

SUPPORTING DOCUMENT
Accompanying the
REPORT FROM THE COMMISSION
TO THE EUROPEAN PARLIAMENT AND THE COUNCIL
On Progress in Romania under the Co-operation and Verification Mechanism
ROMANIA: Technical Update

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Legal Framework

On 14 April 2010 the Constitutional Court found substantial and significant parts of Law 144/2007, the Law on the National Integrity Agency, unconstitutional.⁷ In considering an exception raised in one of the Agency's first major confiscation trials, a 3.5 million euro confiscation case concerning a former Member of Parliament, the Court found that:

- the power of the National Integrity Agency (ANI) to verify assets, conflicts of interest and incompatibilities of holders of public office, and to issue administrative documents detailing their findings, breached the Constitutional separation of powers in granting ANI what the Court considered to be quasijudicial powers and that certain activities carried out by ANI's integrity inspectors had jurisdictional nature;
- the power of ANI to ask courts to confirm and confiscate significant unjustified differences between the income and acquired assets of a public official odignitary breached the Constitutional presumption of, and prohibition on confiscating, legally acquired property, as well as the presumption of innocence;
- the obligation to publish asset and interest declarations on the webpage of their employer and their transmission to ANI for publication on ANI's webpage was a breach of the Constitutional duty upon public authorities to respect and protect the intimate, family and private lives of persons. The decision of the Court was not unanimous and in a dissenting opinion three of the nine Court judges expressed their disagreement with the majority decision, suggesting that neither ANI's powers of verification and finding, nor the confiscation of significant unjustified differences between income and assets breached the Constitution¹.

In reaction to the Constitutional Court's judgment the Government submitted a draft law amending the ANI law to Parliament, which was debated and adopted on 12 May. This new law was widely criticised by practitioners and civil society. On 2 June the President therefore decided not to promulgate the new law and returned the law to Parliament for re-examination. However, on 30 June the Parliament adopted the new law once again with only minor improvements. The control of assets, a fundamental element of ANI's original competences, has been lost. ANI is now deprived of the ability it previously possessed to send cases of significant unjustified differences between income and accumulated assets to court for determination and sanctioning. In its place, ANI will only be able to refer such cases to prosecutors or tax authorities, neither of whom is legally competent to sanction unjustified discrepancies arising from the verification of assets and income. In the past, in cases where no criminal offence could be proven or assets seized could not be clearly linked to an offence for which a conviction was achieved, ANI had played an important complementary role to law enforcement in providing for the follow up of significant discrepancies between the income and accumulated assets of public officials and seeking confiscation through its procedures. The majority of ANI's confiscation cases so far derive from such co-operation. An important deterrent and sanction for corruption has therefore been lost.

¹ The three judges' separate opinion concluded that ANI did not have quasi-judicial / jurisdictional powers, given ANI did not deliver judgments, but undertook research and investigation and notifies courts or other competent institutions in order to take steps provided by the law. As regards confiscation of unjustified assets, the separate opinion concluded that the ANI law did not reverse the presumption of licit acquisition of property (as it was for ANI to present their findings as regards the discrepancies between income and assets) nor the presumption of innocence. They also felt confiscation constitutional as the Constitution allowed the legislator to institute the forfeiture in all cases of illicitly acquired assets.

As a result, under the new law follow-up or sanctioning of discrepancies between assets and income identified, and therefore meaningful control of dignitaries' and officials' accumulation of wealth whilst in public office will no longer occur. Amendments which sought to keep alive the possibility of sanctioning such unjustified discrepancies, utilising arrangements in another law allowing for the confiscation of unjustified assets, which the Constitutional Court has found constitutional as recently as 2007, were rejected by the Romanian Senate on 30 June.

The new law as adopted by Parliament also includes a host of other amendments that weaken the effectiveness of ANI's legal framework in areas unrelated to the Constitutional Court decision: establishing a short prescription period of one year for completion of ANI's verifications after a public official leaves office; limitation of the period for which the *public* asset and interest declaration will remain accessible online and limitation on the period for which a state of incompatibility can be sanctioned; reducing the content of the actual declaration forms undermining their effectiveness as a tool for transparency or investigation; and significantly reducing fines for persons or institutions who do not supply information requested by ANI. Following the publication of the Constitutional Court decision on 5 May, ANI suspended all ongoing verification activities.

Institutional Developments and track-record

Up until the Constitutional Court decision, ANI had been continuing to consolidate its institutional base. ANI had taken steps to implement the detailed, technical recommendations supplied in the first annual independent external audit undertaken in late 2009 and was now beginning to implement the recommendations arising from the second annual independent external audit undertaken earlier this year. Significant improvements to the software systems were made increasing ANI's potential efficiency.

Consolidation was also the focus as regards staffing. The number of ANI personnel had reduced slightly since summer 2009, with 113 employees in post as of May 2010, of which 55 are integrity inspectors. However, the majority of vacant positions (74 of the 87) are not budgeted (including the position of Vice President) and the focus of ANI's management had therefore been on enhancing efficiency and results with the existing personnel: introduction of new software systems, appropriate training under externally financed projects (though opportunities for comprehensive ongoing training arrangements, underpinned by a learning needs analysis, were constrained by budgetary issues). ANI had also prepared and adopted a Code of Ethics and Professional Conduct for its personnel. The National Integrity Council's (CNI) Evaluation Commission concluded its inquiries into allegations made in February 2009 against ANI's senior management. In a report issued in February 2010 the Evaluation Commission concluded that the allegations against the ANI President were in each instance either unfounded or not confirmed. A similar finding had been reached in October 2009 against the ANI Secretary General and in February 2010 the ANI President was also exonerated in a separate report into his the National Integrity Council (CNI) have come to surface since July 2009. As a result, the CNI has not been able to act as an interface between ANI and politics and was not able to shield the agency from political accusations and promote its development.

Consolidation in terms of the institution had also been mirrored in ANI's operational track record, in line with the recommendation contained within the Commission's report of 22 July 2009. From 301 completed investigations as of 22 May 2009, by 1 May 2010 ANI had completed 1576 investigations (since the commencement of activities by the Agency). From 68 files sent to competent institutions for sanctions to be applied or for criminal investigation, as of 1 May 2010 ANI had sent 291 files to competent institutions. One hundred and seventy five of these files have been sent to prosecutors' offices (to investigate possible criminal offences – 169 cases for false statements and 6 cases for conflicts of interest); six files to courts (to confiscate unjustified wealth); and 110 files to disciplinary committees (to apply disciplinary sanctions for incompatibilities or conflicts of interest).¹¹ As of 1 May investigations were underway in 3534 files. Further to a recommendation by the Commission, ANI had also taken steps to monitor the timely follow up by judicial and disciplinary bodies to cases they submit. Case management processes within ANI were reviewed and strengthened, to ensure regular and routine follow up by ANI inspectors to files forwarded to other competent institutions. As of 1 May 2010:

- 2 findings of unjustified wealth had been confirmed by the Courts in first instance decisions and the confiscation of significant assets ordered, though both decisions were being appealed.¹² Four further confiscation cases were pending before the courts for a first instance decision

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- 1 finding of an administrative conflict of interest had been irrevocably confirmed by the High Court of Cassation and Justice, and a second case was pending a final decision of the High Court. In the first case ANI had commenced legal proceedings to obtain the annulment of legal and administrative documents concluded by the official in question, as well as to seek the recovery of any prejudice findings of incompatibility (from 110) had become final and thirteen disciplinary solutions had been ordered as a result by disciplinary bodies¹⁴
 - Prosecutors had issued one indictment (concerning a city mayor) arising from an ANI notification and have initiated criminal pursuit in three further cases which are ongoing. Fifteen further cases have been closed by prosecutors after the initiation of the criminal pursuit – although in ten of these cases prosecutors acknowledged the existence of the offence, but decided to apply an administrative fine – and forty-four cases were closed by prosecutors without initiating the criminal pursuit.¹⁵ One hundred and twelve further cases are pending, the majority concerning false statements, but with five cases of alleged conflicts of interest in breach of the Criminal Code. In terms of follow up, questions remained as to the promptitude of action by disciplinary bodies and regarding the leniency of certain disciplinary sanctions applied. Questions also remained as to the celerity of proceedings before prosecutors. Given that ANI's administrative verifications are suspended until the prosecutors' investigations are complete, delays in resolving criminal files have a consequential effect on the efficiency of administrative verifications.¹⁶ However, all these developments towards ensuring a fully operational and effective ANI – and their track record – are now placed in question by inadequacies in the new legal framework.

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The Commission has mapped the main current shortcomings in Romania as follows:

The protection against conflict of interest in the law is not sufficiently effective. Several laws address different aspects of conflicts of interest and are not sufficiently harmonised. This leads to confusion regarding the attribution of responsibilities among competent authorities.

Competent authorities demonstrate only limited activity aimed at preventing and detecting conflict of interest. The Commission could only establish very few cases where conflicts of interest were detected by administrative authorities and sanctions were taken.

Cooperation among administrative authorities in order to design effective prevention strategies and control procedures is missing. Furthermore, as few cases are detected, few signals are transmitted to the judicial authorities.

In addition to these specific shortcomings, a number of more general weaknesses have been noted: Legislation in the area of public procurement has been subject to frequent amendments and too little assistance is provided to contracting authorities for the correct application of the existing legal framework. Too often, these legal amendments aim to address in a symptomatic way weaknesses of the public procurement process without engaging a comprehensive strategic analysis of underlying causes. Together with insufficient expertise and capacity of local contracting authorities, the result is often insecurity how laws and procedures should be applied. This insecurity results in turn in a high number of complaints and works against an effective prevention of irregularities.

This picture of insufficient and complex legislation on conflict of interest together with a low sensitivity towards risks among administrative authorities and a weak track record in prevention and control contrasts sharply with the important risk of conflict of interest in public procurement which is confirmed by competent authorities and may also be ascertained through data provided by other sources. The majority of conflict of interest cases transmitted by the National Integrity Agency to the judicial authorities for decision relate to public procurement. A number of highlevel cases of corruption also relate to public procurement.