



Policy Brief no. 99, November 2020

How will the Rule of Law report influence adherence to the rule of law standards across the EU? In October 2020, Expert Forum, together with APADOR-CH hosted a round table debate on the European Commission's Report on the rule of law to discuss the plans of Romanian public institutions with attributions on anti-corruption. EFOR publishes the main conclusions of the discussion, together with an analysis of this new mechanism.

The Rule of Law Report. Directions for anticorruption in Romania

1. Introduction

The publication of the [Rule of law report in 2020](#) marks a new chapter in the attempt of the EU to deal with the issue of common values and standards in this field. The experience of [the 2014 Anti-corruption report](#) which was supposed to be a bi-annual exercise but succumbed after the first publication, coupled with rule of law degradation in several European countries mandated caution on the side of the European Commission in preparing the first ever Rule of law report about European Union member states. The report is an intrinsic part of the Rule of law mechanism through which challenges to rule of law would be spotted early on in member states allowing for reparative measures to be taken in consultation with the European Commission before the situation deteriorates severely.

The underlining assumption is that as we all share the same values on fundamental rights, democracy and the rule of law a stronger dialogue and cooperation between national governments and the European Commission when problems arise would have a healing effect and help solve the challenges encountered.

The report comprises an introductory chapter where the goals and expectations as well as overall findings per topic are listed followed by country specific chapters. Every year a new report is supposed to be published focusing on the developments since the last report. The methodology has been discussed with the member states and allows for input from various stakeholders into the process, including from civil society and the media. Views of other stakeholders such as the Venice Commission, GRECO, FRA, OSCE, OECD are also considered when

relevant to the topics covered by the report. The areas covered are: the justice system, the anti-corruption framework, media pluralism, and other institutional checks and balances. In 2020 the response of the EU member states to the COVID19 pandemic featured in the report.

While it is unfortunate that the EU has decided abruptly to halt the publication of the EU-wide Anticorruption report, we welcome that a new vehicle has been designed to address the more and more pressing issue of rule of law deviation in member states. The new tool encompasses more areas and allows for the broader view to issues that may trigger challenges. While this goal is commendable, the tone of the first Rule of law report remains overly diplomatic and descriptive avoiding clear cut recommendations even to member states known to be going through rough times in terms of rule of law. Allegedly this approach is more likely to open doors for dialogue and negotiations – time will tell if such tactics will indeed work in this very sensitive field.

For Romania and Bulgaria, which are still under the [Cooperation and Verification Mechanism \(CVM\)](#), the Rule of law report is a new opportunity to argue that the CVM is obsolete and can easily be replaced with the more inclusive Rule of law report. Governments would naturally try to escape the stricter strings of the CVM benchmarks and suggest that, by comparison, when looking at the Rule of law report Romania and Bulgaria do not come across as the most problematic member states. The European Commission has stated time and again that the CVM will end when the benchmarks are met and that the Rule of law report is not meant to replace the CVM, but the political cost of keeping the two

mechanisms is increasing both for the stakeholders that are for and for those who are against.

In terms of **including input from the civil society** in the process, more efforts should be made to organize meaningful consultations with the European Commission. The expectations for the meetings should be better articulated so that the civil society can prepare contributions which are to the point and at the same time comprehensive. It would be recommendable that the input from member states is made available in advance so that potential different positions with regard to recent developments can be clearly articulated. Indeed, there is little need for opacity when it comes to country level discussions on rule of law. It is commendable that open consultations were launched where anyone, including civil society groups, could present their view point with regard to the topics under review. However, there is a clear need to raise awareness with regard to this mechanism and to improve the technical capacities of the online tool that was created for this purpose.

COVID19 was rightly labelled a stress test for rule of law resilience in the first report. The constitutional and legal basis for restrictive actions taken by the governments to tackle this serious health related crisis have briefly been examined, but more work needs to be put into seeing exactly how the adopted rules were applied in practice in each member state. Statistics on restrictive measures and accompanying sanctions need to be collected and shared among member states. This would allow for a serious discussion about the outcome of the public policies that were implemented, about potential errors that were made along the way, about measures that proved to be working

in the pandemic context. The end goal would be to learn from the past and be better prepared to face future challenges while ensuring predictability and fairness within the EU.

The justice systems of the EU member states are a pillar for rule of law and as such are expected to deliver justice in a timely, fair and predictable manner. When attempts to undermine the independence and impartiality of the justice systems are made it is our view that clear recommendations should be included in the report. **The prosecutorial offices** which come in the EU in many shapes and forms are also central to a fair and independent criminal justice system and the Rule of law report takes a brief look at them too. Digitalization of the justice system has proved furthermore its importance during the COVID19 pandemic and while progress has been made, many EU countries are still struggling. An underexplored issue pertaining to the proper functioning of the justice systems is that of accountability. Future Rule of law reports should also dwell upon this sensitive topic.

The anticorruption framework of each member state is described in the country chapters, unfortunately in much less details than in the 2014 Anticorruption report. While recognising that there is no "one size fits all" type of solution, the report looks into the practices of each member state and brings into the picture the newly established European Public Prosecution Office (EPPO) which will play an important role in protecting the financial interests of the EU. Going beyond national anticorruption strategies, the report analyses the capacity of the judiciary to handle corruption, high-level corruption in particular, to

eventually apply sanctions to the perpetrators and recuperate the ill-gotten benefits and as a result deter further criminal activity in this field.

Media pluralism and media freedom also featured in the report, for the first time in the same puzzle as the rest of the topics. The picture is dire with concerns about the independence and efficiency of media regulators in some member states and challenges regarding the disclosure of media ownership. The misuse of state advertisement to buy the good will of the media, in particular in pandemic times when budgets for this have significantly increase, has been outlined as a serious issue impeding on media independence alongside with direct political pressure and threats to journalists. Mechanisms to ensure access to information for all and protection of journalists against attacks and threats have proven to be fragile in a number of states. The next reports should go more in-depth with regard to these challenges in our view.

It is very good that **checks and balances** were also included in the Rule of law report. While member states have constitutional provisions and legislation that on paper seem to establish a sound democratic system, it is important to explore how the checks and balances actually work in practice. It is not enough, for example, that a member state has an Ombudsman institution which in theory could temper governmental excess if in practice that institution does not use its competences independently from the government. The report also explores recent developments with regard to constitutional review processes and the role of civil society in contributing to enforcing the rule of law culture.

If consistency, coherence and genuine political leverage are ensured for the Rule of law effort and if the language of the reports moves from descriptions towards exploring ways to solve identified problems, the Rule of law report has the potential of growing into a useful tool to counter deviations from the EU values and standards. It is important that rather than exploring legal and institutional arrangements the content of the report be more focused on the issues that are relevant to citizens of each member state. Hopefully such refinements will appear in the years to come and the 2020 Rule of law report is just a first in a long row of assessments, unlike its predecessor – the 2014 EU Anticorruption report.

2. Rule of Law report, country chapter - Romania

On the 29th of October 2020, Expert Forum, together with APADOR-CH hosted a round table debate on the European Commission's Report on the rule of law to discuss the plans of Romanian public institutions with attributions on anti-corruption. We include below the main conclusions.

2.1 Istvan Jakab, Acting Head of the European Commission Representation in Romania

The Commission's rule of law report covers all 27 Member States and is intended as a preventive mechanism based on dialogue both between Member States, who can see good practices from other Member States, and between MS and the European Commission.

The report covers four major chapters: national judiciary systems, the fight against corruption, freedom of the press and checks and balances system

within each Member State. The report does not aim to standardize judiciary systems, nor rank Member States. This mechanism is also not linked to the distribution of EU funds for the next financial exercise

The rule of law report highlights both positive and worrying trends and does not explicitly contain recommendations.

In the case of Romania, there is also the Cooperation and Verification Mechanism which includes clear recommendations that Romania must comply with.

From the perspective of freedom of the press and the media in Romania, it is noteworthy that there were situations reported of pressure on journalists. Transparency must be increased regarding beneficial owners of media trusts. The issue of access to public information for journalists and civil society in Romania is also mentioned.

The report also mentions the way in which the state powers cooperate as well as the checks and balances system in Romania. Thus, it is understandable to resort to emergency ordinances to regulate urgent issues during the pandemic and the state of emergency. But the problem in recent years has been the repeated use of emergency ordinances and the correction of other ordinances through emergency ordinances. Legislation by emergency ordinances does not ensure legislative and economic predictability.

Last but not least, the report highlights the contribution of civil society to the rule of law in recent years, by drawing attention and raising awareness when the state made decisions in the wrong direction.

2.2. Laura Ștefan, Executive Director, Expert Forum

The report provides us with a very good framework of discussion so that Romania can clarify its priorities for the coming period. More precisely, it opens a dialogue about what public institutions intend to do in the coming years to close the CVM exercise, given that until recently Romania went through a tumultuous period from a rule of law perspective.

Although the report does not make direct recommendations, there is a link between the issues mentioned on anti-corruption and the recommendations of the latest MCV report.

In today's debate we invite the speakers to try and answer the following questions:

- What does the next strategic framework look like? The current National Anticorruption Strategy is coming to an end this year. What are the priorities to be included? What is the Government's proposed timeline for future strategic framework?
- How do we strengthen the fight against corruption? Until recently, all prosecution offices functioned with interim leadership. Chief prosecutors were appointed in March 2020 in almost all prosecutor's offices. How has the Justice system been impacted by the pandemic? What were the main challenges and how do we overcome them?
- Then, the issues related to criminal law and criminal procedure - there are significant challenges regarding the amendment of the criminal and criminal procedure codes.
- Another challenge we are currently facing is related to compliance with court decisions - more precisely,

bans on holding public office ordered by courts through final decisions. We note with disappointment that there is extremely diverse practice in this area and that we have judges who do not take into account final decisions passed by other judges. It is a topic for debate in the context of the discussion on adherence to the rule of law and, in fact, on the purpose of anti-corruption institutions.

- We are also discussing today about asset recovery. The area is extremely sensitive, but it very important that the money goes back to the state budget. Criminal convictions are important, but they do not significantly affect criminal organizations who sacrifice individuals to preserve material benefits.
- Last but not least, we should also discuss the legislation and policies in the area of protection for whistleblowers. For Eastern Europe, the implementation of these mechanisms is a challenge and a framework for discussion on the transposition of the Directive in this area is needed.

2.3. Gabriela Scutea, General Prosecutor, Romania

In this report we see a strong focus on continuing DNA investigations (high level corruption), leaving aside small corruption. However, I believe that the diagnosis that petty corruption is prevalent in Romania must be overcome. The General Prosecutor's Office manages petty corruption and there are currently numerous indictment (especially for giving of bribes) and ongoing investigations (especially for receiving a bribe) - by September 2020, we have 218 indictments with 293 defendants. In

comparison, since coming out of the state of emergency, the results have been good (increase from 120 to 293). About a third of criminal investigations are based on ex officio notifications.

We need to focus on cases of **receiving of bribery**, for which the statistics show a large number of cases ongoing. On the other hand, statistics indicate that most cases solved are those of **giving of bribes**. The relevant integrity indicator, in a broad sense, for public institutions is the number of cases of **receiving bribery**.

A challenge faced is that of numerous vacant positions in the National Anticorruption Directorate (DNA). At the level of prosecution offices attached to tribunals, human resources specialized in fighting corruption are sufficient. Another challenge is related to CCR Decision 55/2020, which, together with other CCR decisions, has led to the situation where certain means of evidence could be considered illegal by the courts or prosecutors no longer have a legal basis to use certain information as evidence in their cases.

In 2014 the EU anti-corruption report, gave Member States the possibility to compare anti-corruption measures, so that state could transfer best practices. The current report on the rule of law offers us the possibility to see that there have been developments in some states that confirm certain practices that Romania has been implementing for several years - for example asset declarations.

2.4. Crin Bologa, Chief Prosecutor of the National Anticorruption Directorate (DNA)

In 2020, DNA performed better than in the previous year, although our activity was severely affected by the pandemic which made it difficult to fight corruption. Thus, for two months

criminal investigations were suspended in almost all cases. DNA also faced limitations in criminal prosecution acts such as searches and sting operation which had to be carried out within the restrictions, as well as suspects who refuse to be present at hearings for fear of being exposed to the virus.

Management positions within the DNA were filed this year and, at this moment, the procedure for recruiting prosecutors with executive attributions is in progress.

Unfortunately, the personnel scheme for prosecutors is only 70% occupied. The changes brought to the Justice Law package has generated a personnel crisis for the DNA, compared, for example, with DIICOT. Thus, the recruitment of prosecutors with executive functions is difficult as the age limitations for access to the DNA have increased. The method of examination has also become more difficult.

DNA also faces difficulties in developing technical capacities (limited human and financial resources), having in mind that DNA has recently lost the technical support of other institutions who had better facilities from a technical point of view. There is a Government Decision pending which will supplement the DNA personal scheme with 90 police officers who will work on the development of the technical capacities necessary for wire-tappings.

Compared to 2018-2019, this year DNA has more indictments, with more defendants, but also fewer cases filed. In fact, the efficiency (number of cases sent in relation to the number of cases filed) in the first 8 months of 2020 amounts to about 12% compared to about 7% in the same period of 2019. Over the past year, the percentage of acquittal was 52%. This year we aimed not only a quantitative increase in activity, but especially an increase in

quality, well-proven criminal investigations, in order to reduce the high degree of acquittals.

The number of complaints from citizens and ex officio complaints has increased. This is the first year that this trend has changed since 2015.

At the moment, DNA is working on over 3,500 cases and has over 1,200 cases solved.

With the operationalization of the European Public Prosecutor's Office, DNA loses its competence to investigate fraud with EU funds.

For the future, the chief prosecutor mentioned that he is looking forward to the Justice Laws package being amended so as to remedy personnel shortage in the DNA and return under the DNA's jurisdiction the investigation of corruption offenses committed by magistrates. He also considers it necessary to extend the competence of DNA, for example by including tax evasion and embezzlement crimes over a certain amount, as well as the introduction of public procurement crimes in the legislation.

2.5. Andrei Furdui, Director, Crime Prevention Directorate, Ministry of Justice

On the new Anti-Corruption Strategic Framework (SNA). The National Anticorruption Strategy is a tool appreciated in all CVM reports, as well as in this latest report of the European Commission.

The current strategy expires on December 31st 2020. The new SNA (2021-2025) will have to be developed after an audit of the current strategy. The independent external audit of the 2016-2020 SNA is currently being

prepared and it will provide additional information to justify the decisions in the next strategy. This evaluation will be followed by a public consultation with the 5 SNA working groups of (platforms). Next year there will be a final version of the SNA to be submitted for the Government's approval.

The transposition of the EU Whistleblowers Directive is under way, as we have a deadline to transpose it and a draft of the text will be made public for consultation. It is not an easy transposition because Romania already has a legal framework in the field since 2004 and it is a generous one. The problem is its application. Thus, we must ensure that the national standard is not reduced, while respecting the architecture and philosophy of the European directive.

2.6. Mircea Negruț, Deputy Director-General, Chief Commissioner of Police, General Directorate for Anti-Corruption (DGA)

This year, DGA celebrates 15 years since its establishment as a specialized structure for preventing and combating corruption within the Ministry of Internal Affairs and beyond.

I can say that in the context of the COVID-19 pandemic, DGA's activity did not decrease, on the contrary, which meant that the prosecution offices confidently relied on the DGA to carry out criminal investigations by means of delegation.

For 2021-2022, a major challenge we face is increasing operational capacity. As a result of the CCR decisions in recent years, which have made it impossible to rely on the technical capacity of other structures in terms of technical supervision, the DGA must develop its own capabilities which means additional personnel and logistic resources. The DGA benefits from the

support of the General Prosecutor's Office in this sense, but we are only at the beginning of the process.

Another challenge is personnel shortage. At the level of the Ministry of Internal Affairs, there has been a real human resources shortage in recent years due to the departure of some people from the system, but also due to the early retirement scheme. Currently, in the DGA, more than a quarter of the positions are vacant.

Another problem that we are noticing more and more is the fact that DGA's jurisdiction is contested in courts. Thus, DGA officers are sometimes delegated to prosecution offices in corruption-related cases, due to their experience, and not only in cases in which police officers are involved. In these cases, there are frequently exceptions in court regarding the lack of competence of police officers in the DGA. We believe that a clarification is needed in the primary legislation in this regard.

In addition to the combating component, DGA also has a very active prevention component. I mention for example that the DGA provided technical support to the Technical Secretariat of the SNA regarding the adoption of HG 599/2019 on the standard methodology for assessing the risks of corruption in central public institutions.

2.7. Cornel Călinescu, General Director. National Agency for the Management of Seized Assets (ANABI)

ANABI is the product of the National Anticorruption Strategy which involved a wide public consultation at the time and a political will to set up entity to take over such an atypical mandate for our judiciary system. After 3 years of activity in which we had to overcome

many taboo subjects, we can say that we managed to bring to the attention of colleagues in prosecution offices and courts new institutions in practice:

- (i) early capitalization of assets;
- (ii) planning confiscation and seizure through a cost assessment (pre-planning) for which we work together with prosecutors and police officers;
- (iii) publishing and conducting online auctions.

Thus, ANABI is subject to public scrutiny and it is easy for the public to understand what the agency does and how it can be effective. ANABI showed that anything can be sold - for example trains or virtual currency.

Following these 3 years of activity, we can say that it is important for ANABI to be involved in the early stages of the case and where it is necessary to be consulted in order to give a useful point of view when talking about the effectiveness of precautionary measures.

Regarding the latest changes to the legislative framework on extended confiscation, I am pleased to say that after 3 years we have an answer on the project initiated by the Ministry of Justice. ANABI is already ready to be effective in the new regulatory framework. According to the attributions, ANABI automatically receives court decisions in which the courts have pronounced confiscation decisions. We went through more than 30,000 decisions in these 3 years and only in 46 of the cases has the institution of extended confiscation been applied. I think that the new text will increase the number of decisions.

The new legislative framework consolidates the capacity of the prosecution offices to put in place efficient seizures which will subsequently be transformed into confiscations with revenue-generating potential.

It is also important to mention that at EU level a horizontal evaluation of ANABI-type structures is underway as it does not benefit from a unitary legislative framework, equal at EU level. Thus, the possibility of consolidating the mandate of these institutions is analyzed at the level of the European Commission.

We want an extension of ANABI's jurisdiction, and we have made some proposals of *lege ferenda* in this respect. We hope that in the future we will put on the public agenda a document that will generate a discussion that can bring us to a higher level of asset recovery.

2.8. Silviu Popa, Secretary General, National Integrity Agency (ANI)

ANI continues to have good results, but its effectiveness is being tested by the weakening of the legislative framework. ANI also has a significant workload, but the budget has been reduced.

ANI is facing increased difficulties in applying sanctions following final court decisions. The weakening of the legislative framework affects the results of ANI. For example, the introduction of the general statute of limitation of 3 years has led to the closure of hundreds of cases.

The European Commission's recommendations over time are very clear in terms of the integrity framework and point towards the need to ensure the stability, clarity and predictability of the legislative framework. A clear and predictable legislative framework will make the civil servant understand what a conflict of interest is and what the sanctions are if he/she does not comply.

The clarification and improvement of the integrity legislative framework must be the expression of the agreement of the will of all stakeholders involved and not the result of singular initiatives in the public administration, which are then patched up to become ineffective. It is necessary to show that we have the capacity to debate with all the stakeholders impacted by the integrity framework in order to reach a consensus on the rules from which we will not divert for the next electoral cycles.

In the near future, the most important tool we are preparing is the digitization of the entire system for completing declarations of assets and interests. Digitalization would mean streamlining the entire submission mechanism to allow a detailed analysis of those problematic declaration. Depositors will more easily fill in the declarations and of course the data will be made available in open format and easily analysed by journalists and civil society.



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Event organized under a project funded by the Bureau of International Narcotics and Law Enforcement Affairs (INL), implemented by Expert Forum in partnership with the CEELI Institute and the International Foundation for Electoral Systems (IFES).