political campaign spending. Political parties must account for their spending to the National Audit Office.

The National Audit Office publishes lists of political parties that fail their reporting obligations. These lists are impressive in length but, as a rule, rarely include any of the governing or mainstream political parties.

The Bulgarian chapter of Transparency International monitors political parties and campaign financing, comparing declared party expenditures with an estimate of the actual cost of a campaign. Bulgaria’s ranking is consistently much lower than the standard in other EU member states. Indicators are below 3, in a scale where the countries with transparent political parties financing score 10.¹⁹

Media publications in recent years also contain an impressive amount of allegations that the maximum thresholds for campaign spending are persistently exceeded, publicity is paid for in cash and remains unaccounted for, and more importantly, political parties pay for votes from sources that they do not account for.

A relatively new phenomenon is the proliferation of the so-called ‘business’ political parties that are created by and are directly associated with specific businessmen. Even though none of these parties can win parliamentary elections, they are important players in local elections and, given the long tradition of coalition governments in national politics, some could prove to be ‘kingmakers’ in the coming parliamentary elections as well. A large portion of municipal council seats in the most recent local elections were won by political parties and coalitions that

¹⁸ Published in the State Gazette No. 28 of 1 April 2005.

¹⁹ Data available for 2004 and 2005 for financing of political parties and until 2007 for financing of political campaigns at www.transparency-bg.org.

were unknown at national level. This was unprecedented, and analysts²⁰ interpreted it as an ultimate sign of the country's 'feudalisation' and the historically low support for mainstream political parties.

Shortly before the most recent local elections, parliament criminalised the practice of trading votes. This, however, did not affect the actual incidence of vote-trading in the elections that followed. In a classical example of bad regulation, the legislature obliged the police and the prosecutorial service to dedicate their resources to the investigation and prosecution of numerous small-scale crimes, where it is almost impossible to collect evidence and to prove intent. At the same time the real problem – that political parties or their supporters generate sufficient unaccounted resources to pay for the votes – remains unaddressed.

At the beginning of 2009, the Political Parties Act was significantly revised with the purpose of restricting opportunities for improper influence on political parties. Major amendments include an increase in state subsidies,²¹ prohibition of donations by legal entities, and a €5,000 maximum threshold for private donors. It is still difficult to estimate whether these amendments would limit possibilities for private interests to monopolise political parties.

3. Judiciary and the Legal Profession

3.1 Effectiveness of the judiciary

As a result of the reform in the judiciary, there are visible signs of improved effectiveness, the most important of which is the gradual reduction of backlogs. In the past five years, courts reported a steady 2-4% increase per year in the number of cases finalised; totals are above 100%, meaning that not only newly registered, but also past years' cases are being finalised. Another area of improvement concerns the reduced average length of trial proceedings. Currently data about the average length of the court stage of criminal proceedings in Bulgaria are comparable²² to the average for other EU member states. This is not the case for pre-trial proceedings, and the overall length of both the trial and pre-trial stages in serious crime cases, including 'high-profile' cases, remains excessive.

These achievements are mainly due to the improved material conditions of work in the judiciary. The introduction of computers and electronic file management systems in courts and in the Prosecution Service have had a very positive effect.

3.1.1 Independence, appointment and career structure

With regard to Art. 6 of the ECHR, judicial independence in Bulgaria is a key problem and one that still remains unresolved after 20 years of democratic development. The major obstacles to the implementation of this principle arise from the structure and composition of the Supreme Judicial Council (SJC), the governing body of the judiciary. Parliament appoints half of the members of the SJC in a heavily politicised process. Almost every parliamentary majority after 1991 has found a way to elect a SJC that is better tailored to its own political interests. The

²⁰ See for instance the article "Ot demokratitichen sotzializam kam demorkatitichen feodalizam", in *Sega* Newspaper from 23 October 2008.

²¹ From 2-5% of the minimum monthly salary per vote received by parliamentary represented political parties in the preceding elections.

²² See a report of the Centre for Liberal Strategies, *The Judiciary: Independent and Accountable: Indicators on the Efficiency of the Bulgarian Judicial System*, 2006 (<http://www.cls-sofia.org/en/papers/the-judiciary-independent-and-accountable-performance-indicators-of-the-bulgarian-judicial-system-36.html>).

current governing coalition is no exception. In 2007, using as a pretext the fact that parliament had approved a new Judicial System Act,²³ the ruling coalition ended the term of office of the previous SJC. A new Council was elected amid overt political bargaining about who would be representing whom in its new composition.

Another breach of judicial independence is related to the fact that the Bulgarian Constitution considers judges, prosecutors and investigators alike as members of the judiciary. All of them are represented in the composition of the SJC. Lawyers can also be elected as members. And since the SJC collectively decides about the appointment and career development of all members of the judiciary, it just so happens that prosecutors vote for the appointment or promotion of judges.

Recently the SJC took several decisions that in theory are supposed to improve the effectiveness of trials in organised crime and corruption cases, but in practice jeopardise judicial independence. A SJC decision²⁴ requires judges, prosecutors and the police to jointly analyse the reasons for delays in high-profile criminal cases. If such ‘meetings’ are indeed to be held in the presence of the trial judge, the defence can easily use this as a ground for revoking the final verdict. Furthermore, the SJC decided that both judges’ and prosecutors’ attestations will depend on the outcome of such high-profile cases. This may be justified for prosecutors, but the performance of judges cannot be evaluated based on whether or not they find defendants guilty.²⁵

Otherwise, the appointment and career development of members of the judiciary are regulated based on modern principles. Candidates for appointment and promotion have to meet formal criteria stated in the Judicial System Act and they also have to participate in competitive examinations for every position. The SJC already has practical experience in managing such competitions and all necessary secondary regulations regarding competitive procedures and professional attestations have been adopted.

The practical implementation of these regulations though is problematic. In 2008, the SJC conducted a long-awaited procedure for the attestation of the members of the judiciary. The performance of almost 90% of all attested was rated as “very good”.²⁶ There were 230 candidates for 29 vacancies in the supreme courts and the prosecutor’s general office and all of them had an equal score after attestation. As a consequence, it was not possible to use the results of the attestation as a basis for promotion. Instead, the SJC used only the formal criterion of length of service. In practice, this means two things – first, individual qualities of candidates do not matter, just the length of service is important; and second – if all people received an equal score, then no attestation took place. The ultimate goal of such a procedure is to help differentiate the good and qualified members of the judiciary from those who are incompetent, lazy and corrupt and in 2008 the SJC failed this task.

In 2009 the SJC will have to decide about the appointment and re-appointment of people in managerial positions in the judiciary. This will affect about 250 people, from Deputy Prosecutors-General to the chairpersons of every provincial court. People in managerial positions have enormous discretion as to the assignment and re-assignment of cases to judges, the composition of juries (when it comes to three- or five-member juries), the caseload of the

²³ Published in the State Gazette No. 64, 7 August 2007.

²⁴ Official records of the SJC No. 50 from 3 December 2008.

²⁵ On 26 March 2008, after intensive pressure from human rights groups and an association of judges, the SJC partially revised this decision.

²⁶ An estimate of the Prosecutor General, Mr. Boris Velchev quoted in the article “VSS se namrashti na magistratskite atestatzii” in the *Banker* newspaper, 16 July 2008.

judges and prosecutors, their specialisation, and so on. Managerial positions are the main door through which corruption²⁷ permeates the judiciary and the way the SJC handles the appointment of people will be indicative for its will to effectively solve this problem.

3.1.2 Transparency and corruption

So far the SJC shows little awareness of the seriousness of the problem of corruption within the judiciary and does not seem resolved to take practical steps to curb it. In January 2009, the SJC adopted a document entitled “Strategy for Fighting Corruption in the Judiciary”, which contains a number of empty statements and cannot be described as a working programme to solve the problem.

Under strong pressure from both the European Commission and national public opinion, in 2008 the SJC slowly began to develop its own disciplinary practice as a means of addressing corruption. This comes as a result of the last amendment to the Constitution that led to the creation of an Inspectorate with the SJC. In 2008 the Inspectorate conducted a number of administrative investigations, both planned and unannounced, and submitted its findings to the anti-corruption commission of the SJC for further consideration. A very positive feature of the Inspectorate is that it demonstrates a proactive approach and a number of its investigations are launched based on information disclosed by the media.

Disciplinary sanctions alone cannot remedy corruption in the judiciary. Even though the Constitution was amended in 2003 and judicial immunity was significantly restricted, the channels for imposing criminal responsibility are not used. So far no verdicts for bribery have been issued against judges or prosecutors and this greatly undermines public confidence in the integrity of the judiciary.

The SJC itself is not known for its transparency; it took a decision of the Supreme Administrative Court for the SJC to begin implementing the provisions of the law that require its sessions to be public. The SJC also makes decisions by secret vote, and as a general rule does not formally provide reasons for its rulings. All these factors make it easy for corruption to exist in the administration of justice in Bulgaria. For the upcoming appointment of managers, the SJC should adopt clear criteria, organise the procedure in a transparent manner and justify each decision on the appointment of a specific candidate.

3.1.3 Budgetary constraints and court overload

According to CEPEJ data²⁸ from 2004-06, Bulgaria has one of the busiest court systems among Council of Europe member countries – an average 7,388 civil and administrative court cases per 100,000 population. Only Austria and Serbia have heavier court caseloads. Criminal courts are much less busy. The prosecution caseload is around average COE levels. The average number of cases per prosecutor is 288 a year (although if we spread this out to average number of staff employed in the Prosecution Service, the figure would drop down to 139 cases). Compared to the best, and seemingly busiest prosecutions in the COE chart (Austria, France and Spain), the Bulgarian Prosecution Service is five to ten times less productive. At the same time Bulgaria has one of the highest prosecutor-to-population ratios in Europe – almost 20 to 100,000.

²⁷ The only thing worse is to have no manager at all. It took the SJC almost a year to appoint a new Chairman of the Sofia District Court. This is one of the busiest courts in the country, with an enormous backlog of cases and many unsolved administrative problems and the absence of a manager has very negative effects on the internal organisation of court work and motivation of judges and other staff.

²⁸ http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2006/CEPEJ_2006_eng.pdf

The average caseload of individual courts varies²⁹ dramatically. The Sofia First Instance Court tries 16% of all cases in the country, but spends only 1% of the court system budget. Judges in military and civilian courts of appeal try four to five cases a month, while judges in first instance courts in regional centres have to go through 44 cases a month. There are significant variations in the caseload of different juries within the same court. At the same time, there is no differentiation in payment or status to compensate individual judges for these variations in caseload. These facts show that besides corruption, the court system and the Prosecution Service have serious management and efficiency issues.

The judiciary is currently very well provided for in terms of disposable budget. In the period 1998–2008, its budget increased by 506%, against “a mere” 300% for the Ministry of the Interior, while in the same period the consolidated state budget increased by 192%.³⁰ In fact, the budget of the judiciary marked a more rapid and far greater increase than any other public service budget (including the army, public health and education). This should be taken as evidence of the growing role of the judiciary in the balance of power.

3.2 Legal certainty

3.2.1 Diverging court decisions

Contradictory court rulings are the most unfailing indicator of corruption in the judiciary. Until recently court decisions were inaccessible to the public, so it is difficult to estimate the dimensions of the problem based on media publications alone. With the new Judicial System Act, the courts are already under an obligation to maintain a website and to post all court decisions on it. As a result of this, in 2008 a large number of media publications revealed contradictory court rulings in cases where the facts were similar. In the area of criminal justice, the most striking examples stem from different interpretations of the newly adopted ‘fast-track’ criminal proceedings. Some courts interpret the legal provisions as binding, hence whenever the defendant acknowledges the facts in the prosecutor’s statement, the courts are obliged to allow ‘fast-track’ criminal proceedings. In such cases, the penalty could be lesser than the one provided for the particular crime in the Criminal Code. Other courts do not interpret this legal provision as binding but rather as optional, and they refuse to hear the case in ‘fast-track’ criminal proceedings. As a consequence, in one traffic accident case resulting in the death of three persons, the driver was sentenced to 14 years of prison, while in another case, resulting in one person being killed and another being left in a coma, the court issued a 2.5-year suspended prison sentence for the driver.³¹

The reasons for such contradictory court practice are numerous. Probably the most important one is the dynamic change of legislation in recent years that led to the adoption of a number of new legal instruments that are borrowed from foreign practice. At the same time, court rulings until recently were inaccessible even for judges that work in one and the same court. The new Judicial System Act improved the access to court decisions, but it is still very difficult for practitioners to research court practice.

²⁹ A report on public expenditures for the judiciary of the World Bank, available in Bulgarian at <http://siteresources.worldbank.org/BULGARIAINBULGARIANEXTN/Resources/jeiprbgreport.pdf>

³⁰ Quoted from a report of Georgi Angelov, *Obshtestvni razhodi za provosadie*, Open society institute – Sofia, 2009.

³¹ Interview with Nelly Kutzkova from 20 June 2008 (<http://www.obshtestvo.net/content/view/680/5>); the same facts were discussed in the article “Prisuda za shampioni” (“Sentence for Champions”), *Capital Weekly*, Issue 20 from 16 May 2008.

Another hypothesis for the abundance of contradictory court rulings is corruption in the judiciary. For a very long time the lack of scrutiny in the judiciary allowed for corrupt court practices and direct purchase of court rulings. Probably the most famous case is called ‘Opitzvet’, in which the Supreme Court reversed the verdicts of the first and second instance courts and accepted that more than 660 kg of synthetic drugs were the by-product of a scientific experiment, which were not meant to be sold. There were allegations in the media³² that a six-digit sum was offered as a bribe to secure such a ruling at the last instance court. No corruption was proven in this case; the Supreme Judicial Council only voted for the retirement of the judge who chaired the jury, while the other two judges on the jury received disciplinary sanctions.

The Supreme Court of Cassation is the main body with competences to resolve the problem with contradictory court rulings. It can issue interpretative decisions that will guide the courts and will ensure uniform implementation of the law. In the past, the Supreme Court was not very active in implementing this function. For 2007 there are only two interpretative decisions on its website. The Ministry of Justice has the right to address the Supreme Court with examples of contradictory court rulings, but it was also not very active in using this prerogative. One can already discern a visible positive development in this area in the current year (2009). Only for February 2009 the Supreme Court scheduled three interpretative decisions, including one on the abovementioned issue with the application of ‘fast-track’ criminal proceedings.

3.2.2 Conviction rates and the rule of law

There is a widespread illusion that Bulgarian courts are not ‘tough on crime’. Bulgaria has a very low average acquittal rate – only 1% of all cases according to a recent study.³³ In its 2007 annual report, the Plovdiv Appellate Prosecution Service reports an acquittal rate of 1.97% acquitted persons as compared to the total number of verdicts. In 2005, the acquittals at the Haskovo Prosecution Service were only 0.72%. These numbers come from petty crime. Theft and traffic accidents account for the great majority of cases that the prosecution brings to courts. In 2007 the prosecution brought to court only 179 cases related to organised crime, or less than 0.03% of all. Conviction rates in serious crime cases are much smaller than the average. In 2007 there was a 60% conviction rate for the indictment “membership in an organised criminal group”. In the same year there were only 12 new drug production cases brought to court with only five convicted persons. Of the 296 persons brought to court for corruption (bribery), 142 were convicted – accounting for less than a 50% conviction rate in bribery cases.

These statistics suggest two things: first, serious crimes are still not a priority for the prosecution, and second, the effectiveness of investigations in serious crime cases is much lower than the average. It should be noted that the year of Bulgaria’s accession to the EU probably marks a reversal in both trends. The report of the Prosecutor General for the first half of 2008 already reveals a noticeable increase in money laundering and other serious crime cases. Actually the very fact that the annual reports of the Prosecutor General began to publicise data on number of serious crime cases is a positive development.

If we come back to the very low average acquittal rates found in Bulgaria, we need to add two more facts for consideration. In 2000-01, about 10,000 permissions for wiretapping were issued with a counter-signature by a judge and only less than 3% were used as evidence in criminal

³² On line publication in Bulgarian (http://news.ibox.bg/news/id_1624158797).

³³ A report of the Centre for Liberal Strategies, *The Judiciary: Independent and Accountable. Indicators on the Efficiency of the Bulgarian Judicial System*, 2006 (<http://www.cls-sofia.org/en/papers/the-judiciary-independent-and-accountable-performance-indicators-of-the-bulgarian-judicial-system-36.html>).

trials. And also, a monitoring³⁴ of the Supreme Court of Cassation demonstrated that the Prosecution Service is a more successful litigant in the Supreme Court than are defence lawyers and civil plaintiffs.

These numbers suggest that the totalitarian past is not forgotten and that courts are flirting dangerously with the prosecuting authority, thus compromising their impartiality. In a newspaper interview,³⁵ the Chairman of the Supreme Administrative Court pointed out that there is a certain “fear” among judges to issue rulings and pronounce acquittals, which also explains the constant delays in high-profile cases and the high conviction rates. Such courts *per se* constitute a danger to the rule of law in Bulgaria, a danger at least as important as organised crime and corruption. Moreover, the 1% acquittal rate³⁶ hardly allows the defence to hope that it can win a case. Rather, it is an incentive for the defence to constantly postpone the moment of the verdict; so no matter what measures are planned against trial chicanery, if the defence cannot hope to win the case, chicanery will persist. It may seem as a paradox, but Bulgaria’s road towards the rule of law passes through more acquittals, rather than through more convictions.

3.3 Professional competence in the legal professions

3.3.1 Professional qualifications and continued professional development

Improving the professional qualification of the members of the judiciary was one of the most important priorities of the judicial reform implemented prior to EU accession, and by far the best provided for in terms of available resources. A National Institute of Justice (NIJ) was created as an independent institution responsible for the pre-service and in-service training of judges, prosecutors and investigators. The NIJ has sufficient budget, a comfortable building, competent administrative staff and a large number of experienced trainers; it was the beneficiary of several PHARE projects and has also benefited from bilateral programmes for support from similar institutions in EU member states and the United States.

Under the Judicial System, pre-service training of all members of the judiciary is obligatory. In-service training is also organised on a regular basis and programmes include principles of EU law, jurisprudence of the ECJ; specific courses are developed when there are major changes in national legislation as well.

As noted above, the failure of the SJC to conduct a consistent attestation of members of the judiciary actually creates a gap between professional training and professional development. If the only criterion that really matters for promotion is the length of service, then judges and prosecutors have no incentive to consciously invest in acquiring additional professional expertise.

Even though there is a legal requirement for training and the necessary infrastructure is in place, there is actually very little evidence as to the quality of the training provided by the NIJ. The Ministry of Justice has planned an independent evaluation of the quality of training courses, but there is no information on whether such evaluation took place and what were its findings.

³⁴ A report entitled *Nabljudenie na praktikata na VKS po nakazatelni dela*, 2007, of the Open Society Institute – Sofia.

³⁵ Interview of Konstantin Penchev in *Standart Newspaper*, 29 December 2008.

³⁶ Only Russia has similarly low acquittal rates. For the UK, it is between 10-13%.

Meanwhile, several independent studies³⁷ reveal a deteriorating quality of the university legal education. University education overemphasises a theoretical approach, at the expense of providing students with practical skills in legal research and drafting of legal texts. Several foreign donor programmes tried to introduce legal clinics in law schools, but the universities show little interest in sustaining this practice. The teaching positions in law schools are not attractive for young and motivated lawyers. Bulgarian academics have been underpaid for years; most law school professors also have a legal practice or a political career on the side, which leaves them with little time or incentive to acquire new knowledge. Deterioration in university-level education will inevitably have a negative impact on the professional qualification of the members of the judiciary.

Universities and the Bulgarian Academy of Sciences also hardly support legal research. With the dynamic development of national legislation in the period prior to EU accession and the completely new challenges associated with the implementation of EU law by national judges, this will represent a growing problem.

3.3.2 Access of legal professionals to legal texts, case law and other resources and knowledge of EU *acquis* in JHA

A major shortcoming of the legal framework governing the regulatory process in Bulgaria is the absence of any obligation for the government to maintain a full text database of applicable laws and regulations. Since 2008 the issues of the State Gazette are available on the internet, but when it comes to an amended law, only the amended or newly adopted provisions are published, and not the entire text of the amended law.

There are private firms that maintain full text databases of laws, regulations and case law as a commercial activity. Actually courts, prosecution services and state administration alike purchase annual subscriptions to the information products of these private firms. It may come at a high price for the public budget, but this is how in practice the members of the judiciary get access to legal texts. These commercial information products offer major EU legislation and ECJ case law in Bulgarian. They also contain Bulgarian case law, even though these databases are not comprehensive, since until recently the courts were not under any legal obligation to provide public access to their rulings.

3.4 Accountability of the judiciary

The Bulgarian Constitution treats courts, prosecution and investigative services as equally important branches of the judiciary. It provides for identical rules for appointment and promotion of staff, and also provides identical guarantees for accountability. According to the dominant interpretation of the constitutional provision, the principle of independence is stretched to cover all three branches of the judiciary and should be equally implemented with respect to individual judges, investigators and prosecutors. From here follows the main problem: identical constitutional mechanisms for accountability are provided for organs that have very different procedural functions and different political roles.

Two amendments in the Constitution were adopted with the explicit goal to improve accountability. At first the parliament restricted the immunity for members of the judiciary.³⁸ This did not lead to any visible dynamics in criminal charges brought against members of the

³⁷ See for instance, Ivo Hristov and Ivan Chalakov, *Predizvikatelstva pred juridicheskoto obrazovanie v Bulgaria*, published by the Bulgarian Ministry of Justice, Sofia, 2005, pp. 14-48.

³⁸ Amendment to Art.132 of the Constitution of the Republic of Bulgaria, published in the State Gazette No. 85/ 2003. Further amendments to the same text published in the State Gazette No. 12/ 2007.

judiciary, especially in corruption-related crimes. The second amendments of the Constitution already treated the problem not only as a matter of individual responsibility, but as a political matter related to the distribution of power between parliament and the Supreme Judicial Council (SJC). New constitutional provisions included a reporting obligation for the ‘big three’ of Bulgarian judiciary, i.e. the Prosecutor general and the chairpersons of the Supreme Administrative Court and the Supreme Court of Cassation.³⁹ They are obliged to submit annual reports of their activities to the SJC, which later on submits the reports to the parliament.

Furthermore the new Constitutional provisions⁴⁰ granted the parliament the power, under certain very specific circumstances, to propose to the SJC the dismissal of the ‘big three’. This amendment was declared immediately un-constitutional by the Constitutional Court. And at last, the parliament established the Inspectorate of the SJC⁴¹ as a sort of a controlling organ for the judiciary.

It is still difficult to judge how these newly introduced safeguards will practically improve accountability of the judiciary. In 2008 the parliament heard the first reports of the ‘big three’ and showed very little interest in them. The parliamentary room was almost empty and questions from individual MPs related more to results from individual investigations. The reports were not used as a basis for substantial debate about the priorities of the national criminal policy.

On the other hand, the establishment of the Inspectorate with the SJC already stimulated the disciplinary practice of the SJC and can prove to be an effective mechanism for improved accountability of the judiciary.

Internal accountability of prosecution constitutes a separate problem. The Prosecution Service measures effectiveness exclusively through quantitative indicators – from its annual reports it seems that the conviction rates and time to work on a specific case are the main indicators to assess the performance of prosecutorial services and individual prosecutors alike. Very strong pressure is put on them to reduce the duration of pre-trial phases. Hence prosecutors have an interest to solve as many cases as possible within the shortest possible time frame. This is providing incentives to work predominantly on petty crime, where the perpetrator is already known and charges can be pressed in short time. Overemphasising quantitative indicators provide little incentive for individual prosecutors to prosecute serious crimes. This is true for any serious crime, not only for organised crime or corruption.

3.5 International judicial cooperation

Bulgaria was supposed to harmonise the national legislation with the *acquis communautaire* prior to EU accession. By the end of 2006, all available EU instruments for judicial cooperation in criminal and civil matters had already been adopted. On 28 January 2004, the parliament ratified the European Convention of the International Validity of Criminal Judgements (The Hague, 1970); the European Convention on the Transfer of Proceedings in Criminal Matters (Strasbourg, 1972); additional protocol to the Convention for transfer of convicted persons (Strasbourg, 1997) and the second additional protocol to the European convention for mutual assistance in criminal matters (Strasbourg, 2001).

³⁹ Amendment to Art. 130 (7) of the Constitution of the Republic of Bulgaria, published in the State Gazette No. 12/ 2007.

⁴⁰ Amendment to Art. 129 (4) of the Constitution of the Republic of Bulgaria, published in the State Gazette No. 27/ 2006. Later on declared unconstitutional by the Constitutional Court – Decision No. 7/ 2006 published in the State Gazette No. 78/ 2006.

⁴¹ New Art. 132a of the Constitution of the Republic of Bulgaria, published in the State Gazette No. 12/ 2007.

Bulgaria undertook complex reform of its national legislation in order to adopt the *acquis communautaire* and to ensure administrative capacity for cooperation with other EU member states. In the area of civil law, a new Civil Procedure Code and a new Law on the Commercial Registry were adopted, along with a Code of the International Private Law.

In the area of criminal law, Bulgaria adopted a new Law on issuing, adoption and execution of the decisions for securing property or evidence, issued by the EU member states, which introduces the requirements of the Framework Decision on the execution in the European Union of orders freezing property or evidence into the national legislation.

The new Penal Procedure Code⁴² set up a national legal framework for the implementation of an effective judicial cooperation and legal assistance on criminal matters, recognition of foreign judgements and decisions, transfer of criminal proceedings and transfer of sentenced persons. In order to insure compliance with the Convention on Legal Assistance in Criminal Matters between the EU member states of 2000 and the Protocol to it of 2001, the new Penal Procedure Code regulates legal institutes that are completely new for the Bulgarian legal order, such as the use of undercover agents, controlled deliveries, joint investigation teams, video and phone-conferences.

The Council's Framework Decision of 13 June 2002 on the European Arrest Warrant (EAW) and the surrender procedures between member states were adopted into the Bulgarian legal order through the Law on Extradition and the European Arrest Warrant.⁴³ In 2005 the Bulgarian Constitution was amended⁴⁴ to allow compliance with EU *acquis* in this area. Prior to this, the Constitution explicitly prohibited the rendition of Bulgarian citizens to be judged by foreign countries. The provisions regarding execution of EAW became operational since Bulgaria's accession to the EU.

The requirements of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings and Council Directive 2004/80/EC of 29 April 2004 are introduced in Bulgarian legislation through a new law on assistance and compensation of victims of crime. The law regulates the procedure of compensation of crime victims by the state. A separate commission was set up in the Ministry of Justice with the participation of non-governmental organisations and a budget was assigned to this purpose.

Bulgaria was a beneficiary of several PHARE Twinning Projects dedicated to the strengthening the capacity of the national judiciary for effective participation in the EU cooperation in criminal and civil law matters. Numerous training sessions and seminars took place prior to and after EU accession. The National Institute of Justice amended its programme and it currently offers training courses in EU Judicial cooperation in criminal matters, the European Arrest Warrant and EU cooperation in civil law matters. Impressive administrative work was also done to determine and train personnel at relevant contact points in courts and prosecutorial offices and to select Bulgarian representatives in EUROJUST and EJM. In 2007 Bulgaria created a National network for international judicial cooperation and the SJC subsequently approved its statute and internal rules.

Even though it seems that Bulgaria is currently meeting its EU membership responsibilities in this area, future negative developments cannot be ruled out. The slow and corrupt justice system

⁴² Adopted on 14 October 2005, entered into force on 29 April 2006 and published in the State Gazette No. 86 of 28 October 2005.

⁴³ Published in the State Gazette No. 46 of 3 June 2005; entry into force from 4 July 2005.

⁴⁴ Amendment to Art. 25 (4) of the Constitution of the Republic of Bulgaria, published in the State Gazette No. 18/ 2005.

represents a specific risk for the capacity of Bulgaria to implement the EU instruments for mutual recognition in criminal matters. There is a pending criminal case – the Borilski case – that illustrates this risk. It is a murder case where the victim and the two defendants are Bulgarian citizens, but the crime was committed in France. For 8 years Bulgarian courts failed to produce a final verdict. The case is currently pending before the Supreme Court of Cassation, after two acquittals pronounced at the levels of first instance and appellate. Meanwhile criminal proceedings have also begun in France. On the one hand this hypothesis may potentially lead to a breach in one of the basis principles in criminal law – *Ne bis in idem*, that one person cannot be trialled twice for the same crime. On the other hand, France will eventually request the transfer of the two defendants and if Bulgaria fails to comply, it will violate its obligations under EU cooperation in criminal matters. According to Art. 37 of Bulgaria’s EU Accession Treaty, it can also lead to the triggering of a safeguard clause.

4. Law Enforcement Institutions

4.1 Transparency, corruption and accountability

The beginning of 2008 was marked by two impressive public scandals in the Ministry of the Interior (MoI). First, the then Minister of the Interior resigned after it became publicly known that he had been meeting people from the criminal world; then the Deputy Director of the National Service for Combating Organised Crime was accused of leaking information to criminals. Even though the Minister resigned and the Deputy Director was trialled, these two cases compromised the integrity of Bulgarian law enforcement both from the perspective of other EU member states and national public opinion.

Today there are no signs that the political leadership of the Ministry has developed and implements a consistent policy to curb corruption among high-ranking officials.

Measures to curb corruption in the MoI so far have been limited to police staff and civil servants employed by the Ministry. A code of ethics for this group of personnel was adopted and the Ministry introduced a highly publicised telephone and internet hot line for corruption complaints from citizens. Almost half of the complaints received were later on declared to be without foundation, but no reasons were provided to the public and very probably, to the complainant as well. The Ministry regularly issues public statements about disciplinary procedures against middle- and low-ranking police officers. Investigations are conducted by an Internal Affairs directorate or by the Inspectorate of the MoI, but eventually they all boil down to sending a report to the superior of the accused. Neither division of the Ministry publishes reports on its activities. The publicly accessible regulation of these divisions is very scarce and it is difficult to judge what is the exact distribution of competences between the two.

Unlike courts and prosecution, the MoI does not publish regular reports on its activities. The last available report on the Ministry’s website dates from mid-2007. National police service and regional police directorates do publish reports, but they provide little material for critical analysis of the effectiveness and priorities of national criminal policy.

There is a parliamentary commission for internal order and public security that theoretically controls the MoI. However, given the fact that Ministers of the Interior are by rule very influential members of governing political parties, this form of control is not effective. Based on proposals by the political opposition, parliament has created several ad-hoc investigative committees related to specific criminal investigations, but their work has little impact on systematic problems in the management of the Ministry. Policy questions such as what are the priorities and goals of the Ministry, the effectiveness of public expenditures and integrity of staff members are rarely discussed in parliament.

At the end of 2007, an additional problem with accountability arose when the National Security Service was separated from the MoI and promoted into an independent State Agency for National Security (SANS). This was done through a separate law that also states that one of the functions of the new agency is to investigate serious organised crime and high-level corruption. The Agency has extensive intelligence functions. It can wiretap and otherwise restrict individual rights of citizens, but the law provides for very little guarantees for independent oversight of the Agency's activity.

Public scrutiny of police work is additionally hindered by two problems. Information related to the number and distribution of police personnel is declared a state secret by law. The current Minister recognised that there are no defensible grounds for such secrecy and he released data in this regard, but this is still very far from the accountability standards practised in other EU member states. An additional problem is that there are almost no independent criminological studies in the country. As a reminder of its totalitarian past, criminological studies are still conducted by a research body that is under the authority of the Minister of the Interior.

Internal accountability indicators of police represent the same problem as in the case of the prosecutorial services. The performance of regional police directorates and individual policemen seem to be assessed based on quantitative indicators – crime solvency rates and the duration of investigations. Again this provides an incentive to discourage citizens to report crimes and to focus investigations mainly on petty crime.

4.2 Statistics – petty crime, serious crime, organised crime – clearance rates, workload and budget

There is a steady decline in reported crimes in Bulgaria.⁴⁵ In 2007, the police registered 114,000 crimes, or 7.6% less than the previous year. In about 37,000 of these cases, investigations resulted in criminal charges being brought against a suspect, but only slightly more than 16,000 people were convicted. The ratio between registered and convicted crimes is 7:1.

Although the Ministry of the Interior often cites the reduction in reported crimes as proof of improved police work, other evidence suggests alternative explanations. Reported crimes are in decline because of negative demographic trends (significant decrease in the male population, 15-25 years), migration and reduced unemployment.

An estimated 285,000 crimes annually are not reported to the police.⁴⁶ (Only 1 in 3 crimes is reported.) This number indicates the low public confidence in law enforcement institutions. It may seem like a paradox, but improved police efficiency and strengthened public confidence in the police would result in an increase in reported crimes. This probably explains why police reform is not a very popular political topic.

As regards serious crime, about 160 murders are registered in the country annually. (Just for the sake of comparison, more than 1,000 people die in traffic accidents in Bulgaria each year and more than 10,000 are injured.) It is difficult to estimate how many of the reported murders are so-called 'contract killings'. Although the police do not keep separate statistics for this category, a 2008 report registers five contract killings committed in 2007, compared to seven in 2006. The case solution rate for registered murder cases is above 90%. It would have been even higher if it were not for the contract killings, which generally remain unsolved.

Similarly to the judiciary, but to a much greater extent, the Bulgarian police show signs of inefficiency. Crime, both organised and ordinary, is concentrated in selected geographical

⁴⁵ Center for the Study of Democracy (CSD), *Dynamics in Ordinary Crime in Bulgaria*, 2006-07.

⁴⁶ Estimation of the CSD.

regions. Most crimes are registered in large and highly populated urban areas (Sofia, Varna, Burgas and Plovdiv). Some 17% of all crime in Bulgaria is registered in Sofia alone. The border region of Blagoevgrad, which is equally close to both FYROM and Greece, is particularly susceptible to trafficking and smuggling activities. The structure of the Bulgarian police is ill-equipped to face such challenges. Anecdotal information collected through interviews suggests that the Bulgarian police have to a large extent preserved the geographical allocation and organisation of communications it had back in the 1980s. As a result, according to the annual report of the Sofia Police Directorate, crime-solution rates in Sofia for 2007 are around 42%, which is 10% below the national average.

4.3 Professional competence in law enforcement

4.3.1 Recruitment and professional development

The new Ministry of Interior Act⁴⁷ provides for a competitive examination for entering the police force and also a competitive procedure for rising through the ranks. Police candidates have to meet a few formal requirements – specific education degree and lack of criminal record. There is no public information about the profile of candidates and the way recruitment procedures are actually handled by the administration of the MoI.

Once recruited into the police force, the recruit undergoes a 6-month training in specialised training centres. In-service training is organised within regional police directorates. The MoI received intensive support from the EU and bilateral programmes with individual country members for in-service training of personnel, especially in the area of international human rights standards, training of the border police and implementation of the EAW.

Based on recent monitoring⁴⁸ of the police stations in Sofia, one may assume that the police profession in big cities is losing its attraction to young, educated and motivated people. Policemen in big cities work in poor material conditions and for a monthly net salary equivalent to €250; computers and information systems are lacking; none of the police stations in Sofia was actually designed for the purpose it serves; and conditions for police custody correspond to neither Bulgarian, nor international legal standards.

The low salaries and poor physical conditions are considered the result of poor resource management. The annual budget of the Ministry of the Interior is actually rather high – almost 1 billion BGN in 2008, but at the same time Bulgaria maintains probably one of the biggest police forces in Europe.

4.3.2 Police reform

There is no strategic document that states the goals and priorities of the reform of the Bulgarian police, so it is very difficult to assess whether any progress was made in this direction. The Ministry of the Interior preserves pretty much the organisation and institutional culture it had back in totalitarian times. The new Ministry of the Interior Act formally abolished military ranks, but hardly changed anything in the centralised command structure of the Ministry. Modernisation is promoted mainly through the purchase of equipment and cars, and installation of video-monitoring systems in key areas in Sofia. As a major part of the criminal procedure reform, the investigation of crimes was transferred from the National Investigative Service to the police. Or at least this was the intention of the government. Parliament, however, adopted

⁴⁷ Published in the State Gazette No. 17 of 24 February 2006.

⁴⁸ A report of Open Society Institute – Sofia, *Natzionalen doklad po proekt "Grajdansko nabljudenie v polizijata" za perioda Juni 2007 – August 2008*, available in Bulgarian at www.osi.bg.

legal provisions stipulating that investigations can be carried out only by people with law degrees, and hence less than 2,000 out of 60,000 MoI employees in Bulgaria currently have the authority to collect evidence in criminal cases. This should explain why only 1 in 7 crimes reaches a verdict and why police officers are not motivated to investigate serious crimes.

The overly centralised structure makes the Ministry vulnerable to criminal interests, although we have more evidence of ineffective management than we have of ‘privatisation’ of the Ministry. It is true that the official approach towards organised crime until recently boiled down to a negotiated peace. ‘Negotiations’ between the police and the criminals began in the late 1990s when outbursts of violent crimes on the streets prompted the then Minister of the Interior to invite selected criminal world figures to negotiate a cessation of hostilities (it is not known at what price). Ten years later, the resignation of Rumen Petkov as Minister of the Interior and the establishment of the SANS as an alternative intelligence and investigative authority, already marked the end of this model of negotiations between law enforcement institutions and criminals. And with this hopefully has begun a real reform process.

4.4 International police cooperation

Bulgaria is fulfilling its Interpol international police cooperation obligations. In 2008 Interpol commended Bulgarian authorities for successful arrests in cases involving child pornography and pedophilia; 3.5% of all people searched by Interpol had been arrested by the Bulgarian police.

Within the framework of EU cooperation, based on interviews conducted in the context of this project, the situation was qualified as ‘satisfactory’. Interviewees noted that the Bulgarian police force looks cooperative, competent and trustworthy on the level of day-to-day exchange of information and EAW implementation. When it comes to high-profile cases, however, there are suspicions about deliberate delays in processing documents and information leaks inside the Bulgarian police. This is also true for judicial cooperation in criminal matters. OLAF has reached similar findings.⁴⁹

In the past two years, the MoI has signed several agreements on limited police cooperation with other countries from the Balkan and Black Sea region. Given the geography of criminal networks, this makes sense and could potentially contribute to fighting organised crime on the EU level. As of 2007, the MoI has seconded liaison officers to 16 countries, including to 11 EU member states, neighbouring countries (Romania, Greece, FYROM), SECI Centre and Europol.

5. Private Sector

5.1 Overall business climate and vulnerable sectors

It is important to note that starting a business in Bulgaria is more difficult than in other countries. Onerous license and registration systems, slow and incompetent administration and centralisation create obstacles for private business. The procedure for securing building permission takes an average of 136 days⁵⁰ and obtaining energy supplies for new industrial

⁴⁹ Quoted from the Report from the Commission to the European Parliament and the Council on Progress in Bulgaria under the Co-operation and Verification mechanism, COM (2008) 495 final from 23 July 2008.

⁵⁰ World Bank, *Otzenka na investitziionnija klimat v Bulgaria*, 2008 (<http://www.worldbank.bg/WBSITE/EXTERNAL/COUNTRIES/ECAEXT/BULGARIAINBULGARIANEXTN/0,,contentMDK:22011200~pagePK:1497618~piPK:217854~theSitePK:399204,00.html>) and also www.doingbusiness.org).

construction sites takes 85 days, compared to an average of 17 days for Central Europe. Poor and cumbersome business regulations create conditions for corruption.

Corrupt and incompetent courts represent a separate obstacle to doing business in Bulgaria. According to many macroeconomic analysts,⁵¹ a fair and professional judiciary is a prerequisite for economic growth and foreign investment. The most frequently cited problems include the very high cost associated with the enforcement of business contracts through courts, both in terms of time and legal fees; also on several separate occasions court decisions distrained securities traded on the National Stock Exchange as a guarantee for future claims against firms. The decisions had an immediate effect on both third-party shareholders that were not involved in the dispute and the overall credibility of the Stock Exchange itself. These decisions were blamed on the incompetence of the courts and legislative deficit.

In a recent public speech, the Chairman of the Confederation of Industrialists and Employers in Bulgaria summed up the situation as it follows:

The justice system remains a ‘white spot’ in the business and investment environment. A sense of quick and fair justice does not exist in society. As regards businesses, there are cases in which court decisions serve as an instrument for redistribution of assets and market positions – which is certainly very dangerous. The problem rests in the lack of political will for change and reform, and to some extent in the objective impossibility to make such change.

In mid-2008, Bulgarian media published a draft of the report under CVM which stated that failure to demonstrate progress in the fight against corruption and organised crime would justify postponing Bulgaria’s membership in the Schengen area and the eurozone. This second scenario is particularly worrisome for Bulgarian businesses.

Crime in general poses a threat to free enterprise and overall business development. Companies in Bulgaria are threatened by crime more often than in other CEE countries. Some 75% of companies in Bulgaria pay for private security, as compared to an average of 60% in all other countries surveyed by the World Bank. According to the same estimate, if not for these security expenses, overall productivity of these companies would have been 10% to 18% higher. It is important to note that this is not a threat posed by organised crime; increasingly, fewer companies report risk from racketeering, kidnapping or violent crimes. Companies are mostly concerned with petty crimes, vandalism and theft of production or equipment.

Organised crime (OC) in Bulgaria represents a separate risk for legitimate business. This risk is unevenly distributed in business sectors and mostly affects areas subject to heavy administrative regulation, such as production and trade in goods subject to excise taxes. A recent public opinion poll by OSI – Sofia shows that most people believe that the production and trade in cigarettes, alcohol and petroleum products are the sectors most affected by organised crime. Europol’s OCTA reports for 2007 and 2008 highlight the sectors of transport and financial services within the entire EU as most vulnerable to abuse by OC. And finally, in early 2008 a report by the US Department of Justice said that the infiltration of OC interests in the energy sector and strategic goods trade had been identified as a major risk to US national security.

There is no available analogue risk-assessment for Bulgaria, but nevertheless it is worth considering adapting the governmental policies for issuing various permits and for public procurement to the increased risk from OC faced by specific business sectors.

Interviews with business people suggest that in some of the above-mentioned sectors in Bulgaria, it is difficult to launch and sustain a business initiative without protection or

⁵¹ See for instance Richard Ran’s interview in *Manager Magazine*, December 2008.

permission from certain influential figures; and these figures are not necessarily classic-style organised criminals, but rather established political and business leaders. At the same time, other sectors of the economy, education, intermediary services such as real estate brokerage and tourist services, as well as software development are relatively free from such influence.

5.2 Corruption and business

Corruption is identified as the biggest risk for businesses. A total of 46% of companies⁵² in Bulgaria share this opinion.⁵³ In this case, however, the perception of the risk is much higher than the actual spread of corruption. Some 16% of businesses make informal payments in their interactions with the state administration, but this figure is considerably lower than the average for Eastern Europe and Central Asia (almost 34%).

Has corruption pressures increased since Bulgaria's accession? The data are contradictory. On the one hand, in the beginning of 2009, the US State Department reported an increase in corruption demands to US companies operating in Russia, Ukraine, Romania and Bulgaria. On the other hand, the index of the spread of corruption in the business sector remained steady at about 6% from 2000 throughout 2008.⁵⁴ The perception of businesses about the practical effectiveness of corruption (Is corruption actually helping them sort out administrative problems?) has scored a visible improvement (from 5.6% in 2004 to 3.3% in 2008). On the whole, the reports of the Center⁵⁵ for the Study of Democracy (CSD) register an improvement in the business climate in Bulgaria and a reduction of corruption pressures after EU accession. The authors of the report emphasise, however, that they are using perception-based indicators, which are good only for registering petty corruption. Their conclusion is that unless substantial efforts are made to tackle high-level corruption, these positive results can be compromised.

The main problem with perception-based indicators is that they can reflect not only the actual spread of corruption, but also improved public expectations of the quality and efficiency of public service delivery. From what we see in Bulgaria, we cannot be sure about the first, but we are definitely sure about the second – various factors, such as increased mobility of people and the introduction of better foreign administrative practices, increased foreign investment and the fact that a considerable portion of a highly educated workforce is employed by foreign companies that value the integrity of their staff and are concerned about their public image, as well as the mere fact of EU membership, have substantially increased public expectations towards the performance of Bulgarian administration. Hence, perception-based indicators should be used very carefully.

5.3 The influence of organised crime on business

It should be noted from the outset that classic organised crime (OC) activity in Bulgaria is in decline. CSD reports highlight stagnation or even restriction of classical markets in illegal goods and services such as drugs, weapons and people trafficking. The most dangerous manifestation of OC in Bulgaria is not concentrated in classic criminal markets, but in one characteristic feature of OC, namely its capacity to infiltrate legitimate business structures and

⁵² The World Bank, *Doing Business*, 2008.

⁵³ Compared to other risks – 28% consider crime as the main threat, 23% cite the taxation system, while 21% refer to the burdensome procedures for issuing licenses and permissions.

⁵⁴ Center for the Study of Democracy, *Crime Without Punishment*, 2008 (<http://www.csd.bg/artShow.php?id=9591>).

⁵⁵ The Center for the Study of Democracy is a Sofia-based think tank that conducts regular evaluations of corruption perceptions and the spread of organised crime on a national level.

to distort the market principle of free competition. OC has the distinctive characteristic that within specific time frames, it shifts from one area of activity towards other areas where there are better chances for profit and lesser risk of criminal prosecution. In the past four to six years, several factors drew OC interests away from classical criminal markets towards legal businesses and politics. In the past decade, Bulgaria has had steady high levels of economic growth (6-8% of GDP annually) and a considerable increase in revenue from taxation. This is making an increasing amount of public money available for investment in public projects – construction, infrastructure, public services. At the same time, in the first half of this period, after the mass bank bankruptcies in the late 1990s, financial institutions took a very conservative approach towards lending money to businesses. These two factors, together with the somewhat increased capacity of law enforcement institutions to tackle OC, served as a driving force re-orienting OC interests away from classic criminal markets towards sectors of legitimate business and public procurement.

5.4 EU cooperation to combat corruption

When in July 2008 the European Commission submitted to the European Parliament and the Council its regular report under the CVM, it was accompanied by a separate report on Bulgaria's EU funds management. The report contains a number of negative findings related to conflict of interest, weak management and control systems and lack of transparency in the activity of Bulgarian administration responsible for EU funds.

In particular, the investigations by OLAF, the EU anti-fraud office, were focused on fraud and possible corruption in cases worth at least €26 million under the SAPARD Programme. The investigations include the so-called 'Stoykov–Nikolov' group that involves suspected fraud by a businessman contributing to the last election campaign of the current Bulgarian President. OLAF reported⁵⁶ that the resolution of cases on the national level is impeded by "procedural blockages, leaks of confidential information and alleged influence on the administration and the judiciary". These investigations, as well as regular audits conducted by the European Commission, contributed to the withdrawal of the accreditation of two national implementing agencies under the PHARE and Transitional Facility Programmes, temporary suspension of pre-accession funds and the freezing of payments under other financial instruments.

The Bulgarian authorities responded with efforts to ameliorate legislative framework and administrative capacity for EU funds management and to improve cooperation with the European Commission and OLAF. With this explicit purpose, a new governmental position was established – a vice-prime minister responsible for coordination of EU funds and the national anti-fraud coordination unit was transferred from the MoI under the direct supervision of the new vice prime minister.

6. Public Procurement

The Bulgarian administration is a passive one – most budget resources are spent on salaries, and most public services are provided directly by public administration employees. In this process, there is very little scrutiny of the administration, and very limited evaluation of the quality of public services. The quality of public service only recently began to develop as a concept in the area of education and public health, and is totally unknown in the areas of justice and law enforcement. The Bulgarian public administration has very weak incentives to commission

⁵⁶ Quoted from the Report from the Commission to the European Parliament and the Council on Progress in Bulgaria under the Co-operation and Verification mechanism, COM (2008) 495 final from 23 July 2008.

goods and services, and if it does, there are no incentives to monitor the quality of deliverables. The problem of corruption in Bulgaria is primarily a problem of a public administration that is not accountable for the quality of the services it provides.

6.1 Evaluation of national regulations

The Bulgarian Public Procurement Act (PPA) was enacted in October 2004 and establishes transparent and competitive non-discriminatory procedures that public entities have to follow when purchasing goods, services or construction work.⁵⁷ The main problem with the law is that regulation is limited to the public procurement procedure alone. Very few provisions are included about the nature and content of public procurement contracts. The contracting authority is not specifically obliged to monitor and verify the quality of the deliverables under such contracts. There is also no obligation to revoke the contract if it is not fulfilled according to the technical specifications of the tender. At present, there is no publicly available information about revoked contracts and penalties collected by public authorities for non-compliance with the initial contract. In practice the administration has left its control function entirely to the prosecutorial service which is active only if there is evidence for a committed crime.

An additional shortcoming of PPA is that it is not applicable to several important public administration activities – the purchase of land and real rights, production and co-production of radio and TV programmes, specific financial services and research. This is hardly justifiable by rational arguments. Thus, the law leaves considerable financial interests outside of the scope of PPA. In the case of radio and TV programming alone, the Bulgarian national radio and TV spend approximately 100 million BGN a year, and it is not known how much of these resources are spent outside PPA. Considerable political interest is involved here, as well.

There is a separate law regulating the granting of concessions by public authorities, as well as separate regulations on procedures for so-called ‘small’ public procurements. Transparency and accountability in granting concessions and ‘small’ public procurement contracts are less well-regulated.

In theory, state administration should be fully bound by the PPA, but there are numerous opportunities to get around its principles. Interviews with business people, recent criminal cases and analysis of PPA implementation show persistent practices such as:

- different methods for determining the material interest of public procurement; if it falls below a specific threshold, the administration can avoid announcing a tender;
- breaking the service/goods or construction into several small pieces so that the thresholds are avoided;
- amendments to contracts or tender specifications after the announcement; in the first two years of the PPA implementation, the most common form of circumvention was to add an annex to the contract stipulating a considerable increase of the material interest involved. This was officially prohibited in 2006 and currently there are only three grounds justifying amendments to already signed contracts. No data are available, however, on the actual implementation of this provision.
- contractors avoiding or delaying their reporting obligations under the PPA and not registering the contract and tender information.

It is very difficult to estimate how often the PPA is being circumvented and at what cost to the public purse. Recent reports by the Public Procurement Agency show that in the past three years

⁵⁷ Published in the State Gazette No. 28 of 6 April 2004.

there has been a considerable increase in the public procurement market. Each year there is a gradual increase in the number of contracts, tenders and total spending under the PPA. The total number of public procurement bids in 2007 was 17.4% higher than in 2006. This should be noted as a positive development. The public procurement market has doubled in size in the past four years. However, this should not be taken as a sign that the amount of unlawfully spent public resources has decreased, because it also could mean that public budgets have increased considerably. Most recent public procurement market estimates⁵⁸ suggest that it represents 9.5% of GDP, but potentially it could grow to 20-25%. This figure should be carefully monitored since it is the only, even if imperfect, indicator of circumventions of the PPA. Because implementation of the PPA requires substantial administrative reform in terms of staff qualifications, technical capacity and setting up of procedures, it is unrealistic to expect that the public procurement market would have reached its potential within the four years of its existence. A more realistic estimate would be 10 years, and then only if the government plans and implements targeted measures to limit opportunities for circumventing the PPA.

Available data show a very alarming negative trend towards a reduction in the number of companies that are chosen as public contractors. In practice, this means that fewer and fewer companies are spending more and more public funds. According to research by a sociological agency in 2008, about 10% of all companies in the country receive public procurement contracts worth a total of 6 billion BGN. In 2002 an estimated 43% of all companies participated in public procurement tenders; in 2007 this figure dropped to 14%.⁵⁹ The concentration of the public procurement market creates an increased risk of corruption and establishes conditions for “sustainable clientele monopolistic networks” (as the Centre for the Study of Democracy put it). The same research confirmed that in selected market niches, public procurement provides for a significant share of companies’ income. These niches encompass medical supplies, including medicines, petrol products, office equipment and PCs. This is the most alarming indicator of state capture. However, there should be caution about such an interpretation. Public perceptions of corruption have the dubious effect of discouraging firms from participating in bids and public authorities now are selecting contractors from among a decreasing number of bidders.

The control of the PPA’s implementation is entrusted to the Public Procurement Agency, which was established⁶⁰ in 2004. The Agency provides informational and educational services to both public bodies and private contractors. The Agency also maintains a public procurement register. Setting it up was a considerable improvement on the previous situation, when public institutions had no obligation to inform anyone about the goods and services they contracted out. Information about every public procurement contract should be submitted to the register by the public contractor. Some critics note that this information is often incomplete and very vague about the deliverables, and so does not allow for scrutiny of the implementation of the contracts. Publication of the full text of the contract would be a more appropriate solution.

The most recent amendments to the PPA⁶¹ were adopted in late 2008 after a public scandal involving a high-ranking government official from the Road Infrastructure Agency who had awarded a public works contract to his brother’s company. Positive developments that deserve to be noted include the introduction of a maximum term for public procurement contracts (up to

⁵⁸ Center for the Study of Democracy, *Crime Without Punishment*, 2008 (<http://www.csd.bg/artShow.php?id=9591>).

⁵⁹ Data from a presentation of Dr. Konstantin Pashev before a seminar on 17 October 2008 (<http://epi-bg.org/dmdocuments/Corruption%20in%20public%20procurement%20BG%20Fund%20081017.ppt#4>).

⁶⁰ With Ordinance No. 56 of 12 March 2004, published in the State Gazette No. 24 of 23 March 2004.

⁶¹ Published in the State Gazette, 28 November 2008; in force since 1 January 2009.

4 years), explicit prohibition of contracting between ‘connected persons’⁶² and definition of functions for so-called “preventive” control over PPA implementation. ‘Preventive’ control is imposed on public contractors – they are subject to an audit as to the organisation and implementation of tender procedures prior to actual contracting. This control is limited exclusively to public procurement bids that are announced by Bulgarian authorities on the EU market or financed by EU funds. The first category represents less than 8% of all public procurement, and currently EU-funded projects are blocked by the European Commission.

It is erroneous logic to provide better safeguards for spending EU funds than for spending Bulgaria’s public budget. On one hand, the amounts spent from the Bulgarian national budget are incomparably higher than the EU funds that are currently (not) allocated to the country. The budget surplus for 2008 alone is higher than 2 billion euro and it was spent within a month outside the State Budget Act. On the other hand, one cannot reasonably expect that the Bulgarian public administration will be less corrupt and more efficient in spending EU funds than it is in spending the national budget. Its capacity to spend EU funds rationally and responsibly is a mere function of its capacity to spend Bulgaria’s public budget rationally and responsibly. From this perspective, the capacity for PPA implementation should be assessed together with the capacity to spend EU funds.

6.2 Implementation of EU standards

The alignment of the Bulgarian public procurement legislation with EU standards was an important part of the EU membership negotiations under Chapter 1 “Free movement of goods”. When voted in 2003, the Bulgarian PPA, was designed to implement relevant EU regulations and in particular Directives 92/50/EEC, 93/36/EEC, 93/37/EEC and 93/38/EEC. When in 2004 two new directives were adopted (2004/18/EC and 2004/17/EC), subsequent amendments in the Bulgarian legislation were introduced. In 2006 Bulgaria also revised the procedure for appealing the award of public procurement contracts to respond to the requirements of Directives 89/665/EEC and 92/13/EEC. It provided for a two-instance appeal before the Commission for the Protection of Competition and before the Supreme Administrative Court. A similar appeal procedure was also adopted for concessions.

PPA correctly transposes the main principles of EU regulations, namely: freedom of competition, equality of participants, transparency of procedures and prohibition of discrimination. Experts see a violation⁶³ of EU principles in the lack of special regulations for the appeal of awarded contracts under the so-called ‘small public procurement’, as well as in the fact that European directives treat concessions as a type of public procurement, while Bulgaria maintains two separate legal regimes for public procurement and concessions. According to national experts,⁶⁴ the most serious departure from EU standards in project management is that scrutiny in Bulgaria is associated with the public procurement procedure and not with the actual outputs of contracts.

⁶² Definition is provided in Paragraph 1 from the Additional norms in the Conflict of Interest Prevention and Disclosure Act, published in the State Gazette No. 94 of 31 October 2008.

⁶³ Prof. Emilia Kandeve, “Administrativnopraven pogled varhu zakona za obshtstvenite poratchki v svetlinata na evropejskite direktivi”, in *Administrative Justice*, issue 3 from 2005.

⁶⁴ See a presentation of Dr. Konstantin Pashev and Assen Dyulgerov for a round table on Corruption in public procurement organised by the Center for the Study of Democracy, Sofia, 26 June 2007.

7. Conclusions

Almost two and a half years after EU accession, organised crime and corruption still represent serious problems for Bulgaria. They influence in distinctive ways internal political dynamics, the fundamental rights of citizens, legitimate business and the treasury. Harms caused by organised crime and corruption include:

- reduced public confidence in public institutions and the political system;
- infringement of fundamental rights and freedoms of citizens;
- hindrance of economic growth;
- restriction of economic freedom and entrepreneurship in selected business sectors – it is difficult to launch and sustain a business venture in some sectors of the economy unless political and/or criminal patrons give their permission or protection;
- plundering the treasury through reduced revenues from excise, taxes and custom fees and unfair public procurement contracts – consequences include reduced welfare protection, fewer public services available to people and deteriorating quality of existing services; and
- harm done to individuals – probably unquantifiable, but yet a significant price paid by drug addicts, victims of human trafficking and their families. The viewpoint of these victims hardly reaches media or public discourse on organised crime; they are politically “invisible”.

Immediately before and in the first years of EU accession the perceptions for corruption increased due to the unprecedented amount of public resources that were distributed through non transparent public procurement and concessions. This process was accompanied by migration of organised criminal interests from illicit markets towards legitimate business sectors and public procurement contracts.

This process was facilitated by three main factors. On one hand, shadow financing of the political process is still pertinent. Internal regulations are drafted in an unpredictable, non-transparent and non-participatory manner. This allows corrupt private interests to easily penetrate the law-making process. Moreover, the newly adopted public procurement regulations are cumbersome and complicated and create incentives for the administration to circumvent the law, rather than provide for clear and predictable rules for spending public funds. The control mechanisms are focused on the public procurement procedure, rather than on the results of the implementation of the contracts.

The third factor to facilitate the widespread corruption and penetration of organised criminal interests in politics and selected business sectors consists in the slow and limited response of the law enforcement and the judiciary. Corruption, incompetence and lack of motivation are certainly present also in the judiciary and law enforcement. However tackling these problems is hardly a priority for the relevant institutions. The Supreme Judicial Council and the top management of the Ministry of the Interior are turning a blind eye to the problem. Only disciplinary procedures against police officers and members of the judiciary are currently reported, but their scope is disproportionately small as compared to the scale of the problem. Court verdicts of top policemen or members of the judiciary for bribery are practically non-existent. Decisions as to the appointment and promotion of staff and especially promotions to managerial positions have an enormous potential to deter corruption; however, attestations of personnel in both police and judiciary are factitious. The preliminary phase of criminal proceedings is still disproportionately slow. Investigative police are ineffective and the prosecutorial service fails to control and appropriately guide the gathering of evidence.

As a result of the reforms in the pre-accession period, there have been significant achievements in the material status of the judiciary and the Prosecution Service, as well as in working conditions and professional competence. This leads to a gradual increase in effectiveness, even though performance in serious crime cases is very problematic. The judiciary and the Prosecution Service are adequately provided with resources to do their job, although these resources are somewhat unequally distributed throughout the country. However, this is not the case with the police. Police officers lack material resources and this has an impact on both motivation of staff and the effectiveness of investigations in serious crime cases. Overall, reform in the police service lags behind.

Failures of national criminal policy and corruption in the judiciary and law enforcement provide only a partial explanation for Bulgaria's problems with organised crime and corruption. The process of modernisation and democratic transition of the country's judiciary and law enforcement is still incomplete and as a matter of fact, has never been systematically implemented. The structure, organisation and institutional goals of the Ministry of the Interior and the Prosecution service are still bound to the totalitarian era when these institutions were meant to control the population and punish political dissidents, as opposed to preventing and investigating crime. Both institutions lack the basic democratic culture of transparency and accountability. Setting policy goals and accounting for their practical implementation has never represented a part of their institutional culture. This should explain the many failures of both internal accountability and reporting progress to the European Commission under the CVM.

In many other areas of public life, the EU integration process successfully served as a substitute for modernisation and democratic transition since the available *acquis communautaire* provided adequate reform goals and appropriate benchmarks to be replicated. In the area of national justice and home affairs, only the reform of the Bulgarian border police followed this path. However there is no exportable EU model for judicial independence or effective policing. Combined with the limited internal political will for reforms, this led to stagnation in the reforms of the judiciary and law enforcement in the first year of EU accession.

From the perspective of legal practitioners and civil society groups in Bulgaria, the CVM is perceived as the only engine to sustain the reform process. It has two very positive effects on Bulgaria: it focuses political attention on corruption and organised crime and consolidates the reporting mechanisms of the police, the prosecutorial service and the courts. Outside the CVM, they all tend to develop their own internal and piecemeal indicators that provide them with evidence of fictitious progress. Court verdicts are the ultimate criterion for the effectiveness of police and prosecution, and the CVM correctly reiterates this concept. At the same time, the CVM uses benchmarks that are too broadly defined and indicators that are exclusively related to the activity of criminal justice. It provides the Bulgarian government with an excuse to transfer the 'heat' and the responsibility to satisfy the requirements of EU membership to the judiciary. This is very dangerous, since it serves as yet another channel to limit the independence of judges. Executive and legislative power have also serious instruments to disrupt the nexus between organised crime and politics and to prevent their influence on legitimate business.

8. Recommendations

8.1 Recommendations to national institutions

Legal certainty

- a) Fighting corruption in the judiciary branch should be recognised as a top priority for the Supreme Judicial Council; when appointing and promoting members of the judiciary, it should implement in practice criteria for the assessment of professionalism, effectiveness

and integrity of individual members of the judiciary; the same recommendation is valid for professional attestations in the police service.

- b) The office of the Prosecutor General should assess the impediments to and intensify criminal investigations and prosecutions of corruption in the judiciary, law enforcement and within its own ranks.
- c) The Minister of justice and the Inspectorate of the Supreme Judicial Council have an important function of identifying contradictory court rulings and submitting them for consideration by the Supreme Court of Cassation – they should intensify research and regularly submit cases where unification of the court practice is a matter of priority.
- d) Reform the regulatory framework to allow for transparent and participatory process of drafting and adopting regulations so as to avoid frequent changes in legislation.

Transparency and accountability of institutions

- a) Bulgaria should not rely exclusively on external evaluation of the reform process; the State Agency for National Security should conduct periodical assessments of the risk posed by organised crime and corruption to national security, rule of law, economy and treasury that are to be made public so as to guide subsequent legislative and governmental steps.
- b) Introducing an independent system for police oversight – handling citizens' complaints against police crime should be taken outside the structure of the Ministry of the Interior; alternatively, regular reporting should be introduced with regard to the number and the grounds of complaint received and the results of the follow up investigations.
- c) Upgrade internal reporting procedures and introduce a reporting obligation for the Ministry of the Interior, including regular reporting for the internal investigations unit and the Inspectorate of the MoI.

Independence and professionalism in the judiciary and other institutions

- a) While deciding on appointment and promotion of and disciplinary procedures against members of the judiciary, the Supreme Judicial Council should treat judges and prosecutors separately. An appropriate step would be to have separate disciplinary committees, following the example of Romania.
- b) Introduction of contemporary information systems for case registration and management in the police nationwide and finalising the national unified information system for crime control.
- c) Plan for specific measures to increase the motivation of staff to investigate and prosecute serious crime.
- d) Improving material conditions, payment and selection of staff in the police.

Protection of human rights

- a) Strengthen the capacity of national courts to implement directly the Convention for the protection of human rights and fundamental freedoms through systematic training and popularisation of key decisions of the ECtHR against Bulgaria.

8.2 Recommendations to EU institutions

- a) Sustain the CVM beyond the initial 3-year period, but modify benchmarks and indicators. Concepts such as ‘fighting organised crime’ and ‘corruption’ are not fit to serve as the basis for further monitoring because of the vagueness of definitions and because they are traditionally evaluated through perception-based indicators that can be influenced by many other factors as well. Instead it is more appropriate to measure the effectiveness and fairness of law enforcement and justice and the harm done by organised crime and corruption to political freedoms, public revenues, economy and business.
- b) Binding EU monitoring more closely with other monitoring systems (COE/GRECO/World Bank).
- c) Binding EU monitoring more closely with internal accountability mechanisms – adjusting the timing of EU reporting to internal reporting mechanisms and providing critical assessments of the internal reporting systems and the indicators for effectiveness used by Bulgarian police and prosecution.

SAFEGUARDING THE RULE OF LAW IN AN ENLARGED EU: THE CASE OF ROMANIA

DANA DENIS-SMITH*

1. Introduction

The European Commission's 2008 report on Romania's progress under the Cooperation and Verification Mechanism (CVM) highlighted a series of failures in implementing reforms in the justice and home affairs areas. In particular, the Romanian authorities have been slow at tackling high-level corruption, at developing the administrative capacity of the judiciary and, more generally, to ensure that "commitment to and ownership of reform needs to take root across the entire political spectrum and within the judiciary".¹

In 2008, Romania lost its status as the most corrupt country in the European Union. According to the latest corruption perception index by Transparency International, Romania's index had increased by 0.1 per cent since 2007, ranking it 70th out of 180 countries in the index, with the top posting the least amount of perceived corruption.² The 2008 Global Integrity report concluded that Romania had

a reasonably strong integrity framework in civil society and the media's ability to report on corruption, fair elections, and effective implementation of the rule of law. Nevertheless, there are pockets of weakness. While there are robust whistle-blower protections in place for civil servants, the de facto reality is cause for concern. The civil service in Romania continues to be intensely politicized: top and middle management is used to reward party supporters; lower levels are more stable, but not necessarily more professional, as survival strategies are more important than competence.³

Since 2007, when it joined the European Union, Romania continued its efforts to implement the reform of the judiciary but the prosecution of high-level corruption stalled. 2008 was an electoral year, with local elections held in June and parliamentary elections held on 30 November resulting in a change of government. As a result, after the publication of the July Report, little progress has been registered in addressing its recommendations and speeding up reforms. The government and the parliamentary political parties spent the second half of 2008 campaigning for the elections. Notably, none of the four political parties that are now represented in the parliament (and two of which form the governing coalition) placed the fight against corruption at the heart of their election campaign. The European Commission's interim report on Romania's progress under the CVM published on 12 February 2009 confirmed that the pace of progress in implementing judicial reform was not maintained.⁴

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¹ Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism, Brussels, 23.7.2008, COM(2008) 494 (the "July Report").

² http://www.transparency.org/news_room/in_focus/2008/cpi2008/cpi_2008_table

³ <http://report.globalintegrity.org/Romania/2008>

⁴ See http://ec.europa.eu/dgs/secretariat_general/cvm/index_en.htm

The following benchmarks were set for Romania in the context of the CVM:⁵

- Ensure a more transparent, and efficient judicial process, notably by enhancing the capacity and accountability of the Superior Council of Magistracy. Report and monitor the impact of the new civil and penal procedures codes [BM1].
- Establish, as foreseen, an integrity agency with responsibilities for verifying assets, incompatibilities and potential conflicts of interest, and for issuing mandatory decisions on the basis of which dissuasive sanctions can be taken [BM2].
- Building on progress already made, continue to conduct professional, non-partisan investigations into allegations of high-level corruption [BM3].
- Take further measures to prevent and fight against corruption, in particular within the local government [BM4].

For the past two years, small steps have been taken in order to stabilise and consolidate the institutions and structures involved in the reform of the judiciary. However, the results in the fight against corruption seem to have remained, as previously, mainly at investigation level, with little progress made in courts. The 2008 verdict from Transparency International, the anti-corruption watchdog:

Since 2007, some anti-corruption measures have been launched, but results are far from satisfactory since these initiatives are limited to the EU's minimal mandatory requirements and do not address the core corruption problems faced by Romania.

1.1 Public perceptions of the rule of law and trust in the judiciary and law enforcement institutions

Public trust in institutions, including the judiciary, seems to have declined in 2008, compared to the previous year.

Public trust in the judiciary has been undermined by certain decisions by the Superior Council of Magistracy (CSM) which, rather than act as a guarantor of the independence of the judiciary,⁶ it is usually criticised for assuming the role of a trade union and trying to circumvent transparency requirements. As recently as September 2008, the CSM sought to obtain a declaration of unconstitutionality from the Constitutional Court with regard to certain legal provisions, which required the members of the CSM, judges, prosecutors and assistant-magistrates to make public their wealth. This decision was widely criticised⁷ and viewed as an attempt by CSM to prevent transparency in the legal profession.

Between 2004 and 2008, Romania had three justice ministers. This frequent change may have weakened the public trust in the judiciary. In particular, the replacement of Monica Macovei in 2007 with an inexperienced lawyer, Tudor Chiuariu, was widely viewed as a political decision resulting from the break-up of the governing coalition⁸ but also because of Macovei's strong anti-corruption rhetoric. Some of the former justice ministers are being investigated by the

⁵ 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 areas of judicial reform and the fight against corruption (OJ L 354, 14.12.2006, p. 56).

⁶ CSM is "the guarantor of the independence of the judiciary system" (art 133 Para 1 in the Romanian Constitution).

⁷ Letter from CSM to the Ombudsman, No. 19022/1154/2008 (<http://www.csm1909.ro/csm/index.php?cmd=0501&pg=3>)

⁸ http://www.jurnalul.ro/articol_72234/macovei_demisa_de_senat.html

National Anticorruption Agency (DNA) or are involved in law suits that try to establish to what extent they were informers for the communist secret police service – both these elements have done little to improve the public's trust in the judiciary.

Little change has been registered in speeding up the enforcement of court decisions – reaching a decision and then enforcement in some cases can be delayed for years – and this has had the effect that the population remains suspicious of the administration of justice system and often view the use of the courts as being futile in resolving disputes.

Other, less obvious aspects, such as the fact that the Constitutional Court has its headquarters in the Palace of the parliament, result in loss of public confidence in the independence of the judiciary from political influence. But the main reasons for the lack of public trust in the judiciary are most certainly the outrageous court decisions and the long duration of trials.

1.2 Anti-corruption activities – national institutions, international evaluations and perceptions

The decision to found the National Integrity Agency (ANI) in 2007 was generally welcomed by the public. ANI was an institution set up at the request of the European Commission to monitor and investigate the wealth declarations of public figures. However, the ANI has only 64 inspectors (out of 140 employees) and, for example in June 2008, the staff could not verify the 60,000 wealth declarations of the candidates running in local elections. The agency was supposed to start functioning in October 2007. When the government allocated the funds for ANI, it was already too late for the institution to operate in due time for the local elections. At the time, the ANI President, Alexandru Macovei, told the BBC⁹ that the agency needed at least 200 inspectors to function properly.

Also, the role of the National Integrity Council (CNI), a supervisory body set up by the parliament to monitor the activity of the ANI, has been seriously questioned in the media and by NGOs (including Transparency International Romania)¹⁰ following some incidents involving several of its members, who were deemed to have a conflict of interest with the ANI, being themselves either investigated or on trial in corruption cases, or representing persons investigated for corruption, at the ANI's initiative.¹¹ The above conflicts of interest have cast doubt on the ability of the ANI to exercise its mandate independently and efficiently. However, recently the CNI – prompted by whistleblowers – has started investigations into the source of wealth or incompatibility of high-ranking officials including that of Alexandru Macovei, the head of the ANI.¹² These appear to be interesting new developments but we will have to await the results of the internal investigations before evaluation.

Progress is still expected in the investigation and trial of high-level corruption cases by the DNA. In the second half of 2008 the DNA has brought to court four members of parliament, a

⁹ ANI nu poate verifica declaratiile de avere ale candidatilor, BBCRomanian.com, 22 May 2008 (http://www.bbc.co.uk/romanian/news/story/2008/05/080522_ani_averi.shtml).

¹⁰ Adevarata fata a CNI, 10 November 2008, Romania Curata (<http://www.romaniacurata.ro/adevarata-fata-a-cni-61.htm>), TI recomanda Senatului revocarea lui Alice Draghici din CNI, 19 September 2008, Mediafax.ro (<http://www.mediafax.ro/social/ti-recomanda-senatului-revocarea-lui-alice-draghici-din-cni.html?1688;3201921>), TI-Romania solicita modificarea legii ANI, 15 October 2008, Juridice.ro (<http://www.juridice.ro/stiri-juridice/flux-stiri/transparency-international-romania-solicita-modificarea-legii-an.html>).

¹¹ <http://www.ziua.ro/display.php?data=2008-11-11&id=245269>

¹² Interview with CNI member; see also <http://www.frontnews.ro/politic/institutii/cni-ii-cere-sefului-ani-sa-prezinte-rapoartele-de-activitate-dupa-ce-a-lipsit-de-la-trei-sedinte-25104>

former Minister of Agriculture, police officers, prefects, and directors of national companies. By the end of 2008 and early 2009 the DNA has indicted a former Vice Prime Minister, three members of parliament, a former Minister of Labour, and former Prime Minister Adrian Nastase.

The parliament repeatedly blocked several investigations and significant delays were registered in ongoing investigations, which have fuelled the public's suspicions¹³ that political interests influence the successful prosecution of corrupt politicians by the DNA. One such high-level case was that of the former Prime Minister Adrian Nastase, a deputy since leaving office in 2004 and who has enjoyed ministerial immunity from prosecution. In early March 2009 however the deputy's immunity has been lifted, as the parliament has approved the initiation of investigations in his files that have been on hold for years. However, little hope is placed in a successful conviction in the near future as long as Nastase's party, the Social Democratic Party (PSD), is a member of the governing coalition. Also in March 2009, another leading PSD politician and senator since 2008, Miron Mitrea, had his ministerial and parliamentary immunity lifted and the DNA has now pressed charges against him.¹⁴

This is not to say that the only obstacle in securing a decision on any of the three files in the Nastase case is the political influence exercised over judges. There is also the size of those files – with hundreds of witnesses expected to be called – and the time it will take for evidence and reaching a decision.

1.3 Adherence to international instruments to prevent corruption and protect the rule of law

Romania's adherence to international conventions against corruption and organised crime as well as streamlining national legislations in line with these international instruments were prerequisites of Romania's full membership in the Council of Europe. Such display of commitment to fight corruption was advised by the European Commission ahead of Romania's EU accession.

Romania is a signatory to all major international anti-corruption conventions, including the Council of Europe's Criminal Law Convention on Corruption and the Civil Law Convention on Corruption, the Additional Protocol to the Criminal Law Convention on Corruption and the GRECO Statute. The latest available GRECO compliance evaluation for Romania dates from 2006 and it raised the issue of the size of corruption in Romania.¹⁵

Romania was an early signatory to the United Nations Convention against Corruption and the United Nations Convention against Transnational Organised Crime.

1.4 Engagement with the EU to support the rule of law

Our enquiries with key anti-corruption institutions as part of this study showed that the type of EU support Romania receives in fighting corruption is via 'soft' means such as training courses, participation in international seminars or funding for equipment.

¹³ *DNA este burta moale a sistemului judiciar*, 3 August 2008, Juridice.ro (<http://www.juridice.ro/note-studii-opinii/dna-burta-moale-sistem-judiciar.html>).

¹⁴ <http://www.pna.ro/>

¹⁵ [http://www.coe.int/t/dg1/greco/evaluations/round1/GrecoRC1\(2004\)8_Add_Romania_EN.pdf](http://www.coe.int/t/dg1/greco/evaluations/round1/GrecoRC1(2004)8_Add_Romania_EN.pdf)

Since joining the EU, Romania is of course a full member of the Europol¹⁶ but the country had been a member of EUROPOL since 2003, with the EU institution having a local presence in the country since 2004. The cooperation between the local police and EUROPOL centres primarily on cross-border criminal acts such as electronic payment crime, human trafficking or drug traffic and Romania has most often asked for information from police authorities in Spain, Hungary and Italy.¹⁷ Since accession, however, Romania has benefited from bilateral collaboration with individual member states' police and cross-border crime units, perhaps even more than the support of EU institutions. This is primarily because member states want to enter into partnerships with the Romanian authorities rather than impose their working methods on the Romanian institutions.¹⁸

As the leading institution in Romania focused exclusively on fighting corruption, the DNA is one of the most active in collaborating with the EU in this field. Since it was set up, the DNA has periodically updated the EC (through the Ministry of Justice) on its activities pursuant to the recommendations of the EC and the Action Plan for fulfilling requirements under the CVM.¹⁹ The DNA participated in the peer review organised by the EC in Bucharest, in May and December 2008 (as it did in 2007), which had as a purpose the monitoring of the structural evolution of the DNA.

In 2008 the DNA benefited from two PHARE-financed projects, both co-ordinated by the Ministry of Justice. The projects focused on the structural consolidation of the DNA, through a co-operation set up with the Finnish Institute of Public Management (HAUS) and by modernising the DNA's IT equipment.

DNA staff attended international anticorruption conferences and in the international fight against corruption. Part of the purpose of participating in international conferences was to promote the structural model of the DNA among other states and to share the DNA's successes and challenges with participants from other countries. Thus DNA staff have participated in conferences and study visits organised by EIPA (Luxemburg), OLAF (Germany, Portugal, Italy, Spain), EUROJUST (the Netherlands), the CE (Belgium), the USA Embassy (Poland), IRZ (Germany) etc.

Among other activities, a DNA prosecutor participated in the Romanian delegation to the GRECO reunions, while other prosecutors and other specialists of the DNA have participated in the activities of the International Association of Anti-Corruption Authorities (IAACA), in the second session of the Conference of the States Parties to the UN Convention against Corruption, and in the United Nations Office on Drugs and Crime (UNODC) Voluntary Pilot Programme for reviewing the implementation of the Convention against Corruption. The Chief Prosecutor of the DNA has participated in the 7th General Meeting of the Anti-Corruption Network for Eastern Europe and Central Asia.

Perhaps the key aspect of the EU – Romanian cooperation on justice and home affairs was the introduction of the CVM upon accession. The CVM was a tool aimed at helping the EU monitor and verify Romania's progress in reforming its justice system for 3 years following accession. The Romanian authorities state that they view the CVM as a partnership²⁰ with the EU for

¹⁶ The Europol Convention for Romania and Bulgaria entered into force on 01.08.2007, once the Decision of the European Union Council was adopted and published in the Official Journal of the EU, according to Article No.3 paragraph (3) from the Accession Act which is part of the Accession Treaty.

¹⁷ www.guv.ro

¹⁸ This position emerged from our interviews with embassies of other members states in Bucharest.

¹⁹ Government Decision No. 1346/2007.

²⁰ http://www.bbc.co.uk/romanian/news/story/2008/07/080711_predoiu_justitie.shtml

reforming the justice system and member states continue to send advisors to work closely with various Romanian institutions to assist with aspects of the reform. In practice, however, the CVM is viewed as a political embarrassment and lifting the mechanism after the 3 years has become an aim in itself for the government, with the reform of the justice system being secondary to this aim. As a result, it is unclear to what extent the advice of the EU experts²¹ on the ground in Romania is effective and indeed followed by the Romanian authorities. Part of the CVM, the Romanian institutions are required to prepare activity and progress reports which are then submitted to the European Commission. The quality of those reports varies widely between institutions as they are not perceived as learning tools to help push reform further but rather as of symbolic value to stave off further criticism from the EU. This is a dangerous development as a dual-reporting mechanism has developed by which Romanian institutions produce separate reports for EU and internal purposes, suggesting that stricter reporting rules – for example not accepting a report that focuses on listing achievements and numbers but applying a level of self-criticism by the relevant institution.

1.5 Rule of law issues identified by the European Court of Human Rights

In 2008 Romania was on third place among Council of Europe member states in respect of the number of complaints pending before the European Court of Human Rights (ECHR).²² The majority of complaints concerned violations of the right to a fair trial or issues related to the restitution of properties. This situation and the repeated ECHR decisions²³ against Romania for inadequate legislation, inconsistent jurisprudence, excessive length of proceedings, and other deficiencies of the judicial system have also contributed to the poor image of justice. This is mainly because the population has seen very little evidence of the enforcement of those judgements or of the impact on the reform of the judiciary.

One of the issues that has not been successfully addressed by the Romanian government is the process of compensating former owners of nationalised properties that cannot be returned to them in kind. Despite the scores of ECHR decisions²⁴ condemning Romania for not devising and implementing an efficient mechanism, which could ensure the effective compensation of the above-mentioned category of former owners, there is still no legislation in place that establishes clear time frames for compensation. The existing compensation procedure through the ‘Property Fund’ set up by the government in 2005 provides practically no guarantees that former owners will be compensated in the foreseeable future.

²¹ Officials at the Ministry of Justice interviewed for this report questioned the expertise of the EU advisors and dismissed them as very inexperienced. However, the members of civil society that view the experts as very knowledgeable contradicted their view. “This is why the MoJ [Ministry of Justice] is complaining, because they cannot easily be fooled. Those on the ground are also very good – this is why the reports of the EC are extremely accurate”, we were told.

²² “Annual Report 2008 of the European Court of Human Rights (provisional edition), Council of Europe” (www.echr.coe.int).

²³ *Burzo v. Romania*, case No. 75240/01, Judgement of 12 February 2008, *Prodan v. Romania*, case No. 26071/04, Judgement of 11 December 2007, *Atanasiu v. Romania*, case No. 15204/02, Judgement of 11 December 2007, *Paduraru v. Romania*, case No. 63252/00, Judgement of 1 December 2005, *Strain and others v. Romania*, case No. 57001/00, Judgement of 21 July 2005, etc.

²⁴ *Radu v. Romania*, case No. 13309/03, Judgement of 20 July 2006, *Cirstoiu v. Romania*, case no. 22281/05, Judgement of 12 February 2008, *Viasu c. Romania*, case No. 75951/01, Judgement of 9 December 2008; *Ruxandra Ionescu v. Romania*, case No. 2608/02, Judgement of 12 October 2006, *Cernat v. Romania*, case No. 11601/03, Judgement of 11 December 2007, *Tudor v. Romania*, case No. 29035/05, Judgement of 11 December 2007, *Ion v. Romania*, case no. 19436/04, Judgement of 4 January 2008, *Belasin v. Romania*, case No. 15402/04, Judgement of 18 October 2007, etc.

The unpredictability and inefficiency of the compensation system in force, and the repetitive complaints brought against Romania for this reason, have recently caused the ECHR to pronounce a pilot-type decision²⁵ calling Romania to urgently implement simplified and efficient compensation measures, based on a coherent legislation that should strike an adequate balance between the various interests at stake. This decision was followed soon by a similar one specifically on the necessity to implement adequate measures for the timely execution of administrative and court decisions regarding nationalised properties, as currently there are systemic deficiencies that prevent the restitution in kind of properties, or the compensation of the former owners, within reasonable time.²⁶

Romania consistently fails to adequately address major justice deficiencies despite repeated judgements against it at the ECHR. This raises the question of Romania's genuine commitment to safeguarding the rule of law. In particular, it points to a showcase adherence to a number of principles that are fundamental in a democratic state, and especially to a lack of preoccupation for a profound reform of the judiciary. By not complying with the requirements set out in the condemnatory decisions, the Romanian authorities continue to violate fundamental human rights, which negatively impacts on the quality of life of the citizens and on the public's trust in the judiciary and in the political institutions.

2. Politics and Legislating

2009 is also an electoral year in Romania with presidential elections due in November. The incumbent, Traian Basescu, secured his current term mainly as a result of his anti-corruption rhetoric. There are signs that this rhetoric will return during the 2009 elections but will not be central to the elections, just as it was not in last year's parliamentary elections. This is primarily because all the politicians that are expected to run for the presidency have themselves been accused of corruption and investigated by anti-corruption authorities. On 9 March Basescu addressed both chambers in the Romanian parliament calling for far-reaching reforms in the judicial and the state administration systems "that have not been built on the basis of competence, but rather on personal and political connections".²⁷ The concern on the ground in Romania, however, is that Basescu will be restricted in his decisions with regards to the anti-corruption fight as he used his position to have his file classified by the DNA,²⁸ although this perception is incorrect as the investigation was suspended because he enjoys immunity whilst in office.

2.1 The role of the legislature and executive power in providing rational and predictable regulations

Very little progress was made in 2008 in amending key legislation in line with requirements for judicial reform. In particular, the legislature did not manage to amend in meaningful ways a number of laws that were expected to be significantly changed – especially the Civil Code, the Criminal Code, the Civil Procedure Code, and the Criminal Procedure Code (the Codes). In 2008 amendments were introduced to the Criminal Code and Criminal procedure Code but those were deemed outrageous and finally declared unconstitutional.

²⁵ *Viasu c. Romania*, case No. 75951/01, Judgement of 9 December 2008.

²⁶ *Faimblat v. Romania*, case No. 23066/02, Judgement of 13 January 2009.

²⁷ <http://www.presidency.ro/?RID=det&tb=date&id=10719&PRID=ag>

²⁸ Charges in the "Flota" file were dropped against all charged in 2008. President Basescu was one of those investigated for his role in selling Romania's commercial fleet.

The 2008 draft amendments to the Criminal Code and the Criminal Procedure Code prepared by the Ministry of Justice have been heavily criticised, including by the CSM, as containing provisions that would significantly restrict efficient investigation. On 14 January 2009 the Constitutional Court declared the law approving Government Emergency Ordinance no. 60/2006, which would have restricted the rights of prosecution in investigating serious cases, as unconstitutional.²⁹

Under BM1 Romania was required to produce new Codes – not amendments to the existing ones, which date from the communist days. The draft codes were adopted by the government in February 2009 and sent to parliament as draft laws for approval. If the parliament does not pass them, the government stated that it would go for a motion of confidence to introduce them.

Although those interviewed for part of this study expressed concerns with regards to some aspects of the Codes, the unanimous view was that the new Codes were essential for the reform of the justice system as Romania is still relying on Codes dating from the communist regime.

In its Governing Programme for 2009-2012³⁰ presented to the parliament in December 2008, the new government that emerged after the November 2008 parliamentary elections suggested that it intended to finalise the amendments to the Civil Code, the Civil Procedure Code, the Criminal Code and the Criminal procedure Code as drafted previously. However, after consultations with the Minister of Justice, Catalin Predoiu, early January 2009 the government withdrew the proposed amendments introduced in parliament.³¹

Finally, on 25 February 2009, the government adopted the draft new Criminal Code, Criminal Procedure Code and Civil Procedure Code.³² The draft amendments to the Civil Code³³ were adopted by the government on 25 February 2009. According to various sources, including declarations by President Basescu, it is expected that the government will propose a motion of confidence of the parliament in support of the above draft codes, which the parliament is supposed to analyse and adopt by 15 May 2009.³⁴

²⁹ Decision of the Constitutional Court No. 54 of 14 January 2009 (http://www.ccr.ro/decisions/pdf/ro/2009/D054_09.pdf).

³⁰ Annex 2 to Decision No. 31 of 22 December 2008 of the Romanian Parliament regarding the parliament's Vote of Confidence in the Government, published in the Official Gazette No. 869 of 22 December 2008.

³¹ *Predoiu retrage codurile*, Ziuă, 8 January 2009 (<http://www.ziua.ro/display.php?data=2009-01-08&id=247570>), *Guvernul a retras codurile civil, penal si de proceduracivila si penala din Parlament*, Ziarul Financiar, 8 January 2009 (<http://www.zf.ro/politica/guvernul-a-retras-codurile-civil-penal-si-de-procedura-civila-si-penala-din-parlament-3712622/>), Ministry of Justice and Citizens' Rights, Department of Communication, press release of 7 January 2009 (<http://www.just.ro/Sections/Comunicate/Comunicateianuarie2009/7ianuarie2009/tabid/965/Default.aspx>).

³² http://www.just.ro/Sections/PrimaPagina_MeniuDreapta/noulcodpenal/tabid/940/Default.aspx, http://www.just.ro/Sections/PrimaPagina_MeniuDreapta/noulcoddeprocedurapenala/tabid/941/Default.aspx, http://www.just.ro/Sections/PrimaPagina_MeniuDreapta/ProiectulnouluiCoddeProcedur%C4%83Civil%C4%83/tabid/648/Default.aspx.

³³ http://www.just.ro/Sections/PrimaPagina_MeniuDreapta/ProiectulnouluiCoddeProcedur%C4%83Civil%C4%83/propuneriamendamnoulcodcivil09ianuarie2009/tabid/966/Default.aspx

³⁴ *Guvernul isi va suma raspunderea pe cele patru coduri juridice, in luna mai*, Mediafax, 23 February 2009 (<http://www.mediafax.ro/social/guvernul-isi-va-asuma-raspunderea-pe-cele-patru-coduri-juridice-in-luna-mai.html?1688:3985668>), *Basescu: Guvernul isi asuma raspunderea pentru Codurile juridice dupa 15 mai*, Mediafax, 26 February 2009 (<http://www.mediafax.ro/politic/basescu-guvernul-isi-asuma-raspunderea-pentru-codurile-juridice-dupa-15-mai.html?1687:4000939>).

In 2008 the parliament and the government failed to provide rational and efficient laws in several critical areas such as the restitution of properties and the reform of the health system.

The legislation regarding the restitution of properties remains particularly confusing. The negative effects of the previous inefficient, fast-changing and inconsistent legislation in this field, which created an incoherent legal environment and a climate of uncertainty affecting an enormous number of people, have not been yet corrected, despite repeated judgements against Romania at the ECHR.³⁵

The new government undertook to correlate and harmonise legislation in its Governing Programme, so as to create a climate of legal certainty.

2.2 Conflict of interests in the state administration

In the second half of 2008 and the beginning of 2009, the government has continued its excessive use of emergency decrees, the number of which almost equalled the number of laws passed in parliament. A significant number of the laws were passed only to formally approve the emergency decrees issued by the government.³⁶

Although according to the Constitution emergency decrees may only be issued in exceptional situations that command urgent regulation, Romania's governments regularly use this power to legislate in the vast majority of their legislative initiatives.

The fact that emergency decrees have become the rule rather than the exception in the legislative initiatives of the government (as opposed to regular draft law proposals, which can be debated and amended by the parliament), and that they represent approximately half of the legislation usually passed in Romania each year, has transformed the government into a major legislature body, on a par with the parliament. This clearly blurs the division between the legislative and executive powers in the state and opens the legislative process to political influence from various interest groups at the expense of the fight against corruption.

The indiscriminate use of emergency decrees is particularly problematic as it is an undemocratic form of legislation, which enters into force before it is approved by the parliament. Moreover, if the emergency decree is not formally approved or rejected within 30 days as of the date when it was introduced in parliament, it is automatically considered as approved by the relevant chamber of the parliament.

The government's extensive involvement in drafting important laws – but without consultation with the civil society or professionals or parliamentary debates – such as the Criminal Code and the Criminal Procedure Code, further blurs the boundaries between the executive and the legislature.³⁷

More often than not, members of parliament and ministers or other high-level officials have interests in various economic and other groups, and push for legislation to protect such interests. The result is an inconsistency in the laws and regulations passed in several fields.

³⁵ *Paduraru v. Romania*, case No. 63252/00, Judgement of 1 December 2005, *Strain and others v. Romania*, case no. 57001/00, Judgement of 21 July 2005, *Porteanu v. Romania*, case No. 4596/03, Judgement of 16 February 2006; *Radu v. Romania*, case No. 13309/03, Judgement of 20 July 2006, *Cirstoiu v. Romania*, case No. 22281/05, Judgement of 12 February 2008, *Viasu c. Romania*, case No. 75951/01, Judgement of 9 December 2008.

³⁶ Approximately 150 laws and over 130 emergency decrees, between 1 August 2008 and 30 January 2009 (data from "Lex Expert" legislation data base, by Compania de Informatica Neamt, Piatra Neamt, Romania).

³⁷ <http://www.revista22.ro/despre-proiectul-noului-cod-penal-cu-dezam259gire-5794.html>

By its Governing Programme,³⁸ the new government undertook to increase the efficiency and credibility of the parliament, and to curb the excessive use of emergency decrees, including by defining the limitative areas in which such decrees may be issued. However, since taking office on 22 December 2008, it has already issued 11 emergency decrees whilst the parliament has adopted 3 laws.³⁹

2.3 Purchases of legislation, transparency and effectiveness of legislative procedure

There are numerous situations in which the inefficient and inadequate legislation in a particular area seem to point to the possible undue influence of certain professional or economic groups on the parliament and/or government.

One such example in 2008-2009 was the introduction of several amendments to the law on car registration tax (also known as the pollution tax), first introduced in 2007. The stated intention of this law was to stimulate the renewal of the cars owned by the population by increasing the import duty on old cars. However, serious doubts were raised from the outset over the genuine reasons for this tax, which was in fact viewed⁴⁰ as a means of boosting business for the then-prime minister's car dealership (he has exclusive rights for all imports of Citroen- Peugeot brands). These views took hold mainly because of the continuous changes regarding this tax throughout 2008 (including a few times only in December 2008, which suggested that the incoming government was also trying to accommodate business interests within its political ranks). The changes created upheaval as the tax amount was considered by the public as excessive – as in December 2008 when the tax was tripled as compared to July 2008.⁴¹

In some instances, the tax could be as high as the value of the imported car, making it less attractive than acquiring a car via a local dealership. The frequent and erratic changes in the regulation of this tax (which was also deemed by the European Commission as contrary to EC legislation, and resulted in an infringement procedure initiated by the Commission against Romania, in 2007⁴²); the high level of the tax and the errors in the legislation published in the Official Gazette of Romania have been considered as indicative of a piece of legislation that was adopted following agreements between the parliament and the government and certain economic groups. Faced with another infringement procedure,⁴³ on 18 February 2009 the government adopted Emergency Decree no. 7/2009, amending the previous pollution tax

³⁸ Annex 2 to Decision no. 31 of 22 December 2008 of the Romanian parliament regarding the parliament's Vote of Confidence in the government, published in the Official Gazette No. 869 of 22 December 2008.

³⁹ The numbers refer to the period 24 December 2008- 30 January 2009 (data from "Lex Expert" legislation data base, by Compania de Informatica Neamt, Piatra Neamt, Romania).

⁴⁰ *Basescu: Tariceanu protejeaza interesele importatorului Citroen prin taxa auto*, Front News, 21 March 2008 (<http://www.frontnews.ro/politic/diverse/basescu-tariceanu-protejeaza-interesele-importatorului-citroen-prin-taxa-auto-9000>).

⁴¹ Ministry of Environment, press release of 19.02.2009 (http://www.mmediu.ro/biroul_de_presa/comunicate_de_presa/02_Februarie_2009/19.02.09b.htm), *Taxa auto, modificata din nou*, Front News, 11 February 2009 (<http://www.frontnews.ro/social-si-economic/auto/taxa-auto-va-scadea-si-ar-putea-fi-returnata-soferilor-care-au-platit-o-triplata-23164>).

⁴² Procedures Relating to the Implementation of the Common Commercial Policy, Planned closure of complaint 2007/2001, Official Journal of the European Union, C 314 of 9.12.2008 (Notice No. 2008/C 314/06).

⁴³ *Taxa auto, modificata din nou*, Front News, 11 February 2009 (<http://www.frontnews.ro/social-si-economic/auto/taxa-auto-va-scadea-si-ar-putea-fi-returnata-soferilor-care-au-platit-o-triplata-23164>).

legislation. In the motives of Emergency Decree no. 7/2009 the government admitted that a previous emergency decree regulating the pollution tax contained discriminatory provisions in respect of persons who bought cars with the purpose of registering them in Romania before 15 December 2008, and that reparatory legislation had to be enacted to correct this unjustified discrimination. According to Emergency Decree no. 7/2009, the persons who paid the ‘triple’ tax in December 2008 are entitled to claim back the difference between the tripled tax and the tax as previously set.

The involvement of the National Union of Public Notaries in setting the minimum market value of real estate is another matter that raises serious doubts over the lack of political interference in the legislative structures. The current legislation⁴⁴ practically allows notaries’ local organisations (or ‘chambers’) to establish the ‘real’ market price of transactions, in violation of the contractual rights of the parties involved. This results in higher notarial taxes for notaries as well as the conveyance of titles in amounts that far exceed those that would normally apply if only contractual parties agreed prices.

Probably the most controversial legislation adopted recently by the parliament is an amendment to the law regarding the restitution of certain properties nationalised between 6 March 1945 and 22 December 1989 (Law no. 10 of 2001). This law was ‘sponsored’ by one of the most controversial Romanian politicians – Dan Voiculescu, the leader of the Conservative Party (a member of the governing coalition with the PSD). Voiculescu is being investigated for fraud and is himself the beneficiary of such properties either personally or through the group of companies he owns. A number of leading politicians (including PSD leader Mircea Geoana) acquired properties via this route and therefore the legislation is viewed as another means of taking away the right to compensation from the former owners.⁴⁵

According to the amendment, former owners of nationalised properties that have been sold to the tenants occupying them shall not be returned (neither the house/apartment, nor the appurtenant land) if the sales agreements were entered into in accordance with the provisions of Law no. 112/1995 (a law regarding, *inter alia*, the selling of nationalised apartments/houses).⁴⁶ The former owners are entitled to compensation equal to the market value of their lost properties.

The President of Romania and 118 members of the Deputies Chamber of the parliament belonging to two political parties have requested⁴⁷ on different occasions that the Constitutional Court pronounce these amendments unconstitutional. The Constitutional Court has decided that the amended law does not violate the Constitution and the “Voiculescu law” has been adopted.

The consequence of the amended law is that if the tenant bought the property in good faith (which is presumed by law) and in accordance with the above-mentioned Law no. 112/1995 (which detailed the payment terms and other conditions of the sales)⁴⁸ the former owner has no possibility of challenging the contract in court, irrespective of the fact that the nationalisation had been unlawful. Thus the amended law practically validates unlawful nationalisations.

⁴⁴ Art. 77¹ paragraphs 1, 3, 4 and 5 of the Fiscal Code (Law No. 571 of 22 December 2003, as amended).

⁴⁵ *Nomenclaturisti de toate culorile, beneficiarii nationalizarii PSD-PC*, Cotidianul.ro, 9 October 2008 (http://www.cotidianul.ro/nomenclaturisti_de_toate_culorile_beneficiarii_nationalizarii_psd_pc-60617.html).

⁴⁶ Art. I, paragraphs 4 and 5 of Law No. 1 of 30 January 2009.

⁴⁷ Constitutional Court, press release of 10 December 2008 (<http://www.ccr.ro/default.aspx?page=press/2008/10decembrie>); Constitutional Court, press release of 14 January 2009 (<http://www.ccr.ro/default.aspx?page=press/2009/14ianuarie>).

⁴⁸ Articles 9 and 10 of Law No. 112 of 25 November 1995, as amended.

The amended law has caused revolt among the former owners, who consider that their fundamental right to own property has been violated, and that they are the victims of a ‘second nationalisation’.⁴⁹ Moreover, they have little chance of obtaining any compensation, given that the compensation system in place is extremely inefficient. On the other hand, as there were approximately 200,000 compensation requests registered, the new law is likely to cost taxpayers enormous amounts of money, which in turn causes concern and anguish amongst the population at large.

The other expected consequence of the amended law is a chain of successful claims against Romania at the ECHR by former owners.⁵⁰ In the past the ECHR has already found in numerous cases (see 1.5 above) that there was an inherent contradiction between the acknowledgement of the state that the nationalisations were unlawful and the refusal of the courts to declare null and void the subsequent sale agreements entered into with the tenants. The ECHR has ruled⁵¹ several times that such jurisprudence meant an acceptance of the fact that the state could sell properties it did not lawfully own.

The above are a few examples of the use of political influence in the legislative process and they point to the worrying degree to which the parliament/government are prepared to ignore and violate the commitments Romania made to the international community when major economic interests of certain groups are at stake. All the more unsettling is the fact that pieces of legislation such as those quoted above usually impact in significant ways on large categories of the population. The approval by the Constitutional Court of legislation such as the “Voiculescu law” cannot but raise questions about this Court’s commitment to the safeguarding of fundamental human rights.

2.4 Transparency of political parties’ financing

The issue of transparency in political party financing in Romania was first raised by the “Pro Democrația” Association in 2003 when they started a project to monitor the spending of political parties in all elections. In the 2008 local elections, the results of this monitoring showed a big gap between outgoings and declared donations and receipts. The recent legislation dealing with the financing of political parties was pretty much the result of the efforts of civil society. In one of our interviews, we were told that the sums received by political parties during elections campaigns “are much larger, of course, and much more difficult to quantify” because of, for example, the use of free media advertising for candidates that represented the interests of certain media owners.

Romania’s Permanent Electoral Authority (AEP) was founded in 2005 and was charged with monitoring the application of the rules for party financing. A mixture of public subsidies and private contributions generally finances political parties in Romania. Law 334/2006 (as amended by a number of government emergency legislation during 2007 and 2008) governs the way political parties are financed. This stipulates that the government can allocate up to 0.04% of GDP to finance political parties and that the subsidies are generally allocated based on the number of votes received in the most recent local and general elections. The money is paid in monthly instalments to each of the qualifying political parties and there are a number of set purposes for which the money can be used. The AEP has to monitor and discipline parties that

⁴⁹ *Curtea Constitutională a constintit a doua nationalizare*, Cotidianul.ro, 14 January 2009 (http://www.cotidianul.ro/legea_voiculescu_da_o_gaura_bugetara_in_plina_criza-70133.html).

⁵⁰ Ziu Online, 30 January 2009 (<http://www.ziua.ro/news.php?id=20288&data=2009-01-30>).

⁵¹ *Strain and others v. Romania*, case No. 57001/00, Judgement of 21 July 2005, *Porteanu v. Romania*, case No. 4596/03, Judgement of 16 February 2006.

use the money outside of the stated purposes. The AEP publishes monthly reports of the money received by each of the political parties represented in the Romanian parliament.

With regards to the legislation of political parties financing, perhaps the biggest danger is the changes introduced to these rules ahead of elections. We can expect modifications to the rules to be introduced both for the forthcoming European elections in June 2009 as well as for the presidential elections in November 2009.

Despite this transparency with regards to the sums paid to political parties from the budget, there is no similar recent record of the private donations and the ceilings to be applied to these.⁵² It is generally accepted that big commercial interests are at play in financing political parties but no recent study of this activity seems to exist. Dinu Patriciu, a highly controversial businessman, openly declared ahead of the 2008 local and parliamentary elections that he intended to finance the parties that he liked⁵³ and admitted to having financed a number of parties in previous elections.

Despite the ceilings to donations from companies/ individuals/ candidates being introduced, there seems to have been no monitoring of whether these ceilings were respected. DNA seems to have touched on this issue with charges being brought against former Prime Minister Adrian Nastase with regard to the financing of his presidential campaign in 2004. This is perhaps the best area in which reform can be driven by initiatives of the civil society with the support of international organisations and EU institutions as well as national institutions such as the Integrity Agency. Projects to better monitor political party finance can be initiated around elections and provide the support that an understaffed ANI requires to verify conflicts of interest, bribery for votes and the origin of the financial support received by political parties.

3. Judiciary and the legal profession

3.1 Effectiveness of the judiciary

3.1.1 Transparency and corruption

The CSM made some efforts in the second half of 2008 to increase the transparency of the judicial system. For example, there is some evidence that more detailed regulations regarding adducing evidence, access to, and the random allocation of case files to judges and panels of judges have been introduced.⁵⁴ However, there are still cases – mostly in small regional tribunals – that the electronic systems are not operated regularly with the result that, for example, evidence is not recorded on tapes or staff are not trained to take full notes of the trial.

In November 2008 the CSM issued new regulations⁵⁵ forcing courts to publish their relevant jurisprudence on their websites, as well as, in the case of the higher courts, to prepare and publish quarterly and yearly jurisprudence bulletins.

⁵² After the 2004 elections, a report was compiled by the Curtea de Conturi and found irregularities mostly on technical grounds (such as the wrong person filed the party financial report; parties did not file their financial reports within the 15 days required (see <http://www.rcc.ro/documente/raportalegeri2004.pdf>).

⁵³ http://www.realitatea.net/dinu-patriciu-va-finanta-partidele-care-ii-sunt-simpatice_145136.html

⁵⁴ CSM Decision No. 614 of 26 June 2008, amending the Regulation regarding the internal organisation of courts approved by CSM Decision No. 387/2005.

⁵⁵ CSM Decision No. 1315 of 27 November 2008, amending the Regulation regarding the internal organization of courts approved by CSM Decision No. 387/2005.

However, apart from this progress made at the technical level, other aspects of the transparency of the judiciary remain controversial. The repeated investigations conducted by the CSM since 2007, with inconsequential results, in a particularly publicised case⁵⁶ where uncomfortable comments⁵⁷ referring to the judicial system (including the CSM) were made, have raised questions about the CSM's commitment to ensure its own transparency and the transparency of the judiciary.

As long as the code of conduct of judges and prosecutors continues to forbid magistrates from expressing their views on the professional and moral standards of their colleagues, further similar investigations by the CSM are to be expected.

Other unresolved issues of transparency concern the changes made in the composition of panels of judges during the trial of a case. Legally, the replacement of a judge is to be justified and the relevant decision detailing the reason(s) for replacement are to be included in the case file – however, more often than not this does not happen and judges or entire panels are replaced for no apparent reason. This situation practically nullifies the principle of the random allocation of judges, compromises trust in justice and leads to negative consequences, such as the excessive use of appeals. The random allocation of cases is crucial in Romania as there have been regular reports of bribery of judges by advocates themselves.

3.1.2 Independence, appointment and career structure

In the second half of 2008, the CSM amended several regulations so as to improve the independence of the judiciary through a more transparent recruitment and promotion process for magistrates and other staff working in the judicial system.

The amendments include a more detailed regulation⁵⁸ of the procedures to be followed in the examinations of magistrates participating in competitions for promotion. Specific rules have been introduced for the examination of magistrates in the area of the jurisprudence of the ECJ and the ECHR. Other amendments provide a more detailed defining of the requirements that candidates need to fulfil in order to participate in competitive examinations for appointment in executive positions.⁵⁹ New rules have been introduced to increase the transparency of the entry and graduation examinations at the National Magistrates Institute (“INM”).⁶⁰

⁵⁶ *Judecator cercetat de CSM pentru ca a vorbit despre coruptia din justitie*, Cotidianul.ro, 16 November 2007 (http://www.cotidianul.ro/judecator_cercetat_de_csm_pentru_ca_a_vorbit_despre_coruptia_din_justitie-35741.html), *Situatii anormale la CSM*, Revista AEPADO (European Association for the Protection of Human Rights), December 2008 (http://www.aepado.ro/revista/nr_10/index.php?page=0), *Sesizarea la CSM impotriva judecatorului clujean Cristi Danilet, declarata nelegala de comisia de disciplina*, Gardianul de Transilvania si Banat, 9 February 2009 (<http://www.gardianul.ro/transilvania/index.php?pag=nw&id=121410&p=sesizarea-la-csm-impotriva-judecatorului-clujean-cristi-danilet-declarata-nelegala-de-comisia-de-disciplina-.html>).

⁵⁷ “Unfortunately, the system is a web based on who you know, starting from the registrar and finishing with the judge”, “in the circles of justice the tariffs for making any kind of award are well known, starting from the registrar and finishing with the judge” – “Ocaua mica a CSM”, Ziua, 28 November 2008 (<http://www.ziua.net/display.php?id=246109&data=2008-11-28>).

⁵⁸ CSM Decision No. 659 of 3 July 2008 amending the Regulation regarding the organisation of the examinations for the promotion of judges and prosecutors approved by CSM Decision No. 621/2006.

⁵⁹ CSM Decision No. 817 of 4 September 2008, amending the Regulation regarding the organization of the examinations for appointment in executive positions of judges and prosecutors approved by CSM Decision No. 320/2006.

⁶⁰ CSM Decision No. 538 of 5 June 2008 amending the Regulation regarding the entrance and graduation examinations at the National Magistrates Institute approved by CSM Decision No. 439/2006.

As a general rule, magistrates are recruited by competitive examination. Before being appointed as judges or prosecutors candidates must graduate from a 2-year training course organised by the INM. As an exception, sometimes candidates that belong to certain other professions (lawyers, notaries, public, academics, etc.) who have not graduated from the training course of the INM may be appointed as judges or prosecutors, by competitive examination, if they have at least 5 years' work experience. Competitions may be organised every year or as necessary in order to fill the vacancies in courts and in the public ministry.

Promotion of judges and prosecutors and their appointment in executive positions is by competitive examination. Candidates must fulfil certain criteria regarding their work experience, disciplinary record, and professional standard. In the case of executive positions, the candidates' leadership and managerial abilities are also tested.

Judges and prosecutors can be appointed in certain executive positions only subject to recommendation by their superiors. Judges and prosecutors who have collaborated with the secret service before 1990 and those who have personal interests that might influence the impartial exercise of their mandate cannot be appointed in executive positions.⁶¹ Judges and prosecutors may be revoked from office if they do not properly exercise their mandate, suffer disciplinary sanctions or do not otherwise comply with the requirements of the position they fill.

These are provisions that theoretically contribute to the independence of the judiciary, as they are based on the principle of filling positions on the basis of verified competence. However, in practice it is very hard to verify some of the aspects provided by law (such as the personal interests a judge might have that would influence his or her impartial exercise of an executive function). Also, the evaluation of the way in which judges and prosecutors exercise their mandate should be clearly established, otherwise the legal provisions regarding their revocation from office if they do not properly exercise their mandate can make little contribution to the independence of the judiciary.

Promotion to the position of judge of the High Court of Cassation and Justice (ICCJ) is made by the CSM, without examination, from among judges who meet certain requirements of professional experience and reputation, disciplinary record, and expertise.

Judges are appointed to, and revoked from, the highest executive positions in the ICCJ by the President of Romania, at the recommendation of the CSM. Judges may be appointed from among those who have a work record of at least two years at the ICCJ. Tenure is for three years and may be extended only once. Prosecutors are appointed to, and revoked from, similar high-level executive positions in the public ministry by the President of Romania at the recommendation of the minister of justice, with the endorsement of the CSM. Candidates are appointed from among prosecutors who have at least 10 years' work experience as judges or prosecutors. The appointment is for a three-year term and may be extended only once.

The assistant-magistrates working at the ICCJ are appointed and promoted by the CSM, generally by competitive examination, in the same conditions as judges and prosecutors. However, they may be promoted to certain higher positions without competitive examination.⁶²

The CSM seems to be on the right path in making changes that can bring about an enhanced independence of the judiciary, mostly by ensuring that the recruitment and promotion of judges

⁶¹ Art. 6 paragraph 2 of the Regulation regarding the organisation of the examinations for appointment in executive positions of judges and prosecutors approved by CSM Decision No. 320/2006.

⁶² Art. 67 paragraphs 2 and 3 of Law No. 303/2004 regarding the status of judges and prosecutors, as amended.

and prosecutors is based in general on competitive examination. However, the legislation in this field needs clarification, especially regarding the appointments in higher executive positions.

The role of the President of Romania in the appointment of prosecutors should also be clarified, however, this would require a preliminary clarification of the status of prosecutors as magistrates or executive agents. While the career of prosecutors is currently organised by the CSM and prosecutors largely share the status of judges, the prosecutors' position within the judiciary system is still unclear, and this is an element that blurs the independence of the judiciary from the executive.

Again, human resources policies should be integrated across various judiciary institutions directly responsible for safeguarding the rule of law and the personnel should be required not only to declare their financial interests and wealth, but also the relatives/ connected persons that operate in roles that can lead to conflicts of interest in exercising their profession. This is important as, in the case of top executives, such checks are crucial.⁶³

For example, a short definition of 'connected person' that can be equally applied across all public sector departments could be:

Any question as to whether a person is connected with another shall be determined in accordance with the following provisions (any provision that one person is connected with another person being taken to mean also that that other person is connected with the first-mentioned person):

- a) a person is connected with an individual if that person is a relative of the individual,
- b) a person is connected with any person with whom he or she is in partnership,
- c) a company is connected with another person if that person has control of it or if that person and persons connected with that person together have control of it,
- d) any two or more persons acting together to secure or exercise control of a company shall be treated in relation to that company as connected with one another and with any person acting on the directions of any of them to secure or exercise control of the company;

3.1.3 Budgetary constraints and court overload

The Ministry of Justice administers the budgets of courts. Attempts have been made by the Ministry of Justice to bring about legislative amendments causing the administration of the budget to be transferred to the ICCJ. The CSM has also proposed to take over the administration of the budget of courts. However, no changes have yet been introduced.

The CSM and the ICCJ are on distinct budgets, separate from the rest of the judiciary. This has caused conflicts between the staff of lower courts and the Ministry of Justice, accused of treating preferentially the staff of the CSM and of the ICCJ in the administration of their budget (particularly wages).

The average caseload in the tribunals increased during 2008. For example, the Bucharest Tribunal annual report for 2008⁶⁴ shows that a magistrate dealt with an average of 1997 files per year. Statistics show that in Bucharest the number of finalised cases also increased to an average of 877 (almost 100 cases more than in 2007). Another example is the increase in the number of

⁶³ This seems to be the case of Lidia Barbulescu, a member of the CSM board and its former president, whose entire family seems to be working in the magistrature (see <http://www.revista22.ro/csm-are-o-noua-conducere-5344.html>).

⁶⁴ http://www.tmb.ro/getmc.php?param=date_statistic

cases on roll at the Cluj Tribunal by around 1,000 cases between 2007 and 2008 to just over 11,000 and the number of closed files also increased by around 500 cases⁶⁵ to cca 9,500. However, the sources we interviewed for this report advised caution on reading these statistics primarily as most of the cases that are deemed finalised were struck out on procedural grounds precisely to lessen the workload of the judges. Lawyers interviewed were particularly sceptical of these statistics as their experience was of lengthy procedures with delays due to procedural rather than substantive grounds.

There are significant discrepancies between the case load of courts and prosecutors' offices throughout the country, usually the bigger courts having the heaviest caseload, which is due both to the increase in the number of cases and to understaffing.

The budget of the courts and that of the public ministry needs to be increased⁶⁶ so as to cover not only the necessary increase in the number of judges and prosecutors, but also of the other staff (registrars, archivists). At the end of 2008, the DNA was also understaffed, only 83% of the prosecutor positions being occupied.

The salaries in the judiciary need to be raised, especially in order to protect their independence and reduce the risk of incidence of corruption. The salaries of the judges in the CSM, the Constitutional Court and the ICCJ have been considered in certain circles as excessive, compared to other judges' salaries.⁶⁷

However, generally, the relatively low salary of judges and prosecutors has been known to be a cause for their migration to other professions, especially those of notary and lawyer, which in turn contributes to the overloading of the remaining judges and prosecutors, the poor quality of their work, and to long proceedings.

The CSM needs to address the issue of budgeting, especially of the salaries, in order to ensure the increase of the staff and the stability of the positions they hold, as well as in order to promote better quality in the work in courts and in the public ministry.

3.2 Legal certainty

3.2.1 Diverging court decisions and the role of purchasing legislation

Romania has had a project for the unification of case law in place since 2005, but this has still not been implemented. Regular meetings of the judges of the same court are either non-existent or mere formalities. Case law reports do not always contain the most relevant decisions, which should underlie legal practice. Moreover, these reports are made only in courts of appeal and the Supreme Court, not in tribunals, which are the courts of last resort in certain types of cases.⁶⁸

Instead of fulfilling its role and providing a suitable construction of the law, the High Court of Cassation and Justice has become the very source of legal uncertainty, diminishing public trust in the judiciary. The number of recourses in the interest of the law has increased significantly. Not all decisions are published in the Official Gazette.

⁶⁵ <http://portal.just.ro/InstantaInformatiiStatistice.aspx?idInstitutie=117>

⁶⁶ <http://www.revista22.ro/predoiu-nemultumit-de-bugetul-alocat-ministerului-justitiei-5529.html>

⁶⁷ <http://www.romaniaibera.ro/a132859/topul-salariilor-din-justitie.html>

⁶⁸ In *Beian vs. Romania* (see below), ECHR stated that diverging judicial practice within the High Court of Cassation and Justice "is in itself counter to the principle of public security, which is implicit in the articles of the Convention and constitutes one of the fundamentals of the rule of law".

Concerning the way in which the High Court of Cassation and Justice solves these recourses in the interest of the law, it should be noted that most of the judges involved have no specialisation in the matter at hand. For instance, the panel convened for an appeal on a point of law related to criminal matters includes judges specialised in civil, administrative and trade law etc.

The same should be noted about the 9-judge panel of the High Court of Cassation and Justice, which is in charge of the most important criminal files sent to court. Under the law, the panel should consist of specialised judges according to the case. This rule is constantly breached, as most of the judges making up criminal panels, such as those who work on corruption cases, belong to the civil division.

Jurisprudence continues to diverge, including in the High Court of Cassation and Justice. This has caused the ECHR to rule⁶⁹ against Romania on several occasions. Inconsistencies are found, especially in restitution and high-level corruption cases.

The CSM has continued its efforts to identify and eliminate inconsistencies in jurisprudence. In 2008 the Commission for unifying the jurisprudence, established within the CSM, identified and debated, in co-operation with the presidents of higher courts and with representatives of the public ministry, the national unions of lawyers, bailiffs, and notaries, 299 legal points on which such uniformity was needed both in jurisprudence and at pre-trial level.

In November 2008 the Commission signed a protocol of co-operation with the German foundation IRZ with a view to organising 30 training seminars on the topic of unifying jurisprudence. The attendance of approximately 800 judges and prosecutors is expected, over a period of one year. The CSM expects that at the end of this programme a work methodology in the field of jurisprudence unification will be produced.

The unification of jurisprudence was one of the elements discussed on 18 November 2008 in Brussels by the delegation of the CSM and the representatives of the General Secretariat of the EC, under the CVM (Benchmark 1). However, this in itself is not an indication that the unification of jurisprudence is more likely to happen, as traditionally judges are not prone to rely on decisions made by other (higher) courts/judges, because they perceive such reliance or requirement of reliance as an interference with their professional independence. The CSM needs to train judges in respect of the necessity of the unification of jurisprudence.

Progress has been made through the introduction by the CSM of new regulations obliging all courts to publish their relevant jurisprudence on the internet. Courts of appeal are to publish quarterly and yearly jurisprudence bulletins, which are to be published on their web sites (the quarterly digests) and disseminated to the lower courts, the ICCJ, the public ministry, the CSM, the INM and the National School of Registrars.

3.2.2 Conviction rates and the rule of law

The standards of justice applied by courts have been criticised both by the public at large and in professional circles, especially in respect of criminal cases, where individuals involved in high profile corruption seem to benefit from more lenient treatment than other offenders. The Report Regarding the Activity of the DNA in the Year 2008⁷⁰ points to the fact that of 97 individuals convicted in 2008 for corruption, only 29% will execute their sentences in prisons, 58% have been sentenced to the minimum punishment provided by law or even to punishment below the minimum provided by law (due to mitigating circumstances), while for 39%, the punishments

⁶⁹ *Beian v. Romania (1)*, case No. 30658/05, Judgement of 15 November 2007, *Padurar v. Romania*, case No. 63252/00, Judgement of 1 December 2005.

⁷⁰ <http://www.pna.ro/>.

were oriented towards the minimum provided by law. Only in one case was the punishment established oriented towards the maximum provided by law. Courts justify their lenient decisions and suspension of sentences in respect of the police, judges and public officials by the fact that such offenders do not have a criminal record, and therefore benefit from a mitigating circumstance.

Court rulings seem to be influenced to some degree either by political shifts or by economic forces. This is particularly noticeable in restitution and corruption cases.⁷¹

The fact that laws generally lack clarity and consistency, as well as the frequent amendments to the laws, often by emergency decrees, contributes to the poor quality of justice and to the opportunity to interpret and apply laws in inconsistent ways.

Another area that needs significant improvement is the enforcement of court decisions. As the role and competences of the bailiffs and of the police in the enforcement of court decisions is not well defined by law, it is not uncommon that court decisions remain unenforced for long periods of time. This weakens legal certainty, especially considering the difficulty of making bailiffs or the police answerable for the failure of enforcement.

Although this situation has led to several ECHR decisions⁷² against Romania, this issue has not yet been properly addressed. The new government of Romania has undertaken in its governing programme to improve the legislation regarding the activity of bailiffs but so far there is little evidence that the undertaking is being pursued.

3.3 Professional competence in the legal profession

This is probably the key deficiency area in the reform of the judiciary system especially as many in senior roles practised under the communist regime and have shown little ability to adapt to new methods.

3.3.1 Professional qualifications and continued professional development

Judges and prosecutors are required by law to participate at least once every three years to training programmes organised by the INM. They are also required to learn a foreign language and acquire relevant PC skills.

The courts of appeal coordinate other trainings, workshops, conferences and debates in which judges and prosecutors are required to participate.

The INM and the CSM have made efforts in 2008 to improve the training of judges and prosecutors. The INM has organised various courses and seminars, including on the EU *acquis* in JHA, ECJ case law and the role of the national judge in applying EU legislation. The INM is also involved in selecting the candidates that apply for participating in the trainings organised by the European Judicial Training Network (EJTN) in 2009.

⁷¹ *Coruptia vazuta din interior.Cristi Danilet*, Juridice.ro, 24 June 2008 (<http://www.juridice.ro/note-studii-opinii/coruptia-vazuta-din-interior-cristi-danilet.html>).

⁷² *Constantin Oprea v. Romania*, No. 24724/03, Judgement of 8 November 2007, *Butan and Dragomir v. Romania*, No. 40067/06, Judgement of 24 January 2008, *Neamtii v. Romania*, no. 67007/01, Judgement of 24 January 2008, *Bratulescu v. Romania*, case No. 6206/03, Judgement of 17 January 2008, *Strachinaru v. Romania*, case No. 40263/05, Judgement of 31 January 2008, *Ceraceanu v. Romania*, case No. 31250/02, Judgement of 12 February 2008.

3.3.2 Access of legal professionals to legal texts, case law and other resources and knowledge of EU *acquis* in JHA

In July 2008 the CSM has signed a co-operation protocol with the European Institute of Romania, with the purpose of publishing a digest of ECJ decisions. As of October 2008 the CSM has explored the possibility of implementing in the Romanian judiciary an infrastructure similar to the EURINFRA used in the Netherlands.

Romanian law professionals generally have very good access to legal texts and legal information via a large number of internet sources. However, all these sources are run by private enterprises rather than government agencies. There seems to be no obligation on the Romanian authorities to keep a complete database of all court decisions, in full text format. The same providers offer access to ECJ ruling and other EU legislation, even in Romanian.

Most legislation is published in the Official Gazette, which can be easily found in hard copy or online (the service is not free). Legislation can also be accessed via the web site of the Ministry of Justice,⁷³ however, the database found there is relatively difficult to use. And various legal sources publish legal analysis as well as legislative updates. Most of the problems encountered therefore are linked to the publication of case law, which is not predictable and varies widely across the court system. There is no consistency even at the same-level courts – for example, the Court of Appeal of Cluj keeps a much more up-to-date website detailing cases than the Alba Iulia Court of Appeal.

During a round table discussion organised by Freedom House and the DNA in 2008, the judges said that the publication of rulings on court websites could help in the unification of case law.

3.3.3 Differences in quality across the legal profession

In the second half of 2008, a small number of magistrates (around 20) have visited and participated in traineeships at the ECJ and the ECHR. As part of the co-operation between the CSM and the Embassy of the Federal Republic of Germany, two magistrates were assigned by the CSM to participate in training in criminal law organised in the Federal Republic of Germany, between 23 November – 12 December 2008.

It results thus that very few magistrates participated in the above-mentioned trainings, which also usually lasted only a couple of days. Unless the participation of Romanian magistrates in such trainings organised abroad becomes a part of a more consistent training programme implemented at national level, it risks remaining an episode of very little relevance.

Judges and prosecutors undergo evaluations every three years. The efficiency, quality of work, integrity, training, and for those in executive positions, the results in coordinating their department are all part of this evaluation. However, the main problem is not with the rules, but with their application as “almost everyone is very good in the evaluation. 99.9% that is!”, as we were told during our interviews.

Judges and prosecutors with poor results must enrol in special trainings of 3 to 6 months organised by the INM, followed by examinations. Judges and prosecutors whose professional competence is marked as ‘unsatisfactory’ twice consecutively, or who do not pass the examinations at the end of the compulsory trainings organised by the INM are dismissed from their positions.

⁷³ <http://legislatie.just.ro/>.

The CSM and the INM need to make more effort towards a more consistent training of judges, especially for those generations who do not have background studies in EU law. More consistent training is needed also in ECJ and ECHR case law.

Judges' and prosecutors' quality of work and their integrity should be evaluated more frequently than only once every three years. There is a need for the clarification of both the evaluation criteria and of the standards of work that judges and prosecutors need to comply with.

A particular problem in the evaluation of the quality of work of judges is posed by the fact that it is also based on the number of decisions pronounced by the judge that are upheld or reversed by the higher courts. As jurisprudence is very divergent even within the same court, this part of the evaluation risks becoming very subjective and discriminatory. The unification of the jurisprudence is likely to have a positive impact in this respect, as it would contribute to a more objective evaluation of the judges' work.

3.4 Accountability of the judiciary

Judges and prosecutors are answerable under civil and criminal law, as well as for violations of their professional code of conduct.

The Constitution and Law no. 303 of 2004 regarding the status of judges and prosecutors establish the State's pecuniary liability for miscarriages of justice. The State may recover the damages it has paid from the judges or prosecutors only if it is established that they have acted in bad faith or with gross negligence.

Generally, the victims of miscarriages of justice may only sue the state for damages if the judge or prosecutor in that case has suffered a disciplinary sanction or a criminal conviction for an action committed during the proceedings and which was apt to cause a miscarriage of justice. This rule makes it very difficult for the victims of miscarriages of justice to obtain any satisfaction, as by the time the miscarriage is revealed or acknowledged, it is nearly impossible (because of factual or technical reasons) to initiate any action that would trigger a sanctioning or conviction of the judge or prosecutor. A victim of miscarriage of justice can ask the state for compensation but then becomes embroiled in court proceedings in which the court decides whether the state has to pay compensation. The state can only go against the judge or prosecutor that caused the damage if he acted out of gross negligence or bad faith. These are two different trials and there appear to have been no cases when the state went against the judge or prosecutor.

Individuals who have been unlawfully detained, or whose freedom has been unlawfully restricted during criminal proceedings, or who have been convicted by a final court decision, are entitled to damages if the charges against them have been dropped or they have been acquitted following the re-trial of the case. Individuals who have been detained after the lapse of the limitation period of the offence committed, or after an amnesty occurred, or the offence has been discriminated, are also entitled to damages.

In such cases, as well as if an international court has condemned Romania, the State is not merely entitled to, but must file an action to recover the damages from the judge or prosecutor who caused the miscarriage of justice by gross negligence or bad faith.⁷⁴ This rule may be an object of dispute as it can be argued that it discriminates against judges whose cases have been taken to an international court (when the state must file an action to recover damages) as opposed to the others (when the state is only entitled, but not obliged to, file such an action).

⁷⁴ Articles 504, 506 and 507 of the Criminal Procedure Code.

Judges and prosecutors are generally against any personal pecuniary liability for miscarriage of justice, as they view this as a source of undue pressure and potential violations of their professional independence.

Despite the above legal provisions, the state has so far failed to file actions for the recovery of damages. This situation is partly due to the fact that there are very few instances where judges or prosecutors are convicted or suffer disciplinary sanctions related to a case, or where their gross negligence or bad faith in conducting an investigation or a case can be proven, especially after several years since a case has been closed.

Moreover, the Ministry of Finance, who by law acts as the representative of the state in recovery actions, could not agree with the CSM on the preliminary procedures that might be necessary before filing such actions in court, i.e., on the procedure for ascertaining that a judge or prosecutor has acted in bad faith or with gross negligence.

Thus, the Ministry of Finance has argued that the establishment of bad faith or negligence would be necessary in all situations, whereas the presidents of the High Court of Cassation and Justice have expressed their general concern that judges might be faced with thousands of criminal cases against them, which might affect their independence.⁷⁵

Finally, there is no domestic legal provision specifically regarding the possibility of recovering damages in case the miscarriage of justice was due to problems of law.

In December 2008 the CSM requested the Ministry of Justice to prepare a draft law regarding the pecuniary liability of judges. The CSM insisted that it was necessary to enact clear and coherent legislation in this field that should also be consistent with the Constitution and with EU laws.

The request was made following the preparation by the Ministry of Justice of a draft emergency decree that allowed the victims of miscarriage of justice to directly sue the judge or prosecutor for damages and mandated the CSM to verify the guiltiness of judges or prosecutors, prior to the state suing them for damages. The National Union of the Judges of Romania (UNJR) has requested the Ministry of Justice to reconsider the draft emergency decree, as long as the procedures for malpractice insurance for magistrates are still not adopted and effective.⁷⁶ The CSM has criticised this draft provision as being contrary to Article 6 of the European Convention on Human Rights, which guarantees everybody's right to be tried by a court of justice, and to defend him/herself in court. Moreover, by law, the CSM has no competences in the verification of the guiltiness of judges or prosecutors, prior to civil action by the state.⁷⁷

As regards criminal liability, judges of the Constitutional Court, of the CSM, and the judges and assistant-magistrates of the ICCJ, of the courts of appeal and of the military court of appeal, and certain categories of prosecutors are tried in the first instance only by the ICCJ and are investigated by the prosecutors of the Prosecutor's Office functioning by the ICCJ. In practice, such investigations and trials occur very rarely, the existing cases being mostly related to accusations of corruption.

⁷⁵ *Judecatorii nu vor plati procesele pierdute la CEDO*, Cotidianul.ro, 27 March 2008 (http://www.cotidianul.ro/judecatorii_nu_vor_plati_procesele_pierdute_la_cedo-42031.html).

⁷⁶ UNJR, *Raspunderea materiala a magistratilor*, press release of 30 November 2008 (<http://www.unjr.ro/comunicate/raspunderea-materiala-a-magistratilor.html>).

⁷⁷ *CSM despre proiectul de OUG referitor la raspunderea materiala a magistratilor*, Juridice.ro, 15 December 2008 (<http://www.juridice.ro/stiri-juridice/flux-stiri/csm-proiect-oug-raspundere-materiala-magistrati.html>).

Judges, prosecutors and assistant-magistrates may not be searched, detained or arrested without the approval of the relevant sections of the CSM. The searching and detaining may be carried out without the approval of the CSM in case the judges, prosecutors or assistant-magistrates have been caught in the act of committing an offence.

Judges and prosecutors may suffer disciplinary sanctions for various violations of their duties, consisting of unjustified postponements in the handling of cases, the violation of the random assigning of cases to panels of judges, interference with the activity of other judge or prosecutor, as well as for any behaviour that affects the prestige of justice. Sanctions range from warnings to dismissal from magistracy. Sanctions are imposed by the CSM through its disciplinary sections.

In the second half of 2008 some efforts were made to improve the recruitment of the inspectors of the Judicial Inspection functioning within the CSM. The new regulations require that judicial inspectors (who perform preliminary investigations into disciplinary actions regarding judges and prosecutors) be recruited on a wide geographical basis and with due regard to the balancing of the number of inspectors recruited from different regions of the country.

The disciplinary system of the CSM has been criticised by judges and prosecutors, as the preliminary verification of judges and prosecutors is done by the judicial inspectors, while the investigation of the alleged violations is done by a Disciplinary Commission composed, in its turn, of judicial inspectors, and the ‘judging’ of the complaints is done by judges or prosecutors (of the relevant disciplinary section) who have in fact appointed the judicial inspectors. Moreover the judicial inspectors are not recruited by competitive examinations, but on the basis of interviews conducted by members of the CSM, and do not hold a permanent office, but are on secondment at the CSM. Thus the members of the CSM (who may themselves be subjected to disciplinary action) can at any time and without an obligation of motivation, terminate the secondment of judicial inspectors, and therefore the career of the judicial inspectors depends exclusively on the arbitrary will of the members of the CSM. Finally, the CSM is both an investigation and a jurisdictional body in disciplinary action proceedings.

The majority of the complaints registered in 2008 with the Disciplinary Commissions set up within the CSM were filed by parties in court cases, while only a few were registered ex officio by the Judicial Inspection. The Judicial Inspection still has to establish a more solid track record of ex officio investigations.

In 2008 there were 311 complaints registered against judges (in 2007, there were 74), of which 271 by individuals of private entities parties in the cases (51, in 2007) and 12 by the Judicial Inspection (3, in 2007). Of these 264 were declared inadmissible for various reasons. The CSM has decided on the merits of the complaints in 16 cases (7, in 2007), of which 13 were admitted, with sanctions ranging from warning to exclusion from magistracy (2 decisions, currently challenged in court). At the end of 2008, at the Disciplinary Commission for judges there were 34 complaints pending (20, at the end of 2007) and in two more complaints the investigations have been finalised.⁷⁸

At the Disciplinary Commission for prosecutors there were 128 complaints registered (72, in 2007), of which 95 from individuals and private parties (31, in 2007), and 7 by the Judicial Inspection (4, in 2007). Of these 106 were declared inadmissible. The Commission has decided on the merits of the complaints in 6 cases (11, in 2007), of which it has admitted 5, with sanctions ranging from warning to exclusion from magistracy (one decision). At the end of

⁷⁸ Report Regarding the Activity of the Superior Council of Magistracy in the Year 2008 (<http://www.csm1909.ro/csm/index.php?cmd=91>); Report Regarding the Activity of the Superior Council of Magistracy in the Year 2007 (<http://www.csm1909.ro/csm/index.php?cmd=24>).

2008, at the Disciplinary Commission for prosecutors there were 10 complaints pending (4, in 2007) and in 6 more cases the investigations have been finalised.⁷⁹

As a result there has been a significant increase in the complaints against judges and prosecutors, however, the majority of these continue to be declared inadmissible and only a few are finalised with a decision on the merits.

In general, the accountability of judges and prosecutors, especially their pecuniary and criminal liability, remain very strongly disputed and sanctions are very difficult to implement, which practically makes these categories of professionals untouchable. This is a cause of constant criticism by the public, especially in situations where the perceived miscarriage of justice is compounded by diverging jurisprudence.

The disciplinary system of the CSM needs to be reformed, so as to grant more independence to the judicial inspectors from the judges and prosecutors who decide on the disciplinary actions.

4. Law Enforcement Institutions

4.1 Transparency, corruption and accountability

In respect of internal transparency, police staff are required⁸⁰ to report to their superiors any act of corruption committed by other police staff, of which they have knowledge. Also, police staff must immediately inform the unit where they hold positions of any criminal charges brought against them or any criminal investigation to which they are subjected. The police staff investigated or tried in a criminal case may perform duties under certain restrictive conditions.

Police staff are required by law⁸¹ to correctly inform citizens on issues that directly affect them and on public matters. The Ministry of the Administration and Interior (MAI) and the Romanian Police functioning under the MAI publish reviews and police activities are presented in TV and radio programmes. The budget and balance sheets of the MAI are published on the web site⁸² of the Ministry.

Further on, in accordance with Law no. 52/2003 regarding transparency in decision making in the public administration, the MAI publishes the draft laws it promotes/sponsors on its web site, in the interests of public debate.

As concerns accountability, by law,⁸³ the police staff are liable under civil and criminal law as well as for violations of the code of conduct of the police forces. In practice, however, the offences and violations committed by police staff are hard to detect and staff often seem to benefit from lenient treatment by the courts.

The public perception that the police are not held responsible for their actions shifted to some degree in 2008 and early 2009, when investigations on an unprecedented scale were initiated by the DNA and by the General Anti-Corruption Directorate (DGA) respectively functioning under the MAI, against police staff in two highly publicised cases.

⁷⁹ Report Regarding the Activity of the Superior Council of Magistracy in the Year 2008 (<http://www.csm1909.ro/csm/index.php?cmd=91>); Report Regarding the Activity of the Superior Council of Magistracy in the Year 2007 (<http://www.csm1909.ro/csm/index.php?cmd=24>).

⁸⁰ Art. 41 g) of Law No. 360/2002 regarding the status of the police staff.

⁸¹ Art. 42 c) of Law No. 360/2002 regarding the status of the police staff.

⁸² <http://www.mai.gov.ro/>

⁸³ Section 2, “Liability and Sanctions”, Law No. 360/2002 regarding the status of the police staff.

One of these cases involves the investigation of nearly 30 persons (of which 17 were arrested), most of them were staff from the Driving Licence and Car Registration Office of Arges County, involved in the illegal issuing of 3,500 driving licences (including for the Mayor of Sector/District 4 of Bucharest).⁸⁴ In March 2009 the DNA pressed charges against the deputy head of Interior Ministry's Anti-Corruption General Directorate and the head of the intelligence for trying to influence a police officer to close a file regarding a prominent businessman.⁸⁵

The second case involves the investigation by the DGA, for various forms of corruption, of 45 police staff of the Road Police of the City of Iasi, following the initial investigation of four other police staff of the same unit, started in January 2009. The DGA investigation was followed by an internal investigation, initiated by the Iasi County Police Inspectorate. However, the internal investigation was soon stayed, as the Iasi County Police Inspectorate appreciated that it was not possible for two parallel investigations to be conducted for the same offences.⁸⁶ The 45 investigated staff represent more than half of the Iasi Road Police staff.

Bailiffs are a professional category that is subordinated to the Ministry of Justice. However, they have competences in law enforcement, particularly the forcible execution of court decisions. By law, bailiffs are required to ensure the transparency of their activity in relation with the clients and third parties. Bailiffs are to avoid any conflict of interests between them and the clients or other conflicts of interest that may interfere with their activity.

Bailiffs are liable under the general rules of civil law for any damage caused by the violation of their professional duties. In practice, however, bailiffs often prove to be an 'untouchable' category, a situation also determined by their small number. Thus other legal professionals and the public are deterred from filing actions or complaints against bailiffs, particularly where they must rely only on one bailiff or very few operating within a certain area.

Moreover, the role and competences of the police in assisting bailiffs in the execution of court decisions is not well defined by law, which makes it difficult to trigger the accountability of both the police forces and of the bailiffs in situations where they fail to implement the execution of court decisions.

Finally, the accountability (as well as the transparency and independence) of bailiffs seems to be seriously hampered by the legal provisions⁸⁷ that require them to unconditionally observe all decisions of the executive bodies of their professional organisation.

⁸⁴ *Permisele auto obtinute ilegal la Arges vor fi anulate de vineri*, Ziare.com, 15 February 2009 (http://www.ziare.com/Permisele_auto_obtinute_ilegal_la_Arges_vor_fi_anulate_de_vineri-678683.html), *Mai multi arestati in scandalul permiselor de la Arges sunt audiati la DNA*, Cotidianul.ro, 20 August 2008 (http://www.cotidianul.ro/mai_multi_arestati_in_scandalul_permiselor_de_la_arges_sunt_audiati_la_dna-55576.html), *Piedone, la DNA*, Evenimentul Zilei, 21 November 2008 (<http://www.evz.ro/articole/detalii-articol/829306/Piedone-la-DNA/>).

⁸⁵ <http://www.bucharestherald.com/politics/34-politics/2541-dgipi-and-dga-heads-remanded-by-dna-interior-ministry-in-peak-scandal>

⁸⁶ *Ancheta interna de la politia rutiera a fost oprita*, Buna Ziua Iasi (<http://www.bzi.ro/Ancheta-interna-de-la-Politia-Rutiera-a-fost-oprita-A45457.html>), *Iasi: 45 de politisti rutieri urmariti penal*, Mediafax, 13 February 2009 (<http://www.mediafax.ro/social/iasi-45-de-politisti-rutieri-urmariti-penal.html?1688;3912677>).

⁸⁷ Art. 22 of the Code of Conduct of Bailiffs – Annex 1 to Decision No. 21 of 27 April 2007 of the National Union of the Bailiffs of Romania, amending the Statute of the National Union of the Bailiffs of Romania and of the profession of bailiff.

4.2 Statistics – petty crime, serious crimes, clearance rates

According to the information published⁸⁸ by the Romanian Police, criminality in general has increased slightly in 2008 as compared to 2007 (+8%), however, the number of serious violent crimes has decreased by 7%. The number of complaints resolved has increased by 4%.

There have been 9,118 offences reported to the Directorate for the Investigation of offences of Organized Crime and Terrorism (DIICOT). The number of investigated persons was 6,268. In the field of financing of terrorism and the fight against money laundering there were 3,189 offences reported and 191 persons were investigated, of which 49 were indicted.

Traffic in human beings, various forms of sexual exploitation, including pornography, and slavery/forced-labour decreased slightly in 2008 as compared to 2007. There were 1,086 offences reported, and 206 of the 1,009 investigated persons were detained or arrested. A high-level investigation is currently under way in Iasi, north-eastern Romania, as a result of an organised crime ring led by local businessmen in whom politicians are also alleged to have participated. No trial date has been set and the four ringleaders are on bail.

In respect of drug trafficking, there were 3,749 offences reported; 3,024 persons were investigated, of which 663 were detained or arrested. The number of serious violent crimes where the offender has not been identified has decreased by 37% as compared to 2007.

Street crimes represented 6.6 % of all crimes, 8% of which were committed with violence. There has been an increase of 363% in the number of offences related to the use of firearms.

In the fight against corruption, there has been an increase of 236.2% in the number of persons deferred for investigation to the DNA. However, very few cases have actually led to judgements and the process is moving very slowly.

Thefts and other similar less serious economic offences made up 40.47% of the total number of offences. The number of cases solved in 2008 has decreased by 4%, as compared to 2007. The number of other, more serious offences of a financial or economic nature has increased by 19%. Generally, businesses prefer to arbitrate rather than use the courts to resolve disputes because of the length of the trial periods.

According to the Report Regarding the Activity of the DNA in the Year 2008, issued at the end of February 2009,⁸⁹ the DNA has increased its efficiency as compared to 2007. The number of individuals brought to court by the DNA has increased by 64%, while the number of those arrested has doubled. The DNA finalised 70% of the cases in which it sought a solution on the merits in less than a year. 77 individuals were indicted, as compared to 51, in 2007, while 97 individuals were convicted by final court decisions and 122 by decisions that are not final. The number of cases finalised by the DNA with a solution on the merits has increased by 8%, compared to 2007, while the total number of cases closed increased by 11%.

4.3 Professional competence in law enforcement institutions

Police staff are usually recruited from among the graduates of the special schools of the interior ministry (MAI), or other schools in other specialist areas, which are necessary in the police force.

⁸⁸ “Evaluation of the Activity of the Romanian Police in the Year 2008”, the General Inspectorate of the Romanian Police (http://www.politiaromana.ro/relatii_publice/stiri.aspx?tip_id=3).

⁸⁹ <http://www.pna.ro/>

Admission to the special schools of the MAI is by competitive examinations. Police staff are promoted, according to the level of the position to be filled, by the President of Romania, the Minister of the Administration and Interior, by the Inspector General of the Romanian Police or by the chiefs of certain structures functioning within the MAI.

Police staff must comply with certain requirements regarding their work experience and quality of work in order to be promoted. Candidates can only be promoted to certain higher-ranking positions if they graduate from a specialist course or hold a certain academic degree in a relevant specialist area or pass examinations in specialist areas. Executive positions are filled by competitive examination.

The quality of the work of police officers is evaluated annually.

The MAI has admitted⁹⁰ to the necessity of improving the professional competence of the police forces and has prepared a strategy for the training of its staff in the years 2008-2012. The MAI has started to implement its strategy, mostly at the level of restructuring the training system of the police staff. The results of the training strategy are to be seen in the future.

Bailiffs are generally recruited by competitive examination. Judges, prosecutors or lawyers who have a work experience of 5 years, and who have passed final qualification examinations in their own professions may become bailiffs without examination. The examinations are organised annually or whenever necessary, by the National Union of Bailiffs, under the supervision of the Ministry of Justice. The Minister of Justice appoints bailiffs to their positions.

Bailiffs are required to participate in training programmes organised by the National Centre for the Training of Bailiffs at least once every three years. The professional training of bailiffs, particularly, needs to be better organised. The National Union of Bailiffs and the National Centre for the Training of Bailiffs should make more effort to establish a clear strategy for the adequate training of bailiffs and for the evaluation of their professional competence.

These efforts, however, need to be made jointly with more to update the legislation regarding the activity of bailiffs, which currently lacks clarity and sufficient detail.

In order to improve the competence and quality of work of the bailiffs, in the conditions where adequate legislation is lacking, the developing of a code of best practices and of other similar guidelines would also be useful.

4.4 Disciplinary procedures and enforcement of code of conduct

Police staff may suffer disciplinary sanctions for a variety of violations of their duties, including for interference with other staff's work, repeated delays in solving complaints, and violation of confidentiality. Sanctions range from warning to dismissal from the police forces.

A Superior Council of Discipline functions within the General Inspectorate of the Police. Discipline councils, which function as consultative bodies, are established within lower structures. The chiefs of the units impose the sanctions where the sanctioned member of staff works.

Violations of the code of conduct⁹¹ of bailiffs trigger disciplinary action against the bailiffs. Disciplinary action is exercised by the minister of justice or by the board of directors of the

⁹⁰ Ministry of Administration and Interior

(<http://www.mai.gov.ro/Documente/Cariera/CONCEPTIA%20.pdf>).

⁹¹ The Code of Conduct of Bailiffs – Annex 1 to Decision No. 21 of 27 April 2007 of the National Union of the Bailiffs of Romania, amending the Statute of the National Union of the Bailiffs of Romania and of the profession of bailiff.

Chamber of Bailiffs where the bailiff is registered. Investigations are conducted by inspectors of the Ministry of Justice, or by the board of directors of the chamber where the bailiff is registered. Disciplinary Council imposes sanctions. Disciplinary sanctions may be challenged in court. Disciplinary sanctions range from reprimand to dismissal from the function of bailiff.

In practice, due to some inadequacies in the relevant legislation⁹² (e.g., it does not result in sufficient clarity from the law on whether individuals who are clients of the bailiff or the public at large may also file a complaint against the bailiff and request that disciplinary action be taken against him or her). The violations of the code of conduct of bailiffs are hard to establish and bailiffs generally seen to be a category that does not enforce the code of conduct of its profession.

5. Private Sector

5.1 Overall business climate and vulnerable sectors

Generally, Romania is viewed as a stable economy, attractive to foreign investment and an environment in which a business can grow steadily. Romania scores well in the most recent World Bank “Doing Business 2009” survey, and was placed ahead of other EU member states such as Hungary, Slovakia or the Czech Republic.⁹³

5.2 Corruption and business

There are a number of areas that are most prone to corruption in Romania’s business circles, apart from the area of public procurement, which is discussed below. Those sectors are construction and infrastructure; health; wholesale (mainly because of the trade element). Bureaucracy and lengthy procedures in, for example, getting planning permission, tend to be some of the main reasons for corrupt practices in running a business. Owners use bribes to fast-track applications with local authorities, a practice that could easily be eradicated by the introduction of electronic filing systems. For setting up companies, the procedures have been simplified but an owner still has to obtain a court order when incorporating a company (a formality that could easily be eliminated). To close down a company can take over 3 years.⁹⁴ All these small steps are burdensome and can encourage small corruption on a widespread scale.⁹⁵

The court system is not effective with dealing with disputes and this has led analysts at accounting firm PriceWaterhouse Coopers to conclude in a report that arbitration might replace litigation as the preferred form of dispute resolution. Enforcing a contract can take up to 512 days and cost around 20% of the value of the claim.⁹⁶

5.3 Influence of organised crime on business

Financial crime has been on the rise in Romania since 1989 but organised crime as such is not a visible and major problem, especially as there has generally been no violent organised

⁹² Law No. 188/2000 regarding the bailiffs, as amended.

⁹³ www.doingbusiness.org

⁹⁴ www.doingbusiness.org

⁹⁵ “When it takes 60 permits to start a new business, there are 60 opportunities for bribes. The number of these permits can be eliminated and be made more automatic” (see <http://www.worldbank.org.ro/WBSITE/EXTERNAL/COUNTRIES/ECAEXT/ROMANIAEXTN/0,,contentMDK:20059576~menuPK:287317~pagePK:141137~piPK:141127~theSitePK:275154,00.html>).

⁹⁶ www.doingbusiness.org

criminality in the country. However, press reports do cite an increase in organised crime in Romania.⁹⁷ The main areas that are dominated by organised crime are the trafficking of drugs, weapons and people. However, these have a localised impact on businesses. There have been instances in which legitimate businesses were infiltrated by organised crime gangs, but these have become rarer.

Since 2004, DIICOT is the government agency that focuses on anti-terrorism and the fight against organised crime. DIICOT is an agency within the Public Ministry and is mainly staffed by prosecutors. Of the 2377 cases brought by DIICOT during 2007, just under a half were cases of human trafficking, a third were cases of falsifying money and 488 were case of organised crime.⁹⁸ As is the case with other anti-corruption institutions such as the DNA, the conviction rate is generally low. But in November 2008, DIICOT secured a conviction for the Balint brothers (27 years in total), charged for organised crime activities,⁹⁹ one year after pressing charges. However, this is not a final conviction – it can be appealed and subject to second appeal.

Financial crime is by contrast an area that is either under-policed or over-policed by the Garda Financiară (Financial Inspectors). Raids on businesses for non-payment of taxes, for example, are common; however, the widespread practice of employing personnel on minimum wages and then paying them non-taxed salaries outside company records, has not been challenged by financial inspectors although it has a direct impact on tax revenues. This contrasting application of the rules often leads to criticism that the fines imposed by the Financial Inspectors are pocketed rather than fed into the tax pool.¹⁰⁰ According to their annual report, the Financial Inspectors focused recently on tax evasion in relation to transactions with other EU member states and in particular on VAT evasion.

6. Public Procurement

6.1 Evaluation of national regulations

In 2006 Romania aligned its public acquisition legislation with European Union regulations through the adoption of Government Emergency Ordinance 34/2006 (GEO 34/2006)¹⁰¹ concerning the award of procurement agreements and of concession agreements for public works and services. Also in 2006, the government created a new Authority for Procurements (ANRMAP - Autoritatea Natională pentru Monitorizarea și Reglementarea Achizițiilor Publice).¹⁰²

⁹⁷ <http://www.gandul.info/actual/crima-organizata-tot-puternica-romania.html?3927;878200>

⁹⁸ <http://www.diicot.ro/pdf/2008/raport2007.pdf>

⁹⁹ <http://www.frontnews.ro/social-si-economic/eveniment/fratii-camataru-nu-au-obtinut-anularea-deciziei-de-condamnare-a-tribunalului-22327>

¹⁰⁰ The annual report figures are low and suggest that recovery of losses by tax authorities were not very successful (<http://www.gardafinanciar.ro/Prezentare.aspx?q=prezentare&idInstitutie=2>).

¹⁰¹ As approved by Law 337/2006 and amended and supplemented by Law 128/2007 and GEO 94/2007. Since 2006, various aspects of the public procurement process have been modified at least 6 times (see www.anrmap.ro) with the latest change as recent as March 2009. Governments have used changes in EU legislation as reasons for the changes.

¹⁰² ANRMAP has a supervisory role. In its 2007 annual report, the agency states that it issued fines totalling €150,000 after verifying the compliance of 1029 procurement notices. However, the same report states that at least 55,000 procurement electronic notices were issued in Romania. See annual report in

Since 2002, Romania also has an electronic tender system – e-licitatie – that was aimed at making public procurement more transparent but has in effect attracted criticism from participants. Those interviewed by us mainly mentioned the fact that state agencies are not required to put every tender online and that some of them, even when they do place the contract announcement, they specify that the contract will be awarded through ‘direct negotiations’ due to the urgency of the works required. The businesses we interviewed said that this was the way local authorities make sure that ‘those that have to win, win’. We found little evidence of trust within the business community in the transparency of the procurement process. Lack of transparency seems to be a problem across all contracting state entities - from very small local councils that attribute contracts to firms that repeatedly failed to deliver¹⁰³ to very high profile cases such as that of the selection of a fund manager for the Restitution Fund, currently suspended whilst the selection commission redrafts the terms of the tender (specifically the fund management agreement). The bidders we queried expressed concern over the uncertainty of the process and believe that the drafting was a political game to ensure that the winner represents the correct group of interests.

Until 2006, the government and local officials pretty much had free rein with respect to giving out public contracts (yes, the existing legislation did not allow them to do this, but certain provisions and language were interpreted in a very ‘non-legal’ manner thus allowing these decision-makers to bypass – practically speaking – the public tender requirements).

To name just a few of the high profile scandals since 2003 arising out of the granting of multi-million euro contracts without a public tender: the publicity contract for the new Constitution campaign (back in September 2003) as well as the Bechtel and EADS contracts (in 2004). The 2006 rules did not have the expected impact of cleaning up the system - but they went a long way towards ensuring a much more transparent, fair and equitable process. However, high-value contracts continue to be handed out to favoured entities – a recent scandal is the concession of oil fields to an unknown company by the previous administration just before leaving office.¹⁰⁴

The 2006 rules provided for such major changes as the tender documentation being explicitly deemed as public information, a requirement that all invitations to tender must be published in the SEAP (the electronic public procurement system), as well as in the EU's Official Journal as the case may be, starting with January 1, 2007. Previously, only allowed so-called "interested persons" had access to the tender dossier, whereas under the modified provision, anyone requesting the tender dossier pursuant to Romania's Freedom of Information Act (FOIA) should be granted access.

On 7 March 2009, the government introduced amendments to the 2006 public procurement law not only to make the tender process more transparent but also to realign it with changes in EU legislation.

Here is a summary of the changes introduced:

- Shorter tender periods – all tenders have to take place within 30 days; for open tenders, the publication of notices should be 20 days; for close tenders then should be 10 days; for bi-lateral negotiations, 20 days.

Romanian at http://www.anrmap.ro/images/stories/raport%20activitate/Raport_activitate_ANRMAP_2007_FINAL_ms07.pdf

¹⁰³ Examples are numerous, but two such cases are that of companies in Ploiesti and Consanta that were paid for resurfacing works they never finished (<http://www.observator.ro/stiri-dosare-scandaluri/stire-asfaltari-de-doi-bani-14049.html>).

¹⁰⁴ <http://www.hotnews.ro/stiri-esential-5386494-petrolul-din-zona-insulei-serpilor-deja-concesionat-lantului-firme-sterling-canada-melrose-edinburgh-via-midia-resources-romania.htm>

- Stamp duty – the amendments introduce a stamp duty of 2% of the contract value for all appeals against the results of tenders to eliminate appeals by companies that had no intention to win the tender but want to block the tender process for long periods of time. The firms that lose their appeal forfeit the stamp duty.
- Increase the ceiling of the contract value for which public procurement rules do not apply from 10,000 Euro to 15, 000 Euro for certain acquisitions.
- Increase the ceiling of the contract value for which public procurement rules apply: for example, for works contracts, calls for tender only apply for a contract value of 750,000 euro (an increase of 50%) or 100,000 Euro for services contracts (an increase of 30%).

6.2 Implementation of EU standards

The new GEO No. 34/2006 copied ad-literam the main provisions of the relevant EU Directives.

The GEO 34/2006 is by its nature rather complex and parts of it are not easily discernible to less experienced bidders – similarly, the amendments since its introductions and the 2009 are difficult to assess as a unitary legislative body.

7. Conclusion

Corruption in Romania remains widespread. In the network of interests that underpins this spread of corruption we found that political, economic and judicial interests often overlap. This has resulted in a lack of political will to prosecute high-level political corruption, judges being intimidated to finalise sensitive cases and a higher legislative volatility, directly connected with the changes within various interest groups. Against this background of political paralysis in fighting corruption, it seemed only natural that Romania's accession to the EU should be conditioned on improving the country's 'rule of law' mechanisms. This conditionality in Romania's case took shape in the 4 benchmarks contained in the CVM, EC's monitoring tool of Romania's reform progress in the justice and home affairs area.

However, once a member of the EU, Romania's governments have viewed the CVM not as a tool to help them improve the judicial system, but rather an aim in itself with their main preoccupation being the lifting of the CVM after the initial 3 years. Romanian authorities seem to have become very apt at mimicking progress in the areas they consider important for the EU with the consequence that changes are introduced not for the country's benefit in the long term but rather to please Brussels. This is a dangerous development that can ossify the current corrupt structures and make the judiciary even less effective in administering justice than it is today.

The progress reports under the CVM make uncomfortable reading for the political class as they highlight the lack of constancy in implementing reforms. There seems to be a direct link between stepping up the fight against corruption and the approaching issue of a progress report. This has been the case also since the February 2009 interim report, following which a higher number of charges for corruption were brought by the DNA against high profile businessmen, senior civil servants and politicians. The problem in Romania is that these charges generally do not lead to convictions as the files get stuck in the courts. This links up with the elements that form the backbone of the judiciary there – poorly qualified staff that are not subject to enforceable codes of conduct; a lack of transparency in the selection of staff, including to senior positions, which results in a lack of professionalism and motivation across the board; a lack of coherence in the application of the law; and the influence of the political class over the judiciary because of the need to protect the economic interests of various groups. Although EU member

countries are rightly concerned about the application of law in Romania, it is only when the Romanian authorities themselves start understanding that the reform is beneficial to them and the country rather than just a formality to please the EU that visible and lasting reforms in the judiciary can take place. Until then, the current dichotomy will remain between the government – who wants the CVM lifted – and the rest of the actors involved in the reform of the judiciary – who view the CVM as the only lever they can use to keep corruption and reform at the centre of the political agenda.

8. Recommendations

8.1 Recommendations to national institutions

Legal certainty

- a) Ministries should build their administrative capacity to commission and implement policy analyses, cost-benefit analyses and public consultations as is already required by the legislation;
- b) Set up a legislation ‘drafting unit’ (by unifying the current ministry drafting units) staffed by a combination of lawyers/ political scientists and NGO representatives to check for consistency and possible conflicts of law in all or, at least at the start, key new legislation.
- c) Put in place a more transparent and participatory process of drafting and adopting regulations that involves consultations with professionals and NGOs;
- d) The requirement that the parliament and its Law Select Committee have to give their consent to charges being brought against an MP should be removed;
- e) Address the confusion present in the Constitution by constitutional change with regard to whether prosecutors are magistrates or executive agents – more clarity and a political decision is needed in order to separate the two judiciary categories.

Transparency and accountability of institutions

- a) Introduce and enforce a clear definition of “connected persons” for the purposes of public appointments to avoid conflicts of interests; the National Integrity Agency (ANI) can oversee the correct application of this definition;
- b) The methodology applied by the anti-corruption authorities is not sufficiently professional and streamlined – they need to access a wider range of sources to build up their cases for prosecution and not rely on the media/ state agencies alone;
- c) Ensure that anti-corruption bodies are fully staffed and, if there is a lack of suitable candidates, outsource for services via a transparent procurement process;
- d) Enforce security rules and institutions rules equally so that leaks do not happen that are later used as political weapons.

Independence and professionalism in the judiciary and other institutions

- a) Introduce more control over the storage of documents in court proceedings and allocate responsibility to the judge/ court clerks if leaks occur during a trial.
- b) Human resources should become a priority in all judiciary institutions – introduce and monitor a civil service HR policy to ensure consistent staff quality; make this a top priority, ahead of just modernising technology;

- c) Introduce a truly transparent system for the selection of personnel at all (and in particular at the top) levels in the legal sector. Clearly established criteria for the assessment of performance do not seem to exist/ or if they do, they are not applied;
- d) Introduce staggered elections for the Superior Council of the Magistrates (CSM) – every 2 years – in order to renew the CSM composition by one third and force magistrates to be more active in the profession’s electoral process;
- e) Extend the time in office of the CSM president to 2 years, with a restriction that one may not be elected during the first 2 years of their mandate, but can be re-elected for a second term;
- f) Introduce the possibility that CSM members be revoked at any time during their mandate if they do not actively participate and contribute to CSM.

Protection of human rights

- a) Better enforcement of decisions from ECJ/ ECHR.

8.2 Recommendations to EU institutions

- a) The CVM should not be lifted at the end of the 3 year monitoring period; although it is useful that the formulations of the BMs are broad to cover more rather than less of the reform needed, this broad formulation is often used by the Romanian government to hide their lack of progress. Some more precise form of monitoring/ defining further some of the elements that form each of the BMs might result in more accountability within the national institutions;
- b) The CVM should not be annually renewable;
- c) If renewed for the medium term (another 3 years minimum), the CVM benchmarks should become more flexible and more defined to allow for the areas where progress is registered to be dropped without having to drop the whole monitoring process (and to allow the possibility to introduce new areas, as needed);
- d) If cuts in EU funding are envisaged as a potential sanction on Romania, I would advise a carrot and stick approach: the stick is that Brussels cuts all funds for Romania, and the carrot is that Romania may draw on that money in order to fix the justice system – once the judiciary functions properly, the money may be accessed in all other areas, and Romania would have already had a core of well-versed people with regard to accessing EU funds.

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