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PREFACE

This review is one of a series of functional reviews¹ commissioned by the Government of Romania, funded by the European Union, and carried out by the World Bank. Its objective is to analyze the functioning of institutions of the judicial system² in Romania; and to provide analytical and advisory input to enable the Romanian authorities to formulate an action program to improve the performance of the judicial system.

The current review differs from previous reviews in two important aspects: (a) it addresses a series of institutions across different branches of government, some of them with considerable and increasing independence from the executive branch; and (b) it is an element agreed on by the European Union and the Government as part of the post-accession Cooperation and Verification Mechanism (CVM). The review, however, is not primarily intended to inform the CVM evaluation, but rather to set a course for future action based on sound empirical analysis. The Functional Review has a much broader focus than the CVM's targeted monitoring and, while recognizing improvements already made, emphasizes areas and options the Romanian authorities may want to consider for strengthening sector performance.

The present report covers a large part of Romania's judicial system, a term used here with broad scope. In accord with the terms of reference (appendix 1), in addition to the courts, the review covers the Ministry of Justice—focusing on those functions most directly related to the judiciary and to the Public Ministry (PM)³—the PM itself, and a range of independent legal professionals whose work complements and in some cases replaces that of judges and prosecutors. Within the judiciary, aside from the ordinary courts, the review also addressed the operations of the Superior Council of Magistracy, the Judicial Inspectorate, and the High Court of Cassation and Justice, all of which operate quasi-independently. They have their own budgets and administrative structures, although are still governed by laws on staffing set by Parliament and staffing levels approved by the cabinet. Within the PM, the team also looked at the quasi-independent National Anti-Corruption Directorate.

The most notable exclusions from the report are the Constitutional Court, the military courts, the Directorate for the Investigation of Organized Crime and Terrorism, the National Integrity Agency, and various administrative bodies responsible for making preliminary decisions on issues that may end up in the courts if the parties are dissatisfied with the initial results. Romania does not have a separate set of administrative courts within or outside the ordinary judiciary. Other entities of possible interest include arbitration centers set up by chambers of commerce, law schools, and nongovernmental organizations specializing in legal matters.

The review provides an assessment of the organization and functioning of the judicial system and recommendations to improve its performance; an analysis of system resources and their

¹ An overview is available online at www.worldbank.org/content/dam/Worldbank/document/Romania_Snapshot.pdf.

² For a schematic representation of the elements of the system see World Bank (2012).

³ Thus, the MOJ's role in vetting legislation and handling prisons were excluded, along with several other activities regarded as being outside of the scope of this review. However, the team did consult with directors of the MOJ's main offices.

contribution to system performance, the information and communications technology environment and its management; and a systematic framework to identify and mitigate risks affecting the performance of the judicial system.

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ACRONYMS

ABA/CEELI	American Bar Association/Central and Eastern European Law Initiative
CADI	Centrul de Analiză și Dezvoltare Instituțională
CEPEJ	European Commission for the Efficiency of Justice
CMS	Case management system
CVM	Cooperation and Verification Mechanism
DIICOT	Directorate for the Investigation of Organized Crime and Terrorism
EAS	Enterprise Archiving System
ECHR	European Court of Human Rights
ECRIS	Electronic Case Registration and Information System
EU	European Union
GDP	Gross domestic product
HCCJ	High Court of Cassation and Justice
ICT	Information and communications technology
ISARCP	Information System for Audio Recording of Court Proceedings
MOJ	Ministry of Justice
MOPF	Ministry of Public Finance
NAD	National Anti-Corruption Directorate
NCrPC	New Criminal Procedures Code
NCvPC	New Civil Procedures Code
NIM	National Institute of Magistracy
NSC	National School of Clerks
NTRO	National Trade Registry Office
PM	Public Ministry
SCM	Superior Council of Magistracy
SRL	Small Reforms Law
USAID	United States Agency for International Development

OVERVIEW

This review is one of a series of functional reviews commissioned by the Government of Romania (GOR), funded by the European Union, and carried out by the World Bank. It is an element agreed on by the European Union and the Government as part of the post-accession Cooperation and Verification Mechanism (CVM) established to assess further need for reform in the judicial system and to suggest reforms that would ensure Romania's full integration into the European Union system. The objective of the review is to analyze the functioning of institutions of the judicial system in Romania with a view to providing analytical and advisory input to the Romanian authorities as they formulate an action program to improve the performance of the judicial system.

Scope

In accordance with the terms of reference agreed with the GOR, the analysis includes, in addition to the courts, the Ministry of Justice—focusing on those functions most directly related to the judiciary and to the Public Ministry—the Public Ministry itself, and a range of independent legal professionals whose work complements, and in some cases replaces, that of judges and prosecutors. Within the judiciary, aside from the ordinary courts, the review also addresses the operations of the Superior Council of Magistracy, the Judicial Inspectorate, and the High Court of Cassation and Justice. Within the Public Ministry, it considers the quasi-independent National Anti-Corruption Directorate. The analysis does not cover the Constitutional Court, the military courts, the Directorate for the Investigation of Organized Crime and Terrorism, the National Integrity Agency, and various administrative bodies responsible for rendering preliminary decisions on issues that may end up in the courts if the parties are dissatisfied with the initial results obtained in these bodies.

Questions Addressed and Main Findings

The review examines the following main issues relating to judicial system performance, looking at both the individual agency level and the collective performance:

- Efficiency: as measured by the timeliness of case dispositions and productivity;
- Quality: as indicated by corruption in the judiciary, the judicial system's effectiveness in addressing corruption in the broader public sector, and the extent to which there is uniformity in legal interpretations by courts;
- Access: referring to whether ordinary citizens can and do use court services.

The overarching theme is that strategic management of the judicial system is needed. A strategic approach to managing the system means that system performance is measured based on a framework covering relevant performance aspects (e.g. efficiency, quality, access) and that system performance targets are set. Resources are then allocated to achieve these targets within a given time frame. At the same time, system performance is monitored to take corrective action if the set targets are not being achieved. An evaluation at the end of the agreed upon time period

generates lessons learned that will then inform resource allocation for the next management cycle.

The options for performance improvement are based on a performance assessment (component 1), which is linked to system resources (component 2: human and financial resources; component 3: information and communication technology), and risk management techniques (component 4).

To arrive at the conclusions in the review, qualitative and quantitative approaches were combined. The first step involved a definition of hypothesized problems and their causes based on reports and interviews with a broad set of stakeholders. In a second step, competing hypotheses were then tested through statistical analysis and comparisons with international benchmarks, standards, and practices. In a third step, long-, medium-, and short-term options for addressing the most relevant issues were identified.

The main findings of the review can be summarized as follows:

- Overall Judicial System Resources

The judicial system's resources are within the normal European range; it does not suffer from overall budgetary constraints. However, the lack of strategic management and planning across a fragmented system leads to a suboptimal use of resources and a level of performance that, in some respects, is below what the judicial system could achieve.

- Efficiency

On efficiency, the main challenge is that valuable human and financial resources are allocated to deal with non-priority cases. Combined with the absence of measurable system performance targets and appropriate budgeting, the judicial system does not focus its resources on priority areas. As a result, the number of cases that are dealt with in the courts is excessive.

- Quality

On quality, there is a perception by a significant part of the population that the judicial system is not fully able or willing to fight corruption within the system itself and across the broader public sector. Such a perception undermines its credibility. The perception that the law is not applied uniformly is therefore seen to be linked to corruption rather than to the rapidly evolving legal framework and the weaknesses of existing mechanisms to ensure more uniformity.

- Access to Justice

On access, the availability of quality legal aid services prior to a court action and ineffective alternative dispute resolution mechanisms that could settle issues prior to their reaching the courts continue to be a challenge. A key requirement for addressing these performance issues effectively is the introduction of system-wide strategic management and planning based on a solid system performance measurement framework as proposed by the review.

Performance Assessment

Efficiency

The review assesses efficiency in terms of timeliness and productivity. Despite the substantial increase in caseloads in recent years, using the court statistics available, the judicial system does well in terms of delay and productivity. Romania is similar to other countries in the region in seeing an increase in caseloads. Between 2007 and 2011, the number of new cases registered annually across the first three levels of jurisdiction (*judecatorii*, tribunals, and courts of appeal) increased from around 1,488,000 to 2,300,000. Over the same period of time, the number of pending cases rose from roughly 2,000,000 to 3,000,000.

On delay, an analysis limited to the system's own court statistics would suggest that Romanian courts are performing relatively well: it takes less than a year to dispose of most cases and many are settled in less than six months. However, additional data sources indicate the system could perform better. The existing statistics only capture the time from the filing of the case to disposition at the same court. Also, they do not allow for tracking the time it takes for a case to be disposed of when multiple instances/appeals are involved. The European Court of Human Rights receives a high number of cases from Romania for violation of the right to a fair trial within reasonable time. The Court has identified the issue of multiple appeals as a structural challenge causing unreasonable delay for many litigants in Romania. The data generated by the court user survey carried out for this review indicate that multiple appeals, not captured by current Romanian statistics on delay, indeed constitute a challenge. It finds that for 23 percent of parties across the first three levels of jurisdiction, the court that handled the case was the third or higher instance dealing with the case. Interestingly, 22 percent of respondents who were parties say that their *judecatorii*, which are designed to be first instance courts, were at least the third jurisdiction dealing with their case.

On productivity, court statistics indicate that in spite of the rising caseload over the period 2007 to 2011 the courts have been able to keep clearance rates (cases disposed over cases filed) stable at between 90 and 100 percent. The operativity rates (cases disposed over stock plus new filings) also remain stable over the same period of time ranging between 75 and 80 percent.

A closer analysis of the case management data warrants some reservations though along different dimensions for judges and prosecutors. For the judges, much of the higher caseload comprises trivial cases, mass cases of litigation against the government, applications for altering sentences, and the review of enforcement cases. Many of them may not merit the judicial effort invested in them and should have been filtered and directed to other and more appropriate dispute resolution mechanisms. As to prosecutors, the conviction rate (convictions over cases indicted) is close to 100 percent and excessively high. At the same time, they indict in about 3 percent of the cases that come to them, a rate much lower than a normally expected rate of at least 25 percent for serious crimes and 10 to 15 percent for minor property crimes. For the remainder, the prosecutors spend a lot of time justifying why they will not act on some cases while too many others remain in investigative stage. The European Court of Human Rights has identified this as another structural cause of delay. The picture provided based on productivity as measured in terms of clearance, operativity, and conviction rates may therefore be somewhat distorted.

Quality

The review assesses the quality of judicial service delivery in terms of corruption and non-uniform interpretation of the law, two recurrent performance aspects in CVM reports.

On corruption, experiential surveys, public opinion polls, and interviews report that some corruption is present in the justice sector. The 2011 Life in Transition Survey carried out by the European Bank for Reconstruction and Development in 39 countries across the region finds decreasing but comparatively high prevalence of perceived unofficial payments in civil courts (10 percent compared to 18 percent in 2006 and 1 percent on average in Western Europe). At the same time, the number of magistrates indicted and convicted for disciplinary and ethical violations between 2006 and 2011 remains low. While the Life in Transition Survey finds low but increasing satisfaction with service delivery in civil courts (33 percent compared to 27 percent in 2006 and 40 percent on average in Western Europe), trust in the courts has been decreasing (only 14 percent of respondents have some or complete trust in the courts, compared to 28 percent in 2006 and more than 50 percent on average in Western Europe) potentially due to the perception by the general public of the judicial system's limited ability to attack corruption in the broader public sector. This would explain why the trust of actual court users as assessed by the court user survey carried out for this review is higher (at 3.16 on a scale from 1, lowest, to 5, highest).

On inconsistent judgments and non-uniform legal interpretation by courts, data to assess the extent of the challenge is currently not available in the case management system or other statistics. While its prevalence is mentioned as a problem by external observers such as the CVM and not contested by members of the judicial system, quantifying its exact prevalence would require a comprehensive case-file analysis exceeding the scope of the current review. Some unpredictability is inevitable in a new system, and in Romania the challenge of uniform application of the law is exacerbated by a rapidly changing legal framework. While non-uniformity is sometimes linked to corruption or judges deciding cases in full independence, but with no regard to how the law has been interpreted in similar cases, a more likely cause is insufficient standard setting and enforcement by the judicial system as a whole. The impact of recent legal changes introduced to address this challenge will have to be monitored.

Access

Litigation rates (nearly 10,000 cases per 100,000 inhabitants per year) are high compared to neighboring countries and Western Europe. They suggest that access to the judicial system is not significantly obstructed and may need to be managed better by improved filtering of frivolous cases. Cost was not found to be a major obstacle as using the system is relatively cheap. In addition, 29 percent of respondents to the court user survey carried out for this review had been exempted from court fees. However, the survey also found that there is room for improvement as the satisfaction among those using the system was only slightly positive with respect to access aspects such as the ease of finding useful information about their rights, the ease of getting to the court, and the clarity of information given by the court. The share of unrepresented parties is relatively high with 21 percent. At the same time, both judges and prosecutors report that they provide particular assistance to unrepresented parties. However, Romania's low spending on legal aid, among the lowest in the region, suggests that those who need to have access to a lawyer paid for by the State may not receive the services they need.

System Resources

While the level of resources available to the Romanian judicial system is within the normal range of European countries, the review finds that available resources could be better used to improve their contribution to service delivery.

Human resources could be better used to improve service delivery

Human resources are a key factor for judicial system performance across all performance measurement areas. To analyze efficiency, the question addressed is whether there is the right mix and quantity of human resources to meet demand effectively and do strategic management. To analyze quality, the review considers that the entry of competent (and non-corrupt) judges, prosecutors, and staff into the system is key for overall performance. To assess how much access is constrained by human resources, the key question addressed is whether there is enough staff to ensure access to justice.

On staffing levels, the number of judges and prosecutors per capita fit European norms and is appropriate. The complaints of excessive workloads for judges reflect a lack of case filters rather than a lack of judges. The ratio of clerks (*grefierii*) per judge is too low. Finally, the allocation of judges and staff among courts does not fully match caseloads. Independent professionals—such as private attorneys, notaries, and bailiffs—are vital to overall system functioning as well. Overall, however, these independent professions do not seem to pose the most serious challenges to judicial system performance in Romania.

On recruitment, evaluation, and promotion, the system is effective in ensuring that qualified staff enters the system. The entry requirements for magistrates and *grefierii* are consistent and rigorous. The training and testing in professional schools is considered high quality. Overall, promotions are based on objective grounds. Also, the effectiveness of the Judicial Inspectorate in sanctioning judges in breach of disciplinary rules could be improved. On attracting and retaining qualified staff through appropriate wage levels, the salaries and pension benefits of judges and prosecutors are high by public sector standards. There is no evidence that wages are an impediment to recruitment.

Financial resources should be tied to performance goals to focus better on service delivery

Financial resources and budgeting cut across all performance measurement areas; for strategic management to be successful, financial resource allocation needs to be tied to sector performance objectives. The focus should be on setting measurable system performance targets for efficiency, quality, and access—and to allocate financial resources in a way that achieves these targets.

On institutional arrangements and the budgeting process, although the budget structure applied in the public sector in Romania is organized by function, budget proposals by line ministries are submitted in a programmatic form. This program budgeting approach is, however, primarily theoretical. It has limited use in practice because each spending authority manages and monitors budget execution primarily based on the traditional budget classification system used in Romania, which is based solely on inputs, but does not include performance targets in terms of outcomes of specific programs. So, even though the budget is submitted with estimates for programs to be implemented in the coming budget year, there is no incentive to analyze the performance of those programs. The inclusion of performance targets and data should be a key aspect of program budgeting.

On budgetary allocations, income generation, and sector expenditures, Romania's overall justice sector budget as a percentage of the gross domestic product falls within the upper range of European Union member countries, but the legal aid budget falls in the bottom range.

The courts' budget management was to move from the Ministry of Justice to the High Court of Cassation and Justice in 2008. The transfer has not yet occurred. It would entail moving staff to the High Court, which lacks capacity for the task. The courts' budget management should not be decoupled from management of human resources or from that of other resources (mainly ICT and infrastructure investments). It is much harder to ensure proper strategic management of the sector when decisions on the various resources are divided. The same logic also applies to the Public Ministry, which, despite managing its own budget, depends on other agencies to plan human resources.

The fragmentation of Information and Communications Technology (ICT) needs to be overcome

ICT has the potential to enhance efficiency, quality, and access. Using an Enterprise Architecture Methodology, the review examined the sector not only for ICT, but also for the key components: strategy, people, information, and business process.

The Romanian judicial institutions have made great strides toward leveraging ICT to improve the performance of the judicial system in recent years. But simply automating existing processes will not eliminate problems or bring about notable productivity gains. Changes in regulatory frameworks, policies, and directives, business process design, stakeholder buy-in and adoption, human resource capacity, and correct skills mixes are essential for further process efficiencies. The functional gaps identified by the review highlight the key areas requiring improvement as discussed below. There is a need for a more coordinated and integrated ICT strategy, ICT governance mechanisms, ICT capacity strengthening, improved user training, and improved access to case file information by judges, staff, and the public. Most important, the quality of data needs to be improved so they can be used more effectively for management purposes.

Risks

The review provides a systematic framework for the Romanian authorities to measure judicial system performance. In addition to the measurement areas covered by the review (efficiency, quality, and access), strategic management is included as an aspect cutting across all performance measurement areas. The framework identifies internationally recognized indicators to be used for each measurement area (e.g. clearance rate, caseload per judge/prosecutor, cases disposed per judge/prosecutor to measure productivity) as well as available measurement techniques (e.g. case management statistics, case-file analysis, court user surveys, and opinion polls). The framework also identifies potential causes of low performance (e.g. mismatch between geographic distribution of caseload and staff causing low productivity). The framework is intended to help the authorities establish a coherent sector performance measurement system to set performance goals and monitor the progress toward achieving them.

Performance improvement initiatives are subject to risks that need to be identified and managed, e.g. reform fatigue or resistance to reforms. The review therefore suggests an approach to manage them and minimize their impact. The review identifies relevant risks, shows how they

can be identified, and examines their likely causes so that targeted risk mitigation measures can be designed. Reform fatigue, for example, can be revealed by cynical responses to new measures. They may be caused by too frequent changes in goals and policies. Tying policy and legal changes to specific, measurable service improvements can mitigate the impact of such reform fatigue and keep people motivated to continue reform efforts.

Recommendations

Strategic Management should focus on improving outcomes by making available resources better

A cross-cutting issue affecting judicial system performance across all measurement areas is the lack of strategic management and planning at the system level. They are not widely developed in the judicial system, but for a country like Romania it seems essential to introduce them now. Romania does not assess the judicial system's needs (human, financial, and ICT) rigorously. The automatic assumption is that any performance gap will be resolved by more resources, and when resources are not forthcoming, that matters will not get much better. This focus on inputs and individual agencies instead of overall system performance has inhibited the performance gains that a more strategic approach would provide. All resources (financial, human, ICT, infrastructure, and other materials) should be programmed comprehensively.

The performance of the system thus needs to be measured systematically, with resource allocation tied to performance goals. Romania's situation today is complicated by the several independent entities charged with parts of the basic function. Sector budgets are handled by the Public Ministry, the Ministry of Justice (for most courts), the Superior Council of Magistracy (for its own budget and as recommendations to the Ministry of Justice for the ordinary courts), and the High Court of Cassation and Justice (for its own budget). Decisions on human resources (numbers, location, appointment, and further management) are divided among the Ministry of Justice, the Public Ministry, and the Superior Council of Magistracy, as well as the cabinet and Parliament, which enacts the laws determining numbers and location. ICT strategy and decisions are similarly fractionalized. A coherent sector management structure would greatly enhance the potential for achieving better system performance.

While the level of human, financial, and information and communications technology (ICT) resources is within the normal European range, the short-, medium-, and long-term options identified in the review mainly focus on how to use existing resources better for improved system performance. Key recommendations focus on effective strategic management, an issue cutting across all performance areas.

An overview of short, medium, and long term recommendations for each performance measurement area is provided in the following table. Key immediate priorities are highlighted.

Performance Area	Short Term: Start immediately	Medium Term: Begin once short term is under way	Long Term: 3–5-year goals	Resource Requirements (none, little (\$), some (\$\$) or substantial (\$\$\$) and Technical Assistance Need (TA)
Strategic Management	Define sector wide and institutional performance improvement goals and quantitative indicators. Generate and collect necessary data.	Develop institutional (for judiciary and Public Ministry [PM]) results-based plans for multiyear period as part of a Justice System Development Strategy. Use to guide decisions on resource management.	Consolidate and formalize sector wide, results-based plan for multiyear period. Use to guide decisions on resource management.	None, TA
	Inventory all existing “strategic plans” (for agencies and resources) and coordinate, prioritize, and sequence activities.	Begin introduction of results-based budgeting, matching budget requests and resource allocation to intended results.	Introduce budget contracts with work units—their submission of “needs” to be linked to advances in service improvement.	TA
	Explore potential for single institutional, sector management or coordinating body (if PM and judiciary each have their own unit).	Develop single management structures (units) for PM and for courts (for the latter in the High Court of Cassation and Justice—HCCJ). Unify all resource departments below each.	Create a mechanism (such as a Joint Technical Commission) to coordinate the two management units (especially in information and communications technology [ICT] and infrastructure).	None
	To the extent possible, revise current and proposed ICT projects to focus on high priority actions and eliminate redundancy; develop a more coordinated and integrated ICT strategy for the sector.	Strengthen ICT governance mechanisms: multi-tiered governance processes, ICT portfolio management, and shared services.	Continue with medium-term targets.	TA
	Identify human resource needs for non-judicial experts (ICT, planning, budgeting, statistics, human resources) and develop/start implementation of plan to recruit and place.	Strengthen all resource management departments by adding experts in planning and design alternatives (different staffing patterns and distribution of work, especially under the new codes); as management units are strengthened with specialized staff, shift seconded magistrates back to line positions.	Have resource departments develop a series of different scenarios based on budget levels and different resource configurations.	TA

Performance Area	Short Term: Start immediately	Medium Term: Begin once short term is under way	Long Term: 3–5-year goals	Resource Requirements (none, little (\$), some (\$\$) or substantial (\$\$\$)) and Technical Assistance Need (TA)
	Develop plan for balancing staff/magistrate ratio over the longer term.	Prioritize staff recruitment over that of magistrates to help reach balance.	Consider some alternative placements for “excess” magistrates (those already in place, but in terms of new staffing patterns, not needed)—mediation or legal information services as part of the judicial career track, pursuant to required legal changes?	None
Efficiency	Evaluate results of Small Reforms Law—compliance and impact.	Develop and implement results-based evaluation plan for the new codes.	Make any required amendments to new Civil Procedures Code (NCvPC) to improve results.	None
		Explore potential for gradual implementation (by district, by type of crime?) of NCrPC to allow testing of requirements and results.	Revise resource estimates based on pilot implementation, especially as regards numbers of magistrates and infrastructure.	None
	Explore potential for demand reduction, process simplification, and delegation of tasks to courtroom staff.	Introduce as quickly as staff numbers and legal framework allow. Practice delegating more courtroom work to qualified staff.	Amend legal framework to allow more delegation, and to specify types of staff.	TA
		Work with executive agencies to divert claimants for “resolved” government disputes back to them for registration and repayment.	Ensure better vetting of new laws, and consultations with justice sector to anticipate effects on demand and on resource requirements.	TA
	Adopt, on a pilot basis, one or more of the demand reduction options (recommended: review of enforcement).	Evaluate pilot results, make any adjustments and, if positive, consider adoption for other types of cases/ complaints.	Reevaluate enforcement review in terms of value added.	TA

Performance Area	Short Term: Start immediately	Medium Term: Begin once short term is under way	Long Term: 3–5-year goals	Resource Requirements (none, little (\$), some (\$\$) or substantial (\$\$\$) and Technical Assistance Need (TA)
	<p>Improve Electronic Case Registration and Information System (ECRIS) database to facilitate use and allow better analysis for management purposes; step up training for judges and staff; create or expand user groups to provide information on problems; and implement data management practices and capabilities (such as data audits, data standards, and data warehouse).</p>	<p>Improve access to complete case file information and history through an Enterprise Information Integration Infrastructure regardless of format (data, documents, audio) and system of record.</p>	<p>Reduce and eventually eliminate paper case files and improve electronic document management capabilities.</p>	<p>\$\$\$, TA</p>
<p>Implement facilities for business process integration and workflow management; continue and expand implementation of enterprise solutions (such as Resource Management System, Information System for Audio Recording of Court Proceedings [ISARCP]) and/or invest in new solutions to establish common shared services (including enterprise portals/search, document management).</p>		<p>\$\$\$</p>		
<p>Improve security policy definition and reference implementation.</p>		<p>TA</p>		
<p>Consolidate solution for ICT management and operations; optimize and standardize ICT infrastructure; standardize desktop hardware and software.</p>		<p>\$\$\$</p>		
	<p>Strengthen agency statistical units (PM, MoJ and Superior Council of Magistracy [SCM]) at a minimum) with staff capable of analyzing available data to detect problem areas and bottlenecks.</p>	<p>Use results of statistical analysis to develop policies for improving efficiency. Provide technical assistance where needed to introduce alternatives used in other European Union (EU) countries.</p>	<p>Establish principle of information-based management, using statistical analysis and other inputs to anticipate needs, identify problems, and develop alternative solutions.</p>	<p>TA, \$</p>

Performance Area	Short Term: Start immediately	Medium Term: Begin once short term is under way	Long Term: 3–5-year goals	Resource Requirements (none, little (\$), some (\$\$) or substantial (\$\$\$) and Technical Assistance Need (TA)
Quality: Corruption	SCM announces that this is a concern of citizens and thus a priority for its attention. Public discussions of concern and of the specific measures the SCM will take.	SCM program to discourage/prevent corruption in courts and prosecutors' offices and reduce vulnerabilities.	In annual reports on state of justice, include a section on efforts to reduce corruption and actions against ethical standards, and publish results.	None
	Study contracted (using statistics, user surveys) to explore where and in what form corruption occurs.	Introduce annual user surveys including questions about bribe taking and general perceptions on judicial ethics/honesty.	Conduct public education campaign on actions subject to discipline, sanctions, criminal investigation and on where they should be registered. Campaign should emphasize difference between corruption and an "outcome the party does not like" which may be handled through an appeal.	\$\$
	Begin to examine role of Inspectorate to define aims and impact indicators. Study any need for legal reform, and if required, draft new laws and regulations.	Realign Inspectorate's organization, staff, and practices to carry out role. Transfer some functions to other agencies (such as court of appeal monitoring courtroom organization, timeliness, treatment of parties, and compliance with ECRIS requirements).	Launch annual reports on actions (see above) and publication of aims and accomplishments.	TA
			Study possible negative effects of Inspectorate's current actions (such as excessive formalism) and find solutions.	
	Identify bottlenecks for processing of corruption and disciplinary cases.	Based on prior study, change laws and/or practices to speed up processing of cases of Inspectorate and National Anti-Corruption Directorate (NAD) without violating defendant rights.	Work with Parliament on waiving immunity for its members.	None
Study to be contracted through Ministry of Justice (MOJ), on abuses attributed to independent professionals.	MOJ, in coordination with national associations and local chambers, to develop better measures for tracking and attending to complaints, whether legally done by the associations or MOJ.	Set up databases (managed by MOJ and national associations, but available to public and courts) on independent professionals, tracking complaints and resolution.	TA, \$	

Performance Area	Short Term: Start immediately	Medium Term: Begin once short term is under way	Long Term: 3–5-year goals	Resource Requirements (none, little (\$), some (\$\$) or substantial (\$\$\$) and Technical Assistance Need (TA)
Quality: Uniform interpretation of law	Launch study and meetings with users, magistrates, and others to determine where challenges are most common, most damaging.	Explore low-tech remedies (such as court of appeal meetings to review common problems), and develop protocols for handling routine cases and questions.	Introduce user committees to meet with judges to discuss concerns about quality of legal interpretations and outcomes.	TA
	Track requests for preliminary rulings submitted to HCCJ under NCvPC.	Expand and improve ECRIS library of judgments.	Statistical analysis to provide judges with guidance as to awards, sentences in common cases (See New South Wales example).	TA, \$
		Evaluate results of HCCJ organization under NCvPC as regards handling of preliminary rulings.	Consider amendment to NCvPC if HCCJ organization for preliminary rulings could be improved.	TA
Access	Conduct study to determine extent of any obstacles, for whom, and the reasons.	Experiment with creation of legal advice office/service to orient people before they get to courts. This should ideally be separate from the bar associations as their members have a clear incentive to send cases to court.	Encourage courts to refer unrepresented parties to legal advice services before they file a complaint.	TA
	Create database on legal assistance including who receives aid and who is hired to provide it.	Develop and apply improved policies for allocation of legal assistance, for evaluating quality of what is provided, and for payments to providers.	Introduce complaints office for those receiving inadequate/no assistance.	TA
	Track use of courts for issues that could be handled by notaries and by administrative agencies.	Conduct a study on use and results of pretrial mediation to determine, among other things, why it is so little used.	Expand court-annexed mediation services, possibly by making this an alternative career step for magistrates.	TA
	Conduct a study on fee policies for legal assistance to determine whether they should be raised.	Develop, with the bar association, a better fee structure and means for tracking services.	Have bar association (and local chambers) develop more transparent policies for assignment of cases to attorneys or for informing courts of their availability.	TA

Performance Area	Short Term: Start immediately	Medium Term: Begin once short term is under way	Long Term: 3–5-year goals	Resource Requirements (none, little (\$), some (\$\$) or substantial (\$\$\$) and Technical Assistance Need (TA)
	Improve public-facing information-delivery mechanisms enabling public and justice partners to access court records in a timely manner (such as expanded search and notification facilities).	Enhance interoperability between case management and other applications, internally and externally.	Implement electronic filing application.	\$\$\$

PART 1: PERFORMANCE ASSESSMENT

1. IMPROVING PERFORMANCE

1.1 Options for Performance Improvements

1. This Functional Review presents a series of options (table 1.1) for improving the performance of Romania's judicial system. Performance is assessed in terms of the three performance measurement areas identified at the outset: efficiency (productivity and timeliness), quality (corruption and uniformity of legal interpretations), and access.

2. As detailed in part 2 on system resources, the level of human, financial, and information and communications technology (ICT) resources is within the normal European range. Allocating more resources to address challenges is therefore not a sustainable option. The options identified in the review thus mainly focus on how to improve system performance within the current level of resources.⁴

3. Except for the introduction of strategic management and planning (a cross-cutting approach required to improve performance across all three measurement areas), the table presents choices, not single recommendations—and even there, the task could be undertaken in a series of ways.

4. The table offers some prioritization of options, based on their urgency and priority, and if to a lesser extent, eases of implementation. It bears stressing that, in all cases, an early step is the development of a strategy that can be followed, with whatever later modification is required over the longer term.

5. While options including the allocation of additional resources are kept to a minimum, their effective implementation will require funds for planning and developing new mechanisms and for overriding resistance. Some resources can be reallocated within specific categories (primarily ICT and infrastructure). Human resources, however, pose a special challenge and thus moving to their more efficient use is likely to take longer. The authorities should also consider that adding staff they cannot easily remove or transfer later will pose further challenges in the medium and long term.

⁴ The resource implications of the various options in the table are presented in more detail in chapter 3 on performance issues in depth under the respective performance measurement areas.

Table 1.1: Options by Performance Area and Time Frame

Performance Area	Short Term: Start immediately	Medium Term: Begin once short term is under way	Long Term: 3–5-year goals	Resource Requirements (none, little (\$), some (\$\$) or substantial (\$\$\$) and Technical Assistance Need (TA)
Strategic Management	Define sector wide and institutional performance improvement goals and quantitative indicators. Generate and collect necessary data.	Develop institutional (for judiciary and Public Ministry [PM]) results-based plans for multiyear period as part of a Justice System Development Strategy. Use to guide decisions on resource management.	Consolidate and formalize sector wide, results-based plan for multiyear period. Use to guide decisions on resource management.	None, TA
	Inventory all existing “strategic plans” (for agencies and resources) and coordinate, prioritize, and sequence activities.	Begin introduction of results-based budgeting, matching budget requests and resource allocation to intended results.	Introduce budget contracts with work units—their submission of “needs” to be linked to advances in service improvement.	TA
	Explore potential for single institutional, sector management or coordinating body (if PM and judiciary each have their own unit).	Develop single management structures (units) for PM and for courts (for the latter in the High Court of Cassation and Justice—HCCJ). Unify all resource departments below each.	Create a mechanism (such as a Joint Technical Commission) to coordinate the two management units (especially in information and communications technology [ICT] and infrastructure).	None
	To the extent possible, revise current and proposed ICT projects to focus on high priority actions and eliminate redundancy; develop a more coordinated and integrated ICT strategy for the sector.	Strengthen ICT governance mechanisms: multi-tiered governance processes, ICT portfolio management, and shared services.	Continue with medium-term targets.	TA
	Identify human resource needs for non-judicial experts (ICT, planning, budgeting, statistics, human resources) and develop/start implementation of plan to recruit and place.	Strengthen all resource management departments by adding experts in planning and design alternatives (different staffing patterns and distribution of work, especially under the new codes); as management units are strengthened with specialized staff, shift seconded magistrates back to line positions.	Have resource departments develop a series of different scenarios based on budget levels and different resource configurations.	TA

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Performance Area	Short Term: Start immediately	Medium Term: Begin once short term is under way	Long Term: 3–5-year goals	Resource Requirements (none, little (\$), some (\$\$) or substantial (\$\$\$)) and Technical Assistance Need (TA)
	Develop plan for balancing staff/magistrate ratio over the longer term.	Prioritize staff recruitment over that of magistrates to help reach balance.	Consider some alternative placements for “excess” magistrates (those already in place, but in terms of new staffing patterns, not needed)—mediation or legal information services as part of the judicial career track, pursuant to required legal changes?	None
Efficiency	Evaluate results of Small Reforms Law—compliance and impact.	Develop and implement results-based evaluation plan for the new codes.	Make any required amendments to new Civil Procedures Code (NCvPC) to improve results.	None
		Explore potential for gradual implementation (by district, by type of crime?) of NCrPC to allow testing of requirements and results.	Revise resource estimates based on pilot implementation, especially as regards numbers of magistrates and infrastructure.	None
	Explore potential for demand reduction, process simplification, and delegation of tasks to courtroom staff.	Introduce as quickly as staff numbers and legal framework allow. Practice delegating more courtroom work to qualified staff.	Amend legal framework to allow more delegation, and to specify types of staff.	TA
		Work with executive agencies to divert claimants for “resolved” government disputes back to them for registration and repayment.	Ensure better vetting of new laws, and consultations with justice sector to anticipate effects on demand and on resource requirements.	TA
	Adopt, on a pilot basis, one or more of the demand reduction options (recommended: review of enforcement).	Evaluate pilot results, make any adjustments and, if positive, consider adoption for other types of cases/ complaints.	Reevaluate enforcement review in terms of value added.	TA

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<p>Implement facilities for business process integration and workflow management; continue and expand implementation of enterprise solutions (such as Resource Management System, Information System for Audio Recording of Court Proceedings [ISARCP]) and/or invest in new solutions to establish common shared services (including enterprise portals/search, document management).</p>		<p>\$\$\$</p>		
<p>Improve security policy definition and reference implementation.</p>		<p>TA</p>		
<p>Consolidate solution for ICT management and operations; optimize and standardize ICT infrastructure; standardize desktop hardware and software.</p>		<p>\$\$\$</p>		
	<p>Strengthen agency statistical units (PM, MoJ and Superior Council of Magistracy [SCM]) at a minimum) with staff capable of analyzing available data to detect problem areas and bottlenecks.</p>	<p>Use results of statistical analysis to develop policies for improving efficiency. Provide technical assistance where needed to introduce alternatives used in other European Union (EU) countries.</p>	<p>Establish principle of information-based management, using statistical analysis and other inputs to anticipate needs, identify problems, and develop alternative solutions.</p>	<p>TA, \$</p>

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Performance Area	Short Term: Start immediately	Medium Term: Begin once short term is under way	Long Term: 3–5-year goals	Resource Requirements (none, little (\$), some (\$\$) or substantial (\$\$\$) and Technical Assistance Need (TA)
Quality: Corruption	SCM announces that this is a concern of citizens and thus a priority for its attention. Public discussions of concern and of the specific measures the SCM will take.	SCM program to discourage/prevent corruption in courts and prosecutors' offices and reduce vulnerabilities.	In annual reports on state of justice, include a section on efforts to reduce corruption and actions against ethical standards, and publish results.	None
	Study contracted (using statistics, user surveys) to explore where and in what form corruption occurs.	Introduce annual user surveys including questions about bribe taking and general perceptions on judicial ethics/honesty.	Conduct public education campaign on actions subject to discipline, sanctions, criminal investigation and on where they should be registered. Campaign should emphasize difference between corruption and an "outcome the party does not like" which may be handled through an appeal.	\$\$
	Begin to examine role of Inspectorate to define aims and impact indicators. Study any need for legal reform, and if required, draft new laws and regulations.	Realign Inspectorate's organization, staff, and practices to carry out role. Transfer some functions to other agencies (such as court of appeal monitoring courtroom organization, timeliness, treatment of parties, and compliance with ECRIS requirements).	Launch annual reports on actions (see above) and publication of aims and accomplishments.	TA
			Study possible negative effects of Inspectorate's current actions (such as excessive formalism) and find solutions.	
	Identify bottlenecks for processing of corruption and disciplinary cases.	Based on prior study, change laws and/or practices to speed up processing of cases of Inspectorate and National Anti-Corruption Directorate (NAD) without violating defendant rights.	Work with Parliament on waiving immunity for its members.	None
Study to be contracted through Ministry of Justice (MOJ), on abuses attributed to independent professionals.	MOJ, in coordination with national associations and local chambers, to develop better measures for tracking and attending to complaints, whether legally done by the associations or MOJ.	Set up databases (managed by MOJ and national associations, but available to public and courts) on independent professionals, tracking complaints and resolution.	TA, \$	

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Performance Area	Short Term: Start immediately	Medium Term: Begin once short term is under way	Long Term: 3–5-year goals	Resource Requirements (none, little (\$), some (\$\$) or substantial (\$\$\$) and Technical Assistance Need (TA)
Quality: Uniform interpretation of law	Launch study and meetings with users, magistrates, and others to determine where challenges are most common, most damaging.	Explore low-tech remedies (such as court of appeal meetings to review common problems), and develop protocols for handling routine cases and questions.	Introduce user committees to meet with judges to discuss concerns about quality of legal interpretations and outcomes.	TA
	Track requests for preliminary rulings submitted to HCCJ under NCvPC.	Expand and improve ECRIS library of judgments.	Statistical analysis to provide judges with guidance as to awards, sentences in common cases (See New South Wales example).	TA, \$
		Evaluate results of HCCJ organization under NCvPC as regards handling of preliminary rulings.	Consider amendment to NCvPC if HCCJ organization for preliminary rulings could be improved.	TA
Access	Conduct study to determine extent of any obstacles, for whom, and the reasons.	Experiment with creation of legal advice office/service to orient people before they get to courts. This should ideally be separate from the bar associations as their members have a clear incentive to send cases to court.	Encourage courts to refer unrepresented parties to legal advice services before they file a complaint.	TA
	Create database on legal assistance including who receives aid and who is hired to provide it.	Develop and apply improved policies for allocation of legal assistance, for evaluating quality of what is provided, and for payments to providers.	Introduce complaints office for those receiving inadequate/no assistance.	TA
	Track use of courts for issues that could be handled by notaries and by administrative agencies.	Conduct a study on use and results of pretrial mediation to determine, among other things, why it is so little used.	Expand court-annexed mediation services, possibly by making this an alternative career step for magistrates.	TA
	Conduct a study on fee policies for legal assistance to determine whether they should be raised.	Develop, with the bar association, a better fee structure and means for tracking services.	Have bar association (and local chambers) develop more transparent policies for assignment of cases to attorneys or for informing courts of their availability.	TA

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Performance Area	Short Term: Start immediately	Medium Term: Begin once short term is under way	Long Term: 3–5-year goals	Resource Requirements (none, little (\$), some (\$\$) or substantial (\$\$\$) and Technical Assistance Need (TA)
	Improve public-facing information-delivery mechanisms enabling public and justice partners to access court records in a timely manner (such as expanded search and notification facilities).	Enhance interoperability between case management and other applications, internally and externally.	Implement electronic filing application.	\$\$\$

Note: Shaded areas indicate key priorities

1.2 Observations on Progress

6. Despite all challenges, observers and empirical data suggest some important advances both before and after EU accession (and see appendix 2). Table 1.2, comparing selected quantified characteristics, is a basis for some of this discussion.

Table 1.2: Selected Quantifiable Characteristics of European Justice Sectors, 2010

Country	Judges per 100,000 inhabitants	Prosecutors per 100,000 inhabitants	Staff per judge	Staff per prosecutor	% of GDP on legal assistance	Total judicial budget as % of GDP
Slovenia	49.95	8.05	3.20	1.37	0.016	0.57
Luxembourg	36.73	8.99	1.61	0.80	0.007	0.16 ^a
Bulgaria	29.85	19.76	0.35	—	0.011	0.55
Greece	29.29	4.80	2.87	—	0.001	—
Czech Republic	29.12	11.79	1.52	1.23	0.019	0.30
Hungary	28.95	17.43	0.69 ^a	1.29	0.000	0.37
Poland	27.81	14.84	3.38	1.31	0.007	0.48
Slovak Republic	24.86	17.20	3.31	0.76	0.002	0.31
Germany	24.26	6.42	0.02	1.97	0.015	0.33
Lithuania	23.64	25.70	3.25	0.93	0.014	0.31
Latvia	21.17	17.49	3.39	1.01	0.005	0.30
Romania (2008)	19.20	11.10	2.09	1.41	0.003	0.40
Romania (2010)	19.04	10.85	2.08	1.31	0.006	0.43
Portugal	18.39	13.87	3.39	1.19	0.030	0.41
Finland	17.99	6.92	3.09	0.45	0.032	0.19
Austria	17.78	4.13	4.53	0.96	0.006	0.24 ^a
Estonia	16.71	13.06	25.14	0.46	0.021	0.27
Netherlands	15.19	4.72	2.64	4.84	0.061	0.33
Belgium	14.82	7.70	0.04 ^a	3.30	0.021	0.25 ^a
Cyprus	12.93	13.18	5.94	0.94	—	—
Sweden	11.48	10.63	3.29 ^a	0.61	0.053	0.24
Italy	10.98	3.26	3.71	4.76	0.008	0.28

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Country	Judges per 100,000 inhabitants	Prosecutors per 100,000 inhabitants	Staff per judge	Staff per prosecutor	% of GDP on legal assistance	Total judicial budget as % of GDP
France	10.68	3.02	0.84	—	0.019	0.18 ^a
Spain	10.20	5.24	9.46 ^a	0.80	0.022	0.36 ^a
Malta	9.34	7.18	9.59	1.30	0.030	0.00
Denmark	9.01	13.45	4.58	—	0.037	—
England and Wales	3.59	5.19	10.04 ^a	1.67	0.212	0.37
Ireland	3.21	1.79	15.54	1.33	0.055	0.18
EU average	19.52	10.25	4.88	1.50	0.027	0.31
EU median	17.99	8.99	3.30	1.23	0.018	0.31

Source: CEPEJ 2010 and 2012.

— = not available.

a. 2008 data where 2010 data are not available.

7. Some key points emerge:

- The legal and institutional framework is continuing to evolve and, while critics still find fault with the latest versions, there is little evidence of any negative trends in the recent reforms. What has been done may not be perfect, but it nearly always represents an improvement.
- Despite reports from the sector about inadequate staffing (box 1.1), the ratio of judges and prosecutors to population is high, and the proportion of budget and GDP spent on courts and prosecution is in the high range for Europe.
- Despite an apparently large and increasing workload for both prosecutors and judges, basic performance indicators (times to disposition, clearance rates, and “operativity”⁵ rates) are very good. Prosecutors’ conviction rates are very high, usually in the 90 percent range or above.⁶
- Looking at litigation rates (nearly 10,000 cases filed per 100,000 inhabitants annually)⁷ and reports from judges and prosecutors that they treat all complaints with some degree of seriousness (and provide free legal assistance for the most needy), access is not, apparently, the most pressing issue.
- The ratio of independent professionals (private attorneys, notaries, and bailiffs) to population seems adequate, as do the procedures for entry to their ranks as applied by the respective national associations and local chambers.

8. However, observers continue to identify issues requiring improvement:

⁵ As used in Romania, the operativity rate is calculated by dividing the annual number of dispositions by the sum of stock carried over and new filings. It would reach or approach 100 with great difficulty (although a few district courts show rates in the high 90s) and 75–80 percent can be considered good.

⁶ As discussed in chapters 3 and 4, we have some reservations about these indicators both on how they are generated and what they overlook, but they generally seem to reflect the real situation.

⁷ A recent statement by the former president of the SCM said one in six, but there appears to have been some double counting in that figure, as appeals and applications were included. We discuss such statistical anomalies in sections 3.3 and 3.4, and more generally in chapter 2.

- The ratio of administrative staff to judges is unusually low compared with other European countries. Ratios are not rules, but when a country is far out of line with the average, it is worth further exploration.
- Compared with other European countries, Romania spends an extremely low proportion of gross domestic product (GDP) on legal assistance. Access to justice is not mentioned in interviews as one of the most pressing issues, as statistically it would appear that almost one in every 10 Romanians files a legal action annually. Access may in fact be too easy—but lack of legal services for those who cannot afford them and do not qualify for state assistance could, though, present a burden to them.
- With independent professionals, users mention monopolistic practices, unrealistically high fees, and, occasionally, poor service—while attorneys report insufficient demand for their services, bailiffs draw attention to what they see as legal impediments to their enforcement actions and notaries have had to reduce their fees to ensure a reasonable volume of work. One question is whether the current system supports the courts by diverting demands for services to these other providers, or whether fees and other practices are undercutting this effect.

Box 1.1: Interpretations of Problems and their Causes

Many Romanian judges and prosecutors (as well as some members of the SCM) see the challenges to improving performance (which they largely define as high workloads and insufficient time to produce high-quality decisions) as stemming from too much demand for the number of personnel available.

The Functional Review team does not contest most of the facts on which the Romanian arguments are based, but its members think that they require some reinterpretation of the underlying issues and their causes. Our analysis of the challenges and thus of the options for resolving them appears to differ somewhat from views most commonly found among Romanian authorities and judicial officials.

Most of the reinterpretation can be summarized as follows. Caseload is high, but unnecessarily so. Moreover, both judges and prosecutors expend too much effort on low-priority matters and are unable or unwilling to delegate many tasks to staff. Resources (staff, budgets, and ICT) are adequate as a whole, but sub-optimally distributed, geographically and functionally. If these several causes of delay and productivity constraints could be resolved and apparent overload decreased, more attention could be given to resolving the additional performance issues of corruption, non-uniform legal interpretations, and access. Growing demand that exceeds existing resources is a universal judicial problem, but other systems have found more innovative ways of dealing with it (see box 3.3).

Romania might consider some of these countries' methods. However, a first consideration is that its judges and prosecutors could be more productive if the staff-to-judge or staff-to-prosecutor ratio were raised and legally qualified staff allowed to do more "judicial" work. One judge with two well-trained clerks or their equivalent can do as much or more work than two judges with one clerk apiece. The Small Reforms Law (202/2010) seems to recognize this by mandating that labor and social security cases now be heard by one rather than two judges, but with two assistants. Given the paucity of clerks, it is a good question whether this has been possible to implement, and so some monitoring of the law's impact is in order. A still more intelligent step is to foresee reasons for possible noncompliance and address them before the fact.

For future trends, the common anticipation that caseload will continue to grow at the same rate as it has over the past three years overlooks two important facts. First, part of the growth was a one-time event (such as the creation of judges' review of enforcement actions—see section 2.1 on the first paradox) and, while this new demand will remain unless there are changes to the Constitutional Court's 2009 decision, the expansion is unlikely to continue increasing rapidly—and the caseload may in fact remain stable at

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current levels. Second, another part of the growth originated in austerity policies and changing court interpretations on their legality. If the government becomes more careful in the future, or if more austerity measures are not required, these cases should actually decline.

On the issues to which magistrates and the SCM appear to pay less attention—within-system corruption, non-uniform legal interpretations, and access—their solution through additional measures might be facilitated with a reduction of the presumed overload dilemmas. What is being done to combat them promises to have limited results (although possibly a large demonstration effect when a judge at the HCCJ is indicted), but the larger issue is the apparent lack of concern from within the system. Access to justice may be more of a challenge than anyone admits, even given the enormous willingness of judges and prosecutors to deal seriously with essentially frivolous cases brought by unrepresented parties. It would be extremely useful to do some exploration of why people access courts (or do not) and of how much of what they bring forward is actually justiciable. At present, this may be a lower priority than some of the other issues mentioned, but it would be well to investigate it now and so prepare some alternatives for any problems that emerge.

One factor in the interpretations of the same facts relates to Romania's lack of an adequate process for analyzing sector performance, identifying performance shortcomings and their causes, and developing means to resolve them—in other words, strategic management and planning (sections 3.1 and 3.2).

9. Perhaps most critically, public perceptions of the sector remain very negative. Surveys carried out in the past decade reveal that the public rates the judiciary as one of the least trusted (or most corrupt) Romanian public institutions. In the 2010–11 Global Corruption Barometer (Transparency International, 2012) it ranked third lowest, the Life in Transition Survey (EBRD, 2011) for 2006 and 2010 placed it similarly low, and the 2008 Gallup poll conducted for the World Bank–supported Judicial Reform Project (Gallup Organization Romania, 2008) ranked it lowest among 12 institutions. Similarly, a 2010 opinion survey shows that only 24 percent of the respondents trusted judges, and only 23 percent and 22 percent trusted prosecutors and lawyers, respectively (IRES, 2010).⁸ The results of a court user survey carried out for this review indicate a neutral level of trust of 3.16 on a scale from 1 (lowest) to 5 (highest) (CURS, 2013).⁹

10. Less frequent experiential surveys¹⁰ that ask whether bribes have been solicited or paid give the courts (if not prosecutors) a somewhat better showing, but responses were still only 8–22 percent for judges (Danilet, 2009). The higher figure came from a World Bank survey in 2001, and thus may indicate subsequent improvements. Also in mitigation, the Global Corruption Barometer for 2010 found that 87 percent of respondents believe that overall (not just judicial) corruption had increased over the prior three years. There is no existing measure for unpredictable or non-uniform decisions, another common complaint, but it is a reported problem, if of somewhat uncertain dimensions. The European Court of Human Rights (ECHR) has 1,600 pending cases on this issue, although most date to before 2010 when some steps were taken to address the problem.

11. Internationally, Romania is not a high-ranking country among comparators on public trust and confidence (table 1.3).

⁸ By comparison, parliamentarians are trusted by only 6 percent of those interviewed, and ministers 9 percent.

⁹ The trust among those parties who won the case was slightly higher, at 3.41, whereas those parties who had lost the case responded with a trust rate of 2.88. The survey was carried out in January 2013 with a sample size of 2000 respondents.

¹⁰ That is, surveys of users who had an actual experience with the system, as opposed to simple perception and hearsay.

Table 1.3: Comparative Data on Public Confidence in Courts (%)

Country	Satisfaction with service delivery—Civil courts	Reported prevalence of unofficial payments by country—Civil courts	Some or complete trust in courts	Agree that the courts system defends individual rights against abuse by the state	A court system that treats all citizens equally, rather than favoring some over others
Bulgaria	17	8	13	13	12
Croatia	35	6	13	22	17
Czech Republic	44	3	27	25	24
Estonia	76	1	41	35	36
France	—	—	36	47	39
Germany	—	—	63	66	56
Hungary	38	7	33	24	29
Italy	—	—	29	36	36
Latvia	35	3	26	18	13
Lithuania	44	2	13	13	14
Moldova	65	19	20	24	22
Poland	57	2	40	39	34
Romania	33	10	14	18	17
Slovak Republic	45	12	23	26	23
Slovenia	65	5	23	25	21
Sweden	—	—	77	70	67
United Kingdom	—	—	46	55	52
Average	46	7	32	33	30

Source: EBRD 2011.

— = not available.

1.3 Conclusion

12. Romania’s justice sector structurally conforms to usual European patterns and includes all the institutions normally expected. It bears recognizing that European “patterns” include a good deal of variation and that Romania’s choice and adaptation of models feature a mix of influences. The sector’s organization, resources, operating rules, and distribution of responsibilities and mandates have changed considerably in the last 20 years, and especially since the late 1990s. The vast majority of these changes appear to be improvements, although the real test, as discussed in the following chapters, is how the institutions perform, individually and collectively.

13. The issues that the post-accession Cooperation and Verification Mechanism (CVM) process,¹¹ Romanian citizens, court users as a subgroup, and sector members consistently highlighted are essentially three: delays in processing cases, unpredictable or non-uniform legal interpretations and decisions, and corruption. These cover two of the three assessment criteria mentioned at the outset (efficiency, quality, and access): only lack of access does not seem much of a concern, at least in the literature and among those interviewed. The prioritization given to these problems varies with the CVM most concerned about judicial corruption (or the system’s inability to control it in other actors), unpredictability of decisions, and only later, delay. Private sector actors interviewed put most emphasis on delay, then on unpredictable decisions, and finally on corruption. While interviews, surveys, and statistical analysis indicated the presence of all these problems, only delay could be measured directly.

¹¹ For more details on issues highlighted by the CVM, see European Commission (2012a, 2012b, and 2013).

2. FOUR PARADOXES—RESOLVED

14. As the team began its research and took a first look at the statistics, it was puzzled that so many issues were reported about a sector which, at least on paper, appeared to be doing well, both in attracting users and in processing their demands. It grouped them into four:

- Although delay remains a reported issue, court statistics indicate that most cases are disposed in less than one year, and many in fewer than six months. There are some statistical issues here, but the team is convinced that for the most part the figures are accurate.
- Although public opinion polls (and interviews) suggest a belief that the justice sector is corrupt and insufficiently able to attack corruption more broadly (in the other branches of government), people continue to use it. In fact, the judiciary's statistics show that overall demand (as measured by incoming cases) has nearly doubled in the past three years.
- Similarly, demand increases despite observers' (and the EU's) reports of inconsistent judgments and non-uniform legal interpretations.
- Despite the belief of many informed observers inside the Romanian justice sector that the courts and prosecutors' offices are understaffed, under-resourced, and overworked, and that the system is nearing collapse, the judiciary is doing remarkably well on its performance indicators, and its resource endowment along with that of the PM stands up well against European averages.

15. Statistics do not tell the whole story anywhere of course, but those on disposition times and the other performance indicators appear to contradict both popular perceptions and the magistrates' observation of an impending crisis. In the absence of an ability to measure directly things like corruption and non-uniform legal interpretations, growth in demand is important as it seems to contradict the criticisms—why use the sector if you believe its treatment of your claims will be “unjust”?

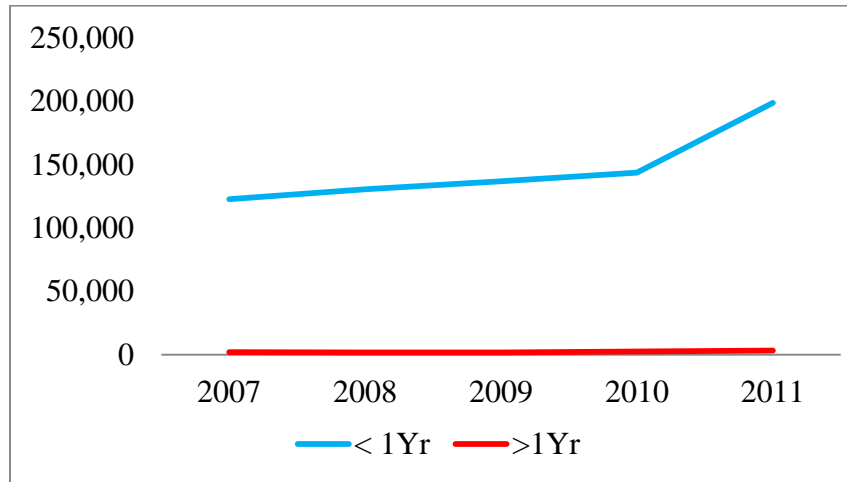
16. The paradoxes are explained for the most part by a disconnect between what actors—inside and outside the system—perceive and what the data indicate is really happening. This does not mean the system has nothing to improve, but simply that it also deserves more credit for the areas where it is performing well.

2.1 First Paradox: Why is There a Perception of Delay While the Statistics Show Rapid Resolution?

Issue

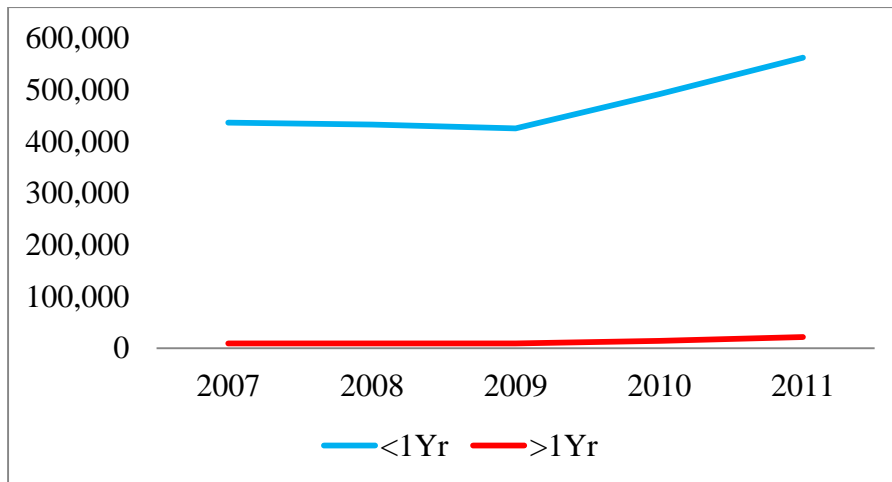
17. First, the team examined the statistical evidence in figures 2.1–2.3 showing the percentages of cases disposed in the three sets of courts (courts of appeal, tribunals, and *judecatorii*) in under and over one year. These courts keep good track of disposition times and the team could have refined the graphs further by tracking the proportion or number of cases resolved in fewer than six or even three months.

Figure 2.1: Cases Disposed in Less Than and More Than One Year, Courts of Appeal, 2007–11



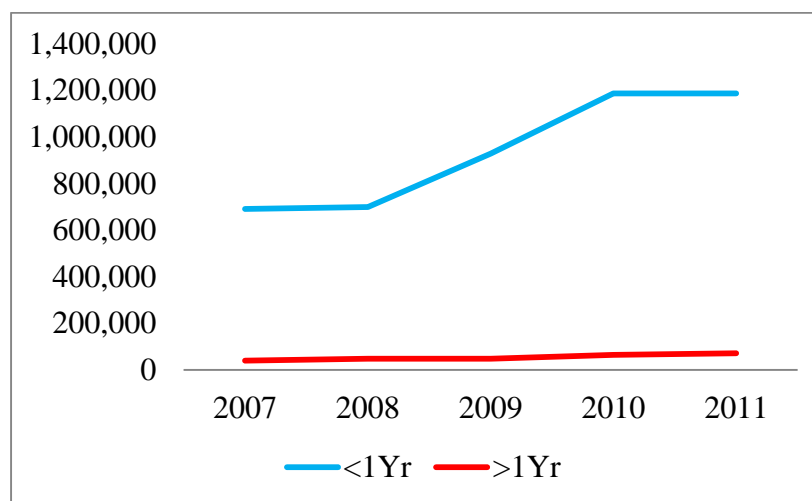
Source: ECRIS Statistics.

Figure 2.2: Cases Disposed in Less Than and More Than One Year, Tribunals, 2007–11



Source: ECRIS Statistics.

Figure 2.3: Cases Resolved in Less Than and More Than One Year, *Judecatorii*, 2007–11



Source: ECRIS Statistics.

18. The graphs had to be drawn separately because of the vast differences in the number of cases handled in each set of courts. The increasing number of cases resolved in less than one year is an absolute figure, and as the number of new entries was rising at the same time should not be taken to mean a greater percentage being handled quickly. Rather, the clearance rate (“cases out” over “cases in”) was more or less stable (as shown in later figures and tables).

19. While the team has some reservations over the complete accuracy of the statistics (next subsection), it has no reason to challenge the general contention of court officials that most cases in all courts are resolved within a reasonable time, and compared with what international standards exist, a more than adequate one.¹² So why is there such a widespread perception that things are otherwise?

Analysis

20. A first explanation—also offered by the Centrul de Analiză și Dezvoltare Instituțională (CADI, 2010)—is that popular perceptions do not always match reality. As studies have found elsewhere (Genn, 2010; World Bank, 2002; Kritzer, 1983), delays are often perceived to be more frequent than is the case because even informed observers tend to focus on extremes—the one case that took 17 years to resolve as opposed to the 17 that took only a few months. Moreover, where complaints about extreme delays are frequently voiced by those who have suffered them, they are often echoed by people with no direct experience with the courts. Finally, people may have unrealistic expectations for how cases can and should be processed. This point was also made by CADI (2010), although its authors added that they found that many court users were

¹² See for example, National Center for State Courts (NCSC, 2005), which lists standards for trial and appellate courts in the United States, developed by the American Bar Association and the Conference of State Court Administrators. The EU encourages speedy resolution, but has yet to set specific standards. CEPEJ has been trying to develop some but is impeded by poor data quality and the many different procedural and organizational systems. Pompe (2012) gives examples of standards set by some member countries for their own courts. While compared with NCSC listings Romanian courts do reasonably well, the targets mentioned by Pompe are far more ambitious.

frustrated with the frequent cancellation of hearings, which—rightly or wrongly—they believed to create delays.

21. Second, although we believe the statistical reports as to the speedy resolution of most cases, the way statistics are kept may overstate an already positive trend. Cases counted are those “registered.” This means that the tally includes many complaints that will be abandoned, rejected for lack of merit, or not pursued for other reasons (for example, nonpayment of the stamp tax, usually a minimal fee but enough to discourage some parties) within a very short time, but they still count as dispositions.¹³ Registration does not appear to include a more formal vetting for admissibility which, whether incorporated in registration/reception or done later, is where most courts elsewhere start counting. Counting registrations that go nowhere may artificially improve disposition times—assuming these “cases” are closed rapidly.

22. Case “dispositions” also include things other than real cases—like the review of enforcement judgments (32 percent of *judecatorii* civil filings in 2011)¹⁴—most of which are resolved very fast and so improve the average scores. Other extraneous inclusions are some “associated filings” (for example, temporary injunction requests, decisions on pretrial detention and so on), and a variety of post-judgment applications for *judecatorii* criminal cases in particular, requesting changes to the length of the sentence or early release. While not in this category, because they are real cases, numbers are also increased by the redundant mass filings against certain government policies; these are often decided quickly because the government has already agreed to a change in policy and because the affected agency sometimes does not respond. Taken together these rapidly handled “cases” improve the overall scores but thus tend to reduce the relative weight of the slower dispositions.

23. Romanian performance indicators, at least in their published form, lack one important dimension—an “aging list” that covers all cases carried over at the end (or beginning) of each year and one that would also show cases disposed, possibly multiple times in various instances but still awaiting a final judgment. According to the SCM, such a list exists internally, but it is not published. As discussed just below, there are indications that the most serious delays originate from a multiple-appeals process, despite a hasty disposition each time.

24. As the time-to-disposition indicator only shows cases resolved, and the aging list shows what is not getting through and how old it is, it would be useful to identify both inactive cases (to be removed) and active files that are taking extremely long times and may never be disposed.¹⁵

25. The team did in fact find an aging list for one type of case—bankruptcy proceedings. “Disposed cases” of this type have reasonably short durations—many resolved in under a year—

¹³ The team was told (but could not confirm) that many of these issues would be addressed in the next version of the ECRIS statistics module.

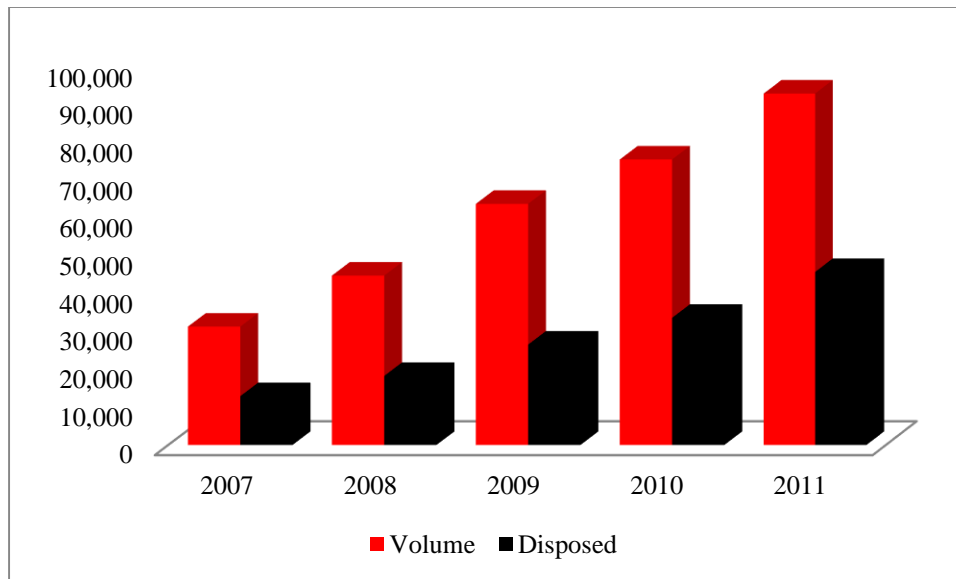
¹⁴ Based on the 2009 Constitutional Court decision that all enforcement proceedings have to be first reviewed by a judge (a priori control).

¹⁵ Those monitoring new code implementation should also take this into consideration as it can be a cause of two types of errors. The most common is for reports to indicate very low disposition times under the new code—but only because no disposition time can be, by definition, longer than the period the code has been in force. The only exception, and the cause of reporting of very long disposition periods, is when old cases are processed under the new rules. After the code has been in force for several years both distortions should nearly disappear, but in the early years highly erroneous estimates of impact can arise.

with most of the others taking from one to three years, which is not unreasonable given the complexity of the issues. However, the backlog is substantial and growing, and it includes many relatively old cases.

26. Insolvency is one example of cases where the backlog is growing and the disposition of many cases may take more than the usual time (figure 2.4), trends further demonstrated in the age of stock (unresolved cases) (figure 2.5). As demonstrated by this rudimentary aging list, while stock has a good number of relatively new cases, the number of cases older than a year is also growing, slightly less fast but still significantly.

Figure 2.4: Insolvency Cases: Comparison of Total Stock (cases carried over plus new filings for each year) versus Cases Disposed, Tribunals, 2007–11



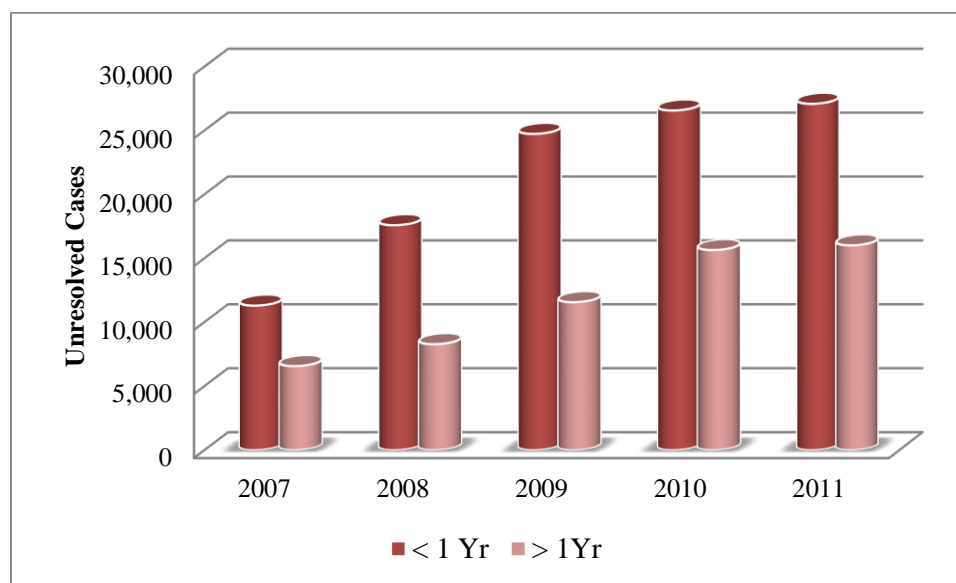
Source: ECRIS Statistics.

27. Cases that take longer to resolve are clearly a minority (although the statistical and other distortions may reinforce this positive picture). Because businesspeople and chambers of commerce mentioned delay, and because they usually have more complex cases, it can reasonably be inferred that this is where the delay is. Most of the examples cited for all civil cases referenced those that had been appealed, sometimes multiple times, and it is not clear whether “average time to disposition” includes only the specific instance or allows for cases taking longer because the judgment has been appealed. Interviews with magistrates and staff who were attempting to use the usual databases, especially ECRIS,¹⁶ noted that the systems made it very difficult to determine whether a case had actually been “disposed.”¹⁷

¹⁶ Discussed in chapter 7.

¹⁷ As also reported by Wittrup et al. (2011).

Figure 2.5: Insolvency Cases: Age of Stock (unresolved), 2007–11



Source: ECRIS Statistics.

28. Another source of information, the ECHR, cites about 400 Romanian cases pending before it involving unreasonable delays in case handling, a problem that judges (and to some extent the ECHR) attribute to overly rigid procedural rules that provide opportunities for dilatory maneuvers by the parties. Romania’s new Civil Procedures Code includes provisions intended to resolve this aspect. Discussions with the ECHR, while hardly conclusive, suggest that these 400 cases may represent a larger category of delay that is not captured by the usual indicators and that particularly affects not larger firms, but rather the smaller parties who lack legal counsel or simply the power to push things ahead. The 2013 survey carried out by the review team (CURS, 2013) points to multiple appeals as a problem. It found that for 23 percent of parties across all levels of jurisdiction, the court they went to was the third or higher instance dealing with their case.¹⁸ Interestingly, 22 percent of respondents who were parties said that their *judecatorii* were at least the third jurisdiction dealing with their case.

29. Roughly 40 percent of the Romanian ECHR cases are criminal cases that have never gone beyond the investigative stage and thus would not figure in the SCM indicators in any recognizable form. The team knows, from reviewing PM data, that many cases remain in the investigative stage, but does not know for how long or why. It suspects, but drawing on an extremely small number of examples, that they are simply left unattended, a status with negative effects for the defendant and victim, although it is most often victims who bring their cases to the ECHR. The other 60 percent are civil matters, delayed because of multiple appeals. This observation was already made by business representatives, but here complainants tend to be smaller actors, frustrated by the seemingly endless appeals process.

30. The ECHR has already suggested to the government that an in-country mechanism for complaining about delays and receiving monetary compensation be introduced. Before this, the

¹⁸ Of the 23 percent: *judecatorii* 22 percent, tribunals 13 percent, courts of appeal 45 percent.

SCM might want to review its own data more carefully to determine whether the 400 cases are an anomaly or represent a larger issue.

Conclusion

31. Most “cases” are resolved rapidly, even taking into account some statistical distortions.

32. The perceptions of delay voiced by many observers thus appear to be inaccurate. They most probably originate in two other factors: people’s unrealistic expectations and their knowledge of a minority of real cases that take a long time. Aside from complex commercial litigation (including insolvency cases), these outliers include several high-level corruption trials—for example that of the ex-Prime Minister Adrian Nastase, concluded after eight years in the public eye. Other examples, visible only to the parties and not the wider public, are smaller civil and criminal cases that take years to final disposition because of multiple appeals (for civil cases) and never moving out of the investigative state (criminal). Because these also cannot be tracked under the current statistical system, the team does not know whether the cases reaching the ECHR are anomalies or symptomatic of more frequent occurrences.

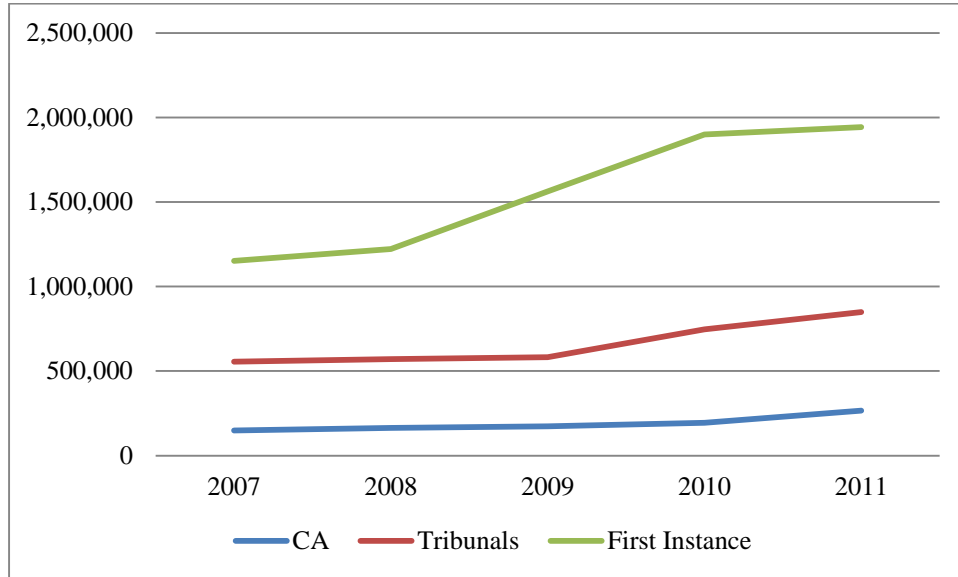
33. Finally, the team would caution the Romanian authorities not to stop their efforts on ensuring reasonable time frames. Throughout Western Europe and in more advanced common-law countries, courts are setting even shorter targets for case disposition. For example, Finland’s Rovaniemi court of appeal has set a 12-month target for completion of all cases; in Norway, all civil cases must be disposed in 6 months and criminal cases in 3 months. In the United Kingdom, targets for one court district are 80 percent of small claims in 15 weeks, 85 percent of fast-track cases in 30 weeks, and 85 percent of multi-track cases in 50 weeks (Pompe, 2012). In short, even a good record has room for improvement.

2.2 Second and Third Paradoxes: Why has Demand Increased Despite Negative Perceptions of the Sector?

Issue

34. We again start with the statistical evidence for the first part of the paradox, which demonstrates significant increases in court use despite the negative perceptions documented earlier. Cumulative workload (stock plus new filings)—not separating original from appellate cases (needed for a more accurate picture)—seems to have risen at all levels especially in 2009–11, with the highest percentage increase for the *judicatorii* (figure 2.6).

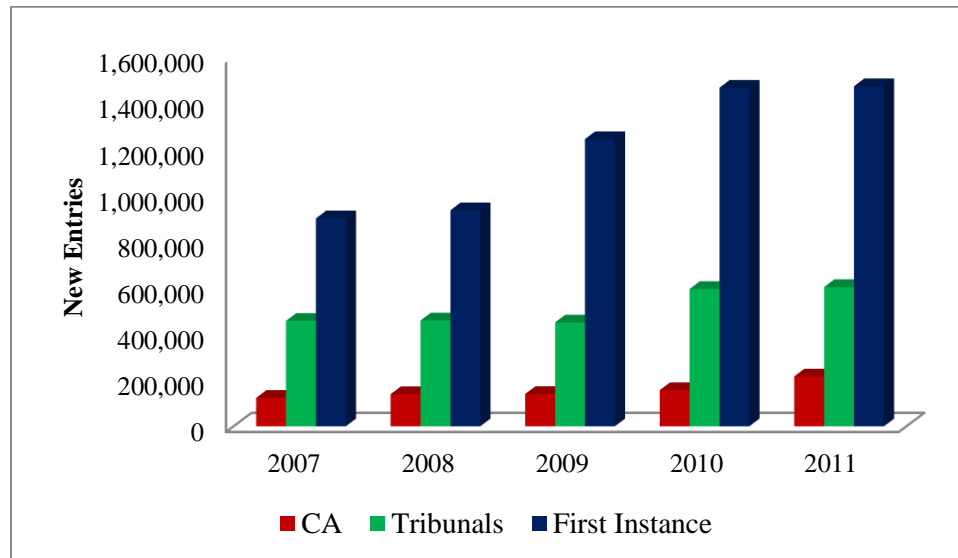
Figure 2.6: Growth in Stock plus New Entries (original jurisdiction and appeals), All Three Instances, 2007–11



Source: ECRIS Statistics.

35. Figure 2.7 gives only new cases over the same period, again showing a steady growth, if with some leveling off from 2010 to 2011 for the tribunals and *judecatorii*. We have not attempted here to eliminate “non-cases,” some of which account for substantial increases and especially in the lowest instance courts. The highest rate of increase (over 100 percent) was in the courts of appeal, followed by a roughly 50 percent increase in the other two instances.

Figure 2.7: Growth in New Entries (original jurisdiction and appeals), All Three Instances, 2007–11



Source: ECRIS Statistics.

36. Given the high increase in the *judicatorii* workload, we extended our analysis here to subtract two types of “cases” we believe should not be counted—the obligatory reviews of all enforcement actions and a number of applications especially related to criminal cases. Both constitute work for the judges, but of a different type than a real case (that is, principal dispute) and thus need to be separated. When they are excluded (as in table 2.1) and only new entries are considered, the increase in *judicatorii* new filings in 2007–11 drops from more than 60 percent to about 18 percent, less than that for the tribunals and courts of appeal. Nonetheless, however calculated, demand has increased over the period. Moreover, the increase in the *judicatorii* is much more gradual than in the other two instances, which experienced most of their increase in 2010 and 2011, most probably as a consequence of the changes introduced by the Small Reforms Law (SRL, Law 202/2010)¹⁹ and other recent laws, especially as they affect appeals.

Table 2.1: New Cases Lodged in *Judicatorii*, 2007–11, With and Without Enforcement Reviews and Applications

Demand	2007	2008	2009	2010	2011
First instance—with enforcement and application reviews	904,000	939,087	1,246,534	1,468,837	1,475,382
First instance—without enforcement	870,555	903,833	988,728	992,028	994,667
First instance—without enforcement and application reviews	825,883	859,536	947,192	956,287	962,476

Source: ECRIS Statistics.

37. Data on citizen perceptions, so far as available, came from surveys and were supported by our own interviews with court users and others outside the system. The opinions expressed on corruption and non-uniform legal interpretations corroborate the low scores of the system in the surveys. Thus the paradox up to this point remains: a growth in demand for court services despite the negative perceptions of the quality of output.

Analysis

38. The likely reasons for the contradictions between citizens’ perceptions and their behavior (court use) are multiple. On the one hand, many court users may assume, possibly correctly, that their specific cases (disputes over small amounts, family matters, and administrative issues) will not be affected or that if they are, they may believe they can make the system work to their advantage.

39. On the other, and possibly encouraging this attitude, the courts are far cheaper to use than notaries. If trust in both is low, as surveys suggest, it makes sense to go with the less expensive alternative (and cases that cost more in courts—those where larger amounts are involved—are no cheaper when handled by a notary). Hence many people take to court civil issues that might be handled by a notary or by an administrative agency. In the latter case, they may not know they can do this. For example, the SRL allows consensual divorces where there are no minor children (article 3, item 3), to be authorized by the civil registry, a process cheaper than the notaries and

¹⁹ This law was introduced as a prelude to the new procedural codes and included amendments to the existing codes intended, among other things, to accelerate dispute processing. Unfortunately, its impact has not been evaluated (section 3.3).

conceivably faster than the courts. It would be important to know the extent to which this is affecting incoming court cases of this type, and if it is not, to make the alternative more visible to the public.

40. Criminal justice is free for the complainant. Hence people file criminal complaints in place of civil ones, even when the issue is clearly not criminal. We cannot separate these claims, but it is indicative that so few of the criminal complaints filed (3 percent) are taken forward to courts. To this can be added, for both civil and criminal cases, a certain amount of popular misperception as to what courts can do; an absence of lawyers in some locations and the reluctance of others (in need of business) to dissuade people from taking frivolous, pointless, or nuisance cases to court; and the willingness of judges and prosecutors to deal with these cases, whether represented by a lawyer or not. This creates a sort of vicious (or virtuous, if one believes it is an important part of the service) circle—magistrates provide attention to parties using the courts for what the Functional Review team would consider inappropriate requests, which thus encourages the latter to come back again and again.

41. These we could call the pull factors—reasons why people favor or are drawn to using court services over ignoring a dispute or using an alternative mechanism.

42. Some push factors are also at work, those which require court use regardless of individual preference. For example, caseload has also increased because of changes to procedural law that really do not represent additional demand, but rather additional requirements. Those with a dispute, or in the middle of one, need to comply with these requirements, regardless of their opinion of the courts. Since late 2009 judges must review all enforcement actions (those carried out by bailiffs, whether based on an executive title or a prior judgment), which has greatly increased workload and apparent demand, but only because enforcement cannot go forward as before, without it.

43. The constant changes of the legislative framework—and frequent amendments to emergency decrees and ordinary law—have contributed to the increase by encouraging redundant filings by individuals protesting the same issues. The ability to contest government actions is important and in several instances has led to a reversal of the law or policy and government commitment to repaying any amounts already collected from the claimants. These reversals do not, however, usually prevent the filing of additional claims as a means, possibly unnecessary, for individuals to put themselves on a list for the repayment the government has already promised.

44. The government has in fact begun to recognize this problem and the prime minister (May 2012) told pensioners that they would be repaid (the 5.5 percent tax) without having to lodge a court case. However, that was soon after the March 2012 Constitutional Court decision that the tax on smaller pensions was unconstitutional (and the reversal of the prior government's subsequent announcement that it would not pay retroactively). The impact remains to be seen. Even judges and MOJ staff said they had filed claims to recuperate back pay (from bonuses or temporary wage increases) owed by government. They won their cases, but this has not speeded up the repayment by installments that the government agreed to.

45. This type of push factor could be reduced by policy change. A group within the SCM has suggested, for another issue involving a car tax (with its own repayment agreement), that claims be filed in the administrative agency rather than in the courts. This would be a sensible solution for many such issues, and offers real potential to reduce the burden on the judiciary once a general agreement is reached on the basis of a first set of leading cases.

46. The situation is not unique to Romania of course. However, the failure to adopt a more efficient solution (and the continued practice of policy reversals) is another explanation why apparent demand has increased.

Conclusion

47. Demand for court services has increased over the past five years even when we add some statistical adjustments and despite few signs that public perceptions of the justice system have improved. Economic downturns increase court activity, but additional underlying issues apply to Romania—the low cost of court use, magistrates’ willingness to consider poorly formulated or non-justiciable complaints, and the real or perceived need to take legal action as security against new laws or policies.

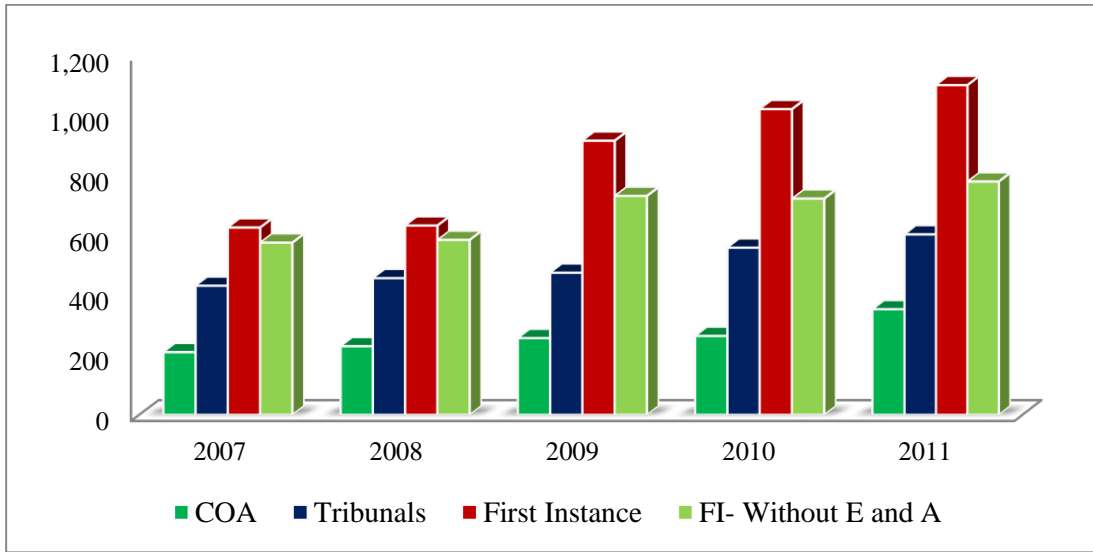
48. Most of these factors are out of the courts’ control, but unless other means are found to address the underlying issues, demand will at the minimum not decrease (growth is another issue) and a need for more judges and prosecutors will inevitably continue. Judicial productivity could also be increased (see section 3.4), but “unnecessary” demand—things that could be diverted to other forums or eliminated by better government policies—is a prime target for reduction.

2.3 Fourth Paradox: Why do Romanian Justice Performance Indicators Remain High Despite Magistrates’ Perceptions of Overload and an Approaching Crisis (if not now, with the new codes)?

Issue

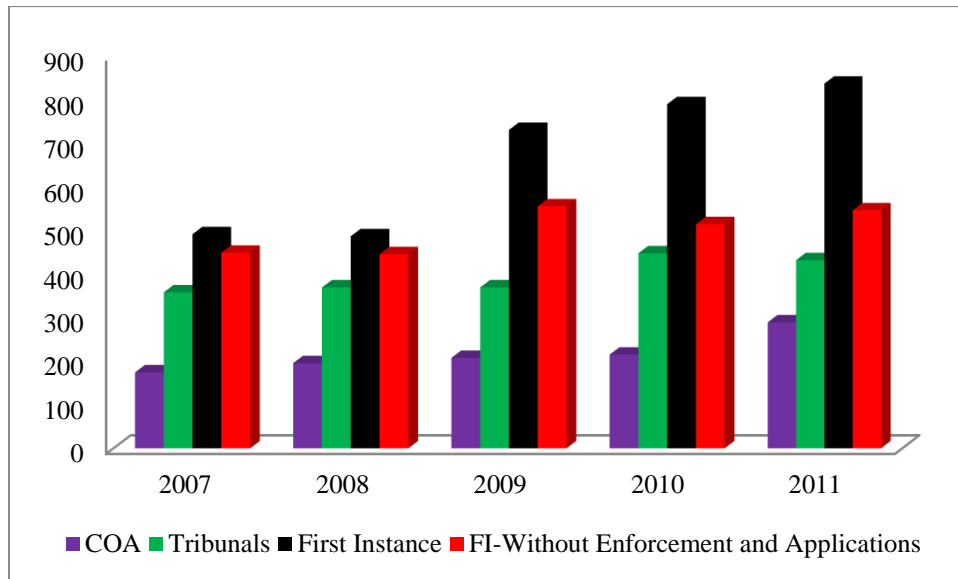
49. Again, we start with the statistical evidence (figures 2.8 and 2.9). First on the judges’ side, and adding to the charts on all workload and on incoming cases shown above, the number of cases per judge has increased over the same period. This is simply because the number of incoming cases has risen faster than the number of magistrates. (As in table 2.1, two sets of numbers are given for *judicatorii*, with and without enforcement and application reviews.)

Figure 2.8: Workload per Judge (stock and new filings), 2007–11



Source: ECRIS Statistics.

Figure 2.9: Workload per Judge (new filings only), 2007–11



Source: ECRIS Statistics.

50. Once enforcement reviews and applications are removed for *judecatorii*, the increase in workload (stock plus new filings) for all instances is about 50 percent over the period—or for the courts of appeal, somewhat higher, at roughly 66 percent. For new filings in the same courts, the increase drops from 80 percent to about 25 percent. The timing of the change is slightly different

for each instance, clearly responding to the effects of legal events, like the SRL and the Constitutional Court decision on review of enforcement actions.²⁰

51. We also review workload for prosecutors, dividing into two categories—all complaints entered and reviewed for possible prosecution and cases resulting in an indictment (table 2.2). The number of complaints entered has grown consistently over the period for an overall increase of nearly 40 percent, in line with that of the courts. Indictments have grown at about the same rhythm but represent only 3 percent of all complaints. Thus whereas the workload per prosecutor is quite high when all complaints are considered, it is relatively low when only cases taken to court are included. Of course, many of the cases that never get to the courts require considerable investigation before they can be closed, but prosecutors also report having to spend time on a significant number that simply are not crimes but still require a “motivated justification” for dismissal.

Table 2.2: Prosecutorial Workload: Complaints per Prosecutor and Judicialized Cases per Prosecutor, 2007–11

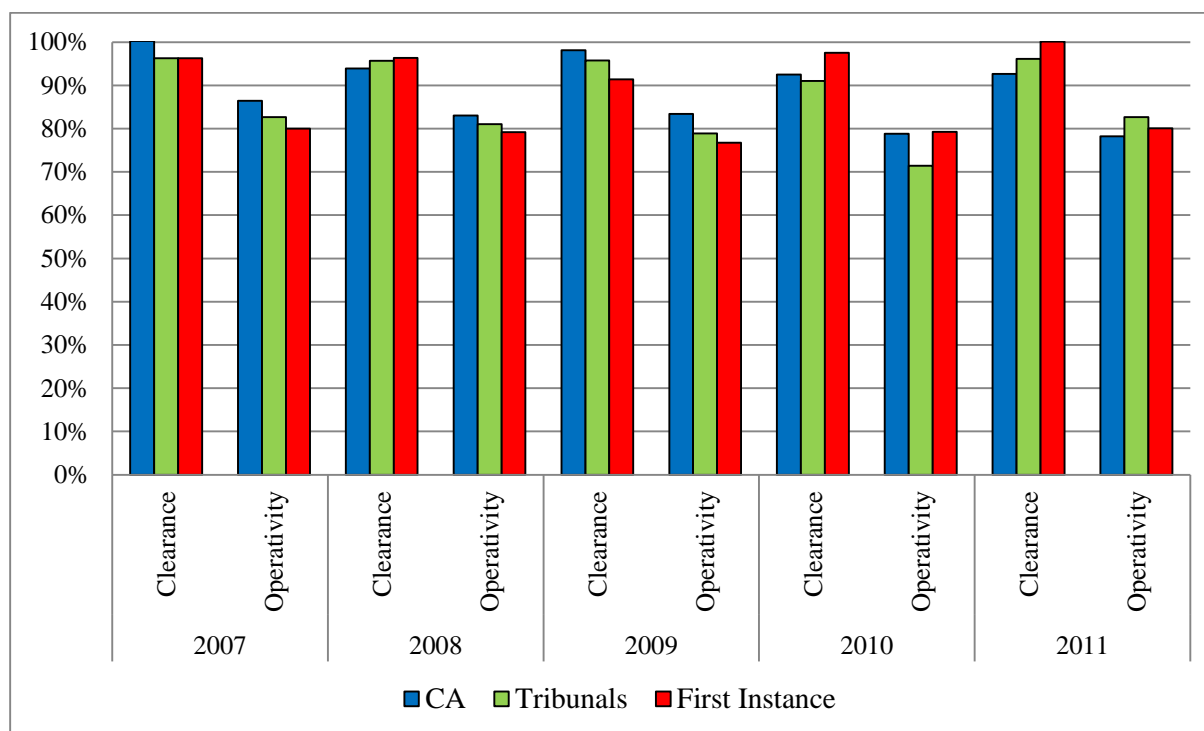
Year	Workload of complaints	Workload of indicted cases
2007	644	22
2008	691	20
2009	765	21
2010	856	24
2011	899	24

Source: Public Ministry Statistics.

52. Also on the judges’ side, but not often mentioned in their arguments on overwork, are the performance indicators (figure 2.10).

²⁰ For courts of appeal and tribunals, we have ignored the use of panels (which varies by type of case) and simply divided the caseload by the number of judges. This is not how the SCM does its calculations, but the method used here is more conventional and is considered by the team to be a better measure of the efficiency of human resources use. Moreover, the usual practice whenever panels are used, anywhere, is for one member to take the primary responsibility for reviewing each case. Hence the assumption that all spend equal time on each issue is not generally valid, and typically only happens when a case is considered very difficult and controversial.

Figure 2.10: Clearance and Operativity Rates for Courts, 2007–11



Source: ECRIS Statistics.

53. A clearance rate of 100 percent (cases disposed equal all new filings) is generally considered good. Rates only go above this when there is a need to eliminate backlog. Operativity rates (cases disposed over stock plus new filings) would only reach 100 percent in a court that had a clear desk at the end of the year (nothing left to do) and would indicate insufficient workload (and thus the court might merit closing). Thus 75–80 percent is considered reasonable. Over the five years, and despite the increase in caseload, Romanian courts have maintained 90–100 percent for clearance rates and 70–85 percent for operativity. This does not suggest that the increased caseload is completely overwhelming capacity, but it raises the question of how they have been able to continue operating so efficiently.

Analysis

54. The statistics as reported do not tell the entire story and that explains a good part of the paradox. Caseload has increased, especially since 2008, but not all increases are the same, and there is a certain tendency to “play with the numbers” (count things that are not really cases). As suggested, increases in caseload and workload are not necessarily the same. Caseload appears higher because of the addition of non-cases, while even much of what might qualify as cases does not represent a large amount of additional work for judges.

55. Thus, a first explanation for the paradox is the peculiar approach to counting cases in Romania. This has been commented on by others (Wittrup and others, 2011) and even inspired a request from the SCM that the Judicial Inspectorate review ECRIS entries to ensure “only cases were included.” The Judicial Inspectorate apparently found few problems, and one interviewee

suggested there never was one, but we continue to find applications counted as cases and new entering caseload counting first and second appeals as new cases. These are important for explaining workload within the court reviewing them, but they should not be counted as “cases” on their own. Doing so results in calculations apparently summing new filings, all appeals, and stock carried over from one year to the next to conclude that “one in every six Romanians had a case in court.”²¹

56. Much of the explosive growth in caseload is fairly recent and can be attributed to specific legal changes and political events. Those planning for the new codes²² seem to assume comparable increases in the future, although it is unclear whether they are just extrapolating from the last few years or have some other basis for this prediction. The SRL and the new Civil Procedures Code reassign some cases to the judiciary that were formerly processed by administrative agencies—for example, *tutela* or guardianship—but they also allow notaries and civil registries to do more (uncontested divorces with minor children for the former; uncontested divorces without minor children for the latter), which could take some pressure off the courts.

57. But ultimately, the SRL and the new Civil Procedures Code seem unlikely to make a huge difference. The new code will change the distribution of cases among instances, but this has no evident impact on overall demand. The only court for which it may augment demand is the HCCJ, derived both from the inevitable confusion caused by new procedural rules and by the provision for the request for “preliminary rulings” on legal issues requiring clarification before a judgment can be made. The HCCJ anticipates that demand will require a threefold increase in its members, but it is unclear how it made this calculation.

58. Something should also be said of the prosecutors’ extremely high conviction rate (90–95 percent). This is rarely matched anywhere else in the world and when it does, raises suspicions as to one of two negative explanations—considerable corruption²³ or an overly risk-averse policy on the prosecutors’ side.²⁴ We believe that in Romania the second explanation holds—prosecutors are so fixed on a nearly perfect conviction rate that they do not pursue cases they believe they cannot win or go for the lower charge they can make stick. They claim they do this because of popular expectations—and cite a president who recommended firing a prosecutor who did not win a particular (corruption) case.

59. Yet this policy raises questions, and we believe that in line with practices elsewhere, prosecutors should take more risks and recognize that anything over 75 percent is fairly acceptable. Sometimes extremely good scores reveal problems, and a prosecutor with a 95 percent conviction rate—like a court with a near 100 percent operativity rate (Romania has some)—raises issues as to what underlies the score.

²¹ *Nine O’Clock* Newspaper, March 30, 2011.

²² Civil Code, already in effect; Civil Procedures Code, entered into effect in February 2013; and the Criminal Code and Criminal Procedures Code, both planned to enter into effect in 2014. See appendix 3.

²³ A few Latin American countries have similarly high conviction rates for the simple reason that anyone who can pay their way out of a legal action does so long before the case gets to court, by bribing the police or the prosecutors. This leaves for the courts only those too poor to pay bribes or, probably, to afford good legal representation. We have no indication of this occurring in Romania, at least not on a significant scale, and thus go with the second explanation, the risk-averse prosecution policy.

²⁴ Japan has traditionally had an even higher rate, closer to 99 percent, and this (risk aversion) is the usual explanation, along with some possible violations of due process rights.

Conclusion

60. Romania's performance indicators are good and an accurate reflection of how the justice sector deals with what Romanian officials count as caseload. The problem lies in what is counted—some of it not qualifying as separate cases, and much of the rest consisting of issues that are automatically and quickly disposed. However, with scores this high and these additional insights into the reasons, the “impending crisis” or extreme overload seems difficult to establish, and this we explore in greater detail in the next chapter. In any event, as with the other paradoxes, perceptions (this time of those within the system) are contradicted by the statistical evidence. Caseload and even workload have grown, but the system seems nowhere near collapse, and given the sources of the growth, the recent increases do not seem likely to continue at the same rates.

3. PERFORMANCE ISSUES IN DEPTH

61. Having, we trust, explained the paradoxes we now turn to a more detailed examination of performance, featuring our three assessment criteria: efficiency (productivity and timeliness), quality (corruption and uniformity of legal interpretations), and access. Cutting across all performance measurement areas is strategic management and planning.

3.1 A Cross-Cutting Aspect: Absence of Strategic Management and Planning

62. Strategic management and planning²⁵ are not a widely developed art in the judicial system, but especially for a country like Romania it seems essential to introduce them now. As documented in part 3, judicial system needs (human, financial, and ICT) are not assessed with the required professional rigor: the automatic assumption by all parties is that any performance gap will be resolved by more resources, and when resources are not forthcoming, that matters will not get much better.

63. The SCM's recent (May 2012) request to courts that they provide an estimate of their needs for implementing the new Civil Procedures Code, although providing respondents with some guidelines, is an example of how things are normally done, and aside from its tardy presentation (four months before the code was anticipated to go into effect) is unlikely to produce much of a sufficiently strategic response. It may just end up a simple wish list. The Strategic Plan (Romania, MOJ, 2010) for 2010–14, while not approved, is said to have guided recent programming. However, like all other plans it is largely a list of things to do, with admittedly many noble objectives, but no clear depiction of how these things will produce measurable improvements in services or how to allocate resources to achieve them.

64. The justice sector's human resources departments appear to emphasize recruitment, training, and promotions, but do not look ahead to emerging needs and ways to deal with them apart from adding "more of the same doing the same thing." The Impact Study contracted for the new codes (Tuca Zbarcea and others, 2011) is critical of these practices and suggests the need for a more sophisticated approach, yet even this study, in predicting needs under new codes, only extrapolated from current staffing patterns, workloads, and growth trends without asking (as we argue would be more useful) two things: whether the recent increases in demand are likely to continue and whether the new procedures will require different kinds of people doing different jobs.

65. Careful statistical analysis would help clarify the first issue (as has been done in other sections of this report, as far as the data allow). As for the second, it is more complicated but begins with a comparative analysis of the work required under the old and new procedures and the skills needed to perform it. There are certainly experts in process analysis (within or outside courts) who could help with this if the judiciary does not feel up to it. The ICT departments

²⁵ They may be defined as a forward-looking approach to improving results by identifying real or anticipated changes in the demand for services and the alterations in processes, rules, and resource characteristics and distribution required to meet them.

likewise do only the most ad hoc planning and their “strategic plan” is arguably a list of “things we wish to do or buy,” and moreover, for lack of sufficient coordination, incorporates redundancies and inconsistencies.

66. Romania’s situation is complicated by the several independent entities charged with parts of the basic function—aside from a certain judicial cultural gap, which admittedly still affects the majority of the world’s justice sectors more than other sectors. Sector budgets are handled by the PM, the MOJ (for most courts), the SCM (for its own budget and as recommendations to the MOJ for the ordinary courts), and the HCCJ (for its own budget). Decisions on human resources (numbers, location, appointment, and further management) are divided among the MOJ, the PM, and the SCM, as well as the cabinet and Parliament, which enacts the laws determining numbers and location. ICT strategy and decisions are similarly fractionalized. Movement of budgetary control of the ordinary courts to the HCCJ (legally required but postponed for years) will eliminate one actor in those decisions, but still separates this from decisions on other resources and by other entities (box 3.1 and section 6.3 on managing the courts’ budget). Such complex systems can be adequately coordinated, but moves to do this require considerable effort that seems missing in Romania. In effect, neither before nor after the “re-creation of the SCM” (appendix 2) was there any entity charged with strategic planning for the sector or for its individual components.

67. Under these conditions it is no wonder that most so-called strategies are little more than wish lists and that no one is considering other equally important issues, such as how to enhance the productivity of resources already in place. Judges claim overwork—and also decreasing job satisfaction (as one reported, “I feel as though I am working on a Ford assembly line”). Unfortunately (Benetti, 2000), much judicial work in modern societies is mass based and needs to be treated as such.

68. The trick therefore is to find a way to give less attention to some demands (dealing with them in a more perfunctory, routinized fashion or perhaps sending it elsewhere) and to reserve the bulk of judicial effort for real controversies. This is called “differential case management,” a concept that does not seem to have taken hold in Romania yet. “Proactive case management” (the judge pushes the case ahead rather than letting the parties set the rhythm) also seems to be highly underdeveloped.²⁶

69. While the larger parts of strategic planning (where we put the resources) are excessively divided, no entity seems to be charged with considering these other, possibly more important issues. In its interviews, the team heard many useful suggestions as to other very punctual changes that might be made in procedures and practices. It would be well to find a way to capture these inputs as some of them appear quite useful. While reformers are always looking for big fixes, in the end their big plans often fail because of inattention to a multitude of details.

70. The judicial system’s present organization does not allow a place for an entity that can dialogue effectively with other governmental organizations whose practices impact negatively on the system. Judges in the SCM have, very tentatively, suggested that government litigation is a

²⁶ Proactive does not mean arrogant or arbitrary—two vices sometimes cited by lawyers—it means doing things with a plan to move them along at a reasonable rate.

major cause of their overwork, and that there are solutions aside from accepting delay or adding more judges. This is a minority voice, however, even within the judiciary. It might have more impact if some entity (logically but not necessarily the SCM) had this as part of its mandate and organized itself to carry out the function effectively.

71. Likewise, while judges complain about inadequate consultation on new laws affecting their operations, a positive response to their requests is impeded by the absence of any designated entity for representing the judicial system—the MOJ, the SCM, the PM, or the HCCJ? Different countries have resolved this issue in different ways so there is no universal best practice. Much depends on local values and preferences, and Romania will have to decide what works for it.

3.2 Introducing Strategic Management and Planning

72. Strategic management and planning entail new functions for judiciaries universally, and thus it is no surprise that they did not exist in Romania before the reforms introduced in 1992 and after. The justice sector as a whole, and the courts in particular, have traditionally been “administered” rather than managed, no matter who is in charge of this function. Administration is typically process focused, emphasizing compliance with rule-based use and distribution of resources.²⁷ Management, while not ignoring the rules, is results focused, no longer regarding mere rule-compliance as the ultimate test of good performance.

73. Where demand is fairly static, administration may be sufficient, but this is no longer the case for justice sector institutions, implying a necessary shift to more dynamic approaches to defining how the sector’s work is—and should be—done. This is a hard transition for any organization, but especially so for those in the justice sector because of the way magistrates use rules in their ordinary work—expected to decide on the basis of the law, not in terms of likely outcomes. This discussion implies no change to that juridical approach, but only as applied to decisions on cases;²⁸ it is inappropriate for present-day management, and therein lies the challenge.

74. Moreover, training in administration, management, and planning is hardly a normal part of judicial preparation, a shortcoming unlikely to be addressed adequately by a few short courses at a training institute. For this reason, judiciaries (and other sector institutions) increasingly rely on specialized experts—a separate category of court administrators and managers, judges who have been transitioned to this career (through a lengthy special preparation), or generic experts (in human resources, ICT, statistics, infrastructure, and so on) who must learn to apply their skills and techniques to the justice system.

²⁷ This may be why so many judicial sectors in developing countries adopt the International Organization for Standardization (ISO) methodology enthusiastically, as ISO applied to public services tends to emphasize process compliance rather than outcomes or results, which are harder to measure. Process compliance, however, is only recommended where one has evidence that the processes will maximize results.

²⁸ Although recent debates on just this issue are whether judges should be more results focused or ignore results in favor of what the law says. They are especially visible in the context of courts’ judicial review functions—and the extent to which their decisions on the constitutionality of laws and policies can, or should, involve policy directives to governments.

75. Unfortunately, the recent and anticipated redistribution of functions among the MOJ, PM, SCM, and HCCJ (appendix 2) has overlooked the chance to insert strategic management and planning somewhere, and thus they still do not exist in Romania's judicial system. These various entities handle pieces of the functions—human resources recruitment and career management, definition of staffing levels and distribution, design and execution of budgets, ICT development, performance statistics, drafting of new laws, and so on—but none of them takes a strategic outlook or is responsible for consolidating the parts so as to determine how they might be readjusted and recombined to produce better results over the short, medium, and long term. Instead their visions tend to be partial and static. Very little of what is called planning is linked to results except for the usual assumption that without more resources, the quantity and quality of services will not improve.

76. We somewhat doubt that sector wide management by one institution is feasible in Romania (there are only a few successful examples worldwide).²⁹ Thus the following should be taken as applicable to either that option or the creation of unitary management for each of the two main institutions: the PM and the judiciary, with some mechanism to coordinate their actions.³⁰ A management function—or better, a strategic management and planning function—would instead perform the following activities:

- Monitor ongoing performance of all entities it oversees and identify areas where one or all may be falling behind the acceptable levels.
- Track changes in demand and assess whether they are likely to continue or are one-time occurrences.
- Make estimates of future demand and how this will affect the allocation of resources, geographically and functionally.
- Investigate ways of reorganizing or reassigning work to increase overall productivity.
- Identify how changing demand and practices will alter the skills required within the sector and find ways to make the necessary adjustments. This means not only adding staff to perform new functions, but also reducing the numbers in other areas accordingly.
- Identify changes in legal procedures necessary to enhance productivity and lobby with the executive and Parliament for their enactment.
- Identify and prioritize changes in other resources (for example, ICT, infrastructure) as they relate to the institution or sector's overall development strategy and performance goals.
- Lobby with other actors ("the government") to encourage resolution of problems by other means, before they reach the courts or prosecution.
- Review how independent professionals augment or reduce sector workload and collaborate with them to find ways of enhancing synergies.

²⁹ Costa Rica is one example—and a more modern version as the Supreme Court also managed the budgets of the PM, Defense, and the Investigative Police, but over time these three agencies have received greater operational autonomy. Of course the traditional system—and not just in Europe—was to give all this authority to a ministry of justice, but as the modern tendency appears to be to eliminate the ministry's control over the sector, the usual solution in Latin America is to have the PM and the courts each do their own management.

³⁰ This would leave the MOJ to manage the functions it oversees—the prisons, independent professionals, a vetting of the legal framework (ideally beyond the sector), and as the executive's primary link with the institutions of the justice sector.

Part 1: Performance Assessment

- Monitor changes introduced by various reforms to ensure the new practices and the intended effects are occurring. Where one or both is not happening, determine why and identify what must be done to alter this.
- Coordinate with other sector entities (if management is divided among them) to ensure consistency among the plans and practices adopted by each.

77. To do all this, the function would require a good, accurate database on within-system events, not just a collection of manually assembled aggregate statistics or automatically generated prepackaged reports. (Other sections of the review look at improvements that should be made to ECRIS and related systems so they can serve this purpose. Here we simply reiterate that without good data and good analysis, planning becomes a very ineffective operation and is likely to err in identifying problems, causes, and remedies.)³¹

78. There is no preferred location for the management and planning functions—they can be done by the HCCJ, MOJ, SCM, PM, or by some combination. However, collaborative performance is rare and has proved difficult to achieve. While both the MOJ and the SCM report that their relations have improved (and some deny they ever were a problem), some comments and observations suggest that their activities could still be better coordinated. One example regards the division of responsibilities for ECRIS—managed and located in the MOJ, but with the SCM having responsibility for compiling court statistics. The SCM does not have access to the entire database, and apparently the MOJ, while capable of replicating it in its entirety, has not done so because it does not have the staff to do the analysis. Moreover, the Judicial Inspectorate, while claiming access to the entire database, uses it largely to monitor compliance with actions subject to disciplinary sanctions.

79. None of the likely organizational candidates for a sector wide—or perhaps, more practically, institutional—approach are currently staffed or structured to carry out these strategic functions. Magistrates alone will not suffice, and a complement of skilled individuals from other professions will be needed—engineers, statisticians, ICT specialists, administrators, and others.

80. Management, whether sector wide or institutional, does not have the final word on performance goals or on sector or institutional development plans. These are set by the sector or institutional leaders, who in Romania are magistrates or high-ranking political appointees (for example, a minister of justice or a head of an administrative department within the MOJ, again depending on how responsibilities are distributed). However, it provides the information and analysis on the basis of which the leaders make their decisions on general directions and goals and is responsible for implementation. And beyond that, the current division of labor poses some dilemmas for any reorganization (box 3.1).

³¹ On this topic, see Genn (2010) on the Wolff reforms in England, and World Bank (2002) on reforms in Mexico. In both cases the authors claim that the lack of an empirical basis caused reformers to misjudge what was needed.

Box 3.1: Slowly Moving Away from the Southern Model

Romania follows a modified “Southern model” (World Bank, 2008) for justice sector administration. This implies career management for magistrates and clerks by the judicial council, with budgets handled by the MOJ (and the PM, HCCJ, and SCM for their own budgets), and staffing levels determined elsewhere but based largely on MOJ recommendations.

The judicial authorities are contemplating a further deviation from this model (toward the “Northern version”) in giving the budgetary functions for the judiciary to the HCCJ (and having already let the PM manage its own budget). This still leaves undefined the responsibility for several other critical elements (most of them currently with the MOJ)—determination of staffing patterns, recruitment of and career management for some non-judicial staff (possibly including *grefieri* in the future—see paragraphs 298 and 299), ICT policy and development, drafting of laws affecting sector operations, and so on.

The new arrangements will thus leave the various parts of the puzzle in fewer but still different hands. To ensure that they represent a real improvement in ability to manage and plan strategically, it probably would be well to take another look at the distribution.

81. In recommending that the authorities introduce strategic management and planning, the team fully realizes that the approach cannot be brought in overnight. Even if an ideal distribution of functions could be defined and enacted legally, it would take some time for the institutions performing them to rise to the task. Realistically, in light of the tensions among the range of institutions, it will have to be done incrementally, with the hope that no change represents a step backward and that over time, the parts can be coordinated or located in one place.

82. Finally, some resource implications stand outside the usual needs list. Depending on the decision on placement—still in various organizations, centralized in one, or with individual organizations consolidating the management of all their own resources—our three main categories of resources—human resources, financial resources, and ICT—would be affected differently (see part 2).

83. Whether management is centralized in one place or divided between the PM and the judiciary, the ideal is a single department to which the individual resource management units—human resources, budget, ICT, infrastructure, and other material inputs—report so that their own plans and proposals can be coordinated. Meeting these goals will require financing and some additional human and ICT resources. Where they are located, how they are organized, and the particular mix will depend on prior decisions on location and decentralization, although at any level or location management should:

- Track performance and identify problems.
- Identify various scenarios and resource combinations to meet sector or institutional goals.
- Coordinate the operations and plans of the different management units (budget, human resources, ICT, other material inputs, process reengineers, planning, etc.) responsible for the various parts. Ideally, all these units should be subordinated to the overall management unit, but this may not be attainable for some time given how functions are now divided.

84. Looking only at human and ICT resources (with the assumption that financial resources will be needed to cover these additions), the following additions will be required:

- *Technical staff experienced in human resources, budgetary, and ICT management at a minimum and possibly in other resource areas.* The central unit or units for each institution will also require a planning and statistical department responsible for tracking performance, identifying problems or deficiencies, and elaborating alternatives for resolving them. Members of these departments should be experts in statistical analysis and planning functions. For the most part, they should not be judges or clerks, although magistrates should be involved in the work of each planning unit, as their insights and further education in the specific expertise will be vital to the units' functioning.
- *ICT resources.* Functional management units (responsible for human resources, budgets, ICT, and other resource divisions) will need real-time data on the resources they oversee. These ICT needs are quite independent of whatever other ICT programs evolve, but it is critical that the programs be tied into the overall sector or institutional development plan, rather than operating in isolation. Still, not all ICT innovations are equally important, just as every new building or extra human resources may not lead directly to better outputs.

85. The creation of strategic management and planning capacity may be relatively inexpensive, at least compared with some of the other proposed changes. However, ensuring it operates as intended will require overcoming numerous cultural, political, and even legal barriers. The cultural and political barriers are the most difficult, but with sufficient political will, laws can be changed.

86. One theme running through this report is that getting offices in the justice sector to relinquish absolute control of the resources they manage is extremely hard, especially as Romania's fragmented administrative approach gives power to groups that will lose the final word. Getting them to acknowledge that this loss is for society's greater benefit is the fundamental political challenge, one that will be overcome only if sector and political leadership adopt that larger vision.

3.3 Efficiency: Is the System Sufficiently Productive and Does It Provide Timely Enough Solutions?

Issues

87. While the SCM has stated that efficiency (productivity and timeliness) are only means, not ends (Romania, SCM, 2012a) they are valid issues. It may indeed make little sense for the system to rapidly produce a large quantity of suboptimal outputs, as the SCM argues, but producing good outputs extremely slowly will not be appreciated by the public, either.

88. However, the issue raised here really follows the SCM's argument, suggesting that while the system is efficient (by its own indicators) in processing existing demand in a timely fashion, there is a more fundamental efficiency issue as to what is getting through the system and whether it represents the best use of system resources. This is a question more of productivity than timeliness—but productivity assessed as value added rather than simply the number of cases

processed. Thus the underlying question is whether the sector could produce “higher value” outputs with the resources it already has, and if so, how.

Analysis

89. The system seems efficient in dispatching a surfeit of simple cases and associated filings rapidly, and seems to continue to do so adequately despite rising demand. There are questions, however, as to whether they merit the effort invested in them, which take on different dimensions for the courts and prosecutors.

90. According to the judges interviewed, much of the extra time is spent working with largely *pro se* parties (having no legal representation) to help them shape their complaints. The review team’s court user survey found that, depending on the level of jurisdiction, about 10 percent of respondents had received help from the judge to prepare their case (CURS, 2013).³² A 2008 World Bank survey suggested that about 40 percent of plaintiffs first arrived without legal representation (Gallup Organization Romania, 2008), while the review team’s 2013 survey found that 21 percent of parties were not represented by a lawyer (CURS, 2013).³³ Whatever the exact number, this is still work that might be more appropriately done by lawyers before a case is lodged.

91. A second cause of lower judicial productivity is a complex legal framework that allows ample opportunity for dilatory maneuvers. These obviously cause delays—they are intended to—but they also mean more work for the judge who must process them. The only ones that could be tracked through the SCM statistics were pretrial and post-judgment applications in criminal cases in the *judecatorii*, which constituted three times the number of actual cases.³⁴ A too lenient policy toward these applications, like the absence of adequate filters for appeals (something judges interviewed suggested is necessary), adds to workload as well. It can be hypothesized that judges exercise this leniency because of a fear of complaints to the Judicial Inspectorate about their having violated parties’ rights, but more investigation is warranted to determine the exact causes.

92. For prosecutors (and police) the situation varies only slightly, although potential sanctions seem to play a part. To dispose complaints that cannot go forward (insufficient evidence, not a crime), prosecutors and police still must study the issues and write motivated justifications for dismissal. In interviews, prosecutors estimated that this might take them a couple of hours per case, which may be exaggerated, but still represents an enormous investment of time given the number of complaints involved. As no police were interviewed, we do not have estimates for their time on this process, but interviewees stressed that both the investigating police officer and the prosecutor had to do this separately.³⁵ Fortunately, Romania’s crime rates are low by international standards, but even so, this effort might be better put into investigating

³² Of the 10 percent: *judecatorii* 4 percent, tribunals 13 percent, courts of appeal 15 percent.

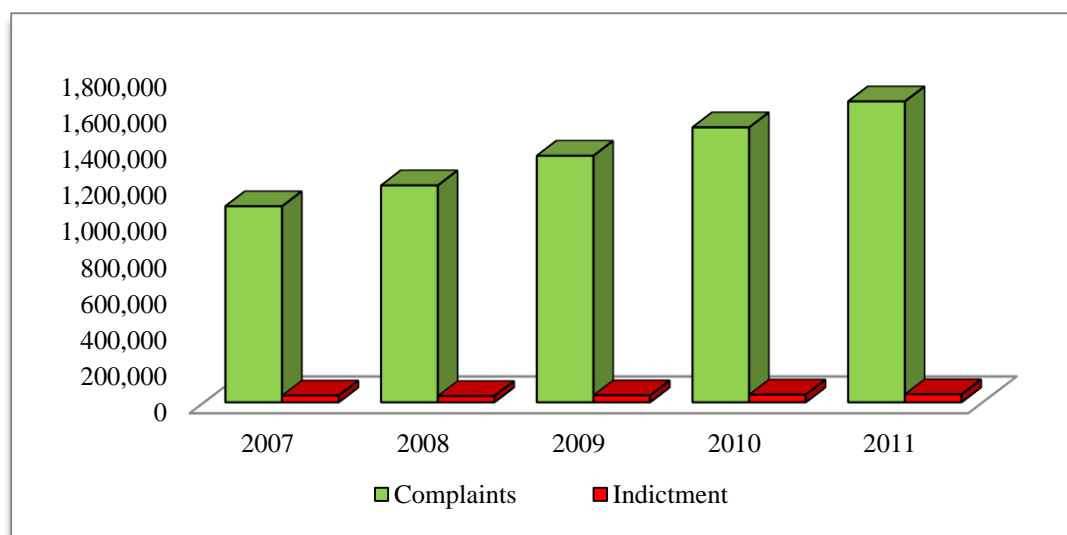
³³ Of the 21 percent: *judecatorii* 20 percent, tribunals 25 percent, courts of appeal 16 percent.

³⁴ As the ICT team discovered, one project under development would allow inmates to e-file their applications. The impact on judicial workload is likely to be negative, first because they will doubtless get more applications and second because the human process of reviewing them will not be expedited. This is a general problem with all types of e-filings—saves time for the complainant, but does not facilitate judicial handling.

³⁵ A recent legislative change seems to have put an end to this obligation by allowing prosecutors to simply endorse the justification provided by police.

and prosecuting real crimes. Only about 3 percent of complaints are taken forward to courts (figure 3.1).

Figure 3.1: Criminal Complaints Lodged with Prosecutors versus Indictments, 2007–11



Source: Team elaboration based on statistics provided by the SCM.

93. Although the prosecutors’ actions are motivated by the possibility that the “victim” might appeal and the prosecutor be held responsible for not taking a valid case forward, actual rates of appeal for these decisions are low, and in most instances do not prosper. Although the SRL introduced the principle of “opportunity,”³⁶ neither the statistics nor interviews with prosecutors suggest any change in practice. As one high-ranking member of the PM noted, most prosecutors continue to write lengthy justifications based on the same fear of successful appeals against their decisions. Table 3.1 documents the number of actual appeals and those that overturn the initial decision not to prosecute (*nolle prosequi*).

Table 3.1: Appeals against *Nolle Prosequi* Decisions and Those Finding against the Decision

Year	Total criminal complaints	Appeals lodged against non-prosecution decision	Appeals decided against non-prosecution	Rulings finding against decision of non-prosecution
2007	1,079,210	15,053	9,837	1,423
2008	1,193,614	16,862	12,302	1,946
2009	1,356,939	17,646	12,622	1,877
2010	1,513,272	18,300	13,892	1,976
2011	1,656,130	20,154	17,715	2,692

Source: Team elaboration based on statistics provided by the Public Ministry.

³⁶ Alternatively known as “prosecutorial discretion”, based on the importance of the case and the chances of collecting sufficient information to prosecute.

94. Only about 1 percent of all complaints generate a protest of *nolle prosequi* and of these protests (appeals), only slightly more than 10 percent are overturned annually. This means a prosecutor's chances of having her or his decision not to prosecute overturned is about 1 in 1,000. Whether this results in any disciplinary action is another question, but given the very small number of disciplinary actions taken by the SCM (see section 3.5, the subsection *Institutions for Tackling Corruption*) the risks may be even lower.

95. In short, much work seems to be undertaken to fend off a very small chance of negative repercussions, and in the process, the opportunity to place that effort into real investigations is lost. This is a good example of reduced productivity. If the prosecutors' estimates on the time involved are correct, they devote at least 220 days a year on average to investigating cases that will not go forward and explaining why they will not prosecute, and only the other 46 days to actual prosecution (assuming a 266-day work year).³⁷

96. All appeals (not just those referenced above), while not usually counted as additional "caseload" or demand at the global level,³⁸ clearly add to judges' and prosecutors' workloads. While the right to appeal a judgment is recognized internationally and in EU law, the goal is to have first instance decisions of high enough quality to make them stand in most cases. Appeals should be based on alleged errors and not simply on a desire to have a different outcome. Thus while the goal is a low appeals rate, somewhat counter-intuitively, it is also for rates of overturn on appeal to be close to 50 percent. This would indicate that only truly questionable decisions are given leave to appeal.³⁹ The two rates must be considered together, and even then more information is required, as two "good rates" could also come from less favorable conditions—high levels of corruption, for example.

97. We found it impossible to calculate appeals rates for a variety reasons (how data are registered in ECRIS and the increasingly complicated arrangement for where appeals and *recurs* enter). Civil and criminal cases both appear to be modest to relatively high (according to the SCM, 11–41 percent, depending on the type of case and the court)⁴⁰ while reversals on appeal are somewhat low (roughly 30 percent) (figure 3.2). This is a suboptimal combination as it suggests that appeals (both *apel* and *recurs*, combined because some *recurs* occur without a prior *apel*, and so include features of both) are being admitted too easily and used to create delays.⁴¹ This adds, possibly unnecessarily, to judges' workload and thus lowers productivity.

³⁷ It should be stressed that not all cases that do not go forward are "non-crime." Some justiciable incidents may eventually be abandoned for lack of sufficient evidence or the inability to identify a suspect. However, more of these cases might be cleared if prosecutors and police were relieved of the need to explain their decisions not to pursue complaints about actions not constituting crimes.

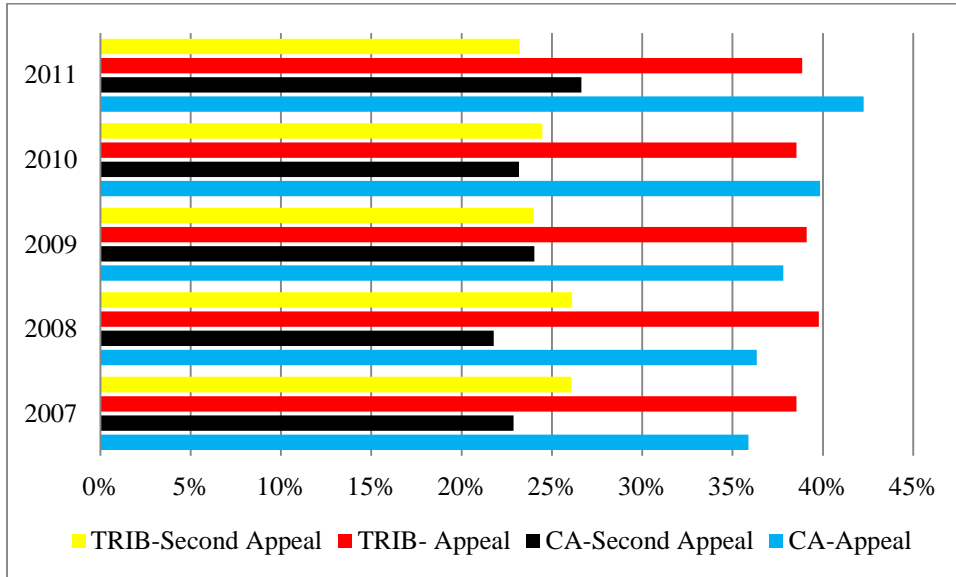
³⁸ By this it is simply meant that appeals should not be counted as new caseload or demand, but rather as a continuation of existing complaints. Since they add to judges' workload, they have been counted as such in the earlier tables showing workload or "caseload" for each judicial instance and the judges working there.

³⁹ While Romania calculates appeals and overturn rates, it does this differently, calculating overturns against all judgments (even those not appealed). Every country can calculate its performance indicators as it wishes, but for comparative purposes it is useful to follow convention.

⁴⁰ These were the figures cited in the SCM's Annual Report for 2011 (pp. 41–42). Given some other statistical issues (how the figures were calculated) they may not be the product of the traditional manner for calculating appeals rates, but, based on the data, the review team was unable to produce its own numbers.

⁴¹ Or out of a knowledge that non-uniform interpretations of the law could produce a different outcome when a second judge or panel of judges is called in.

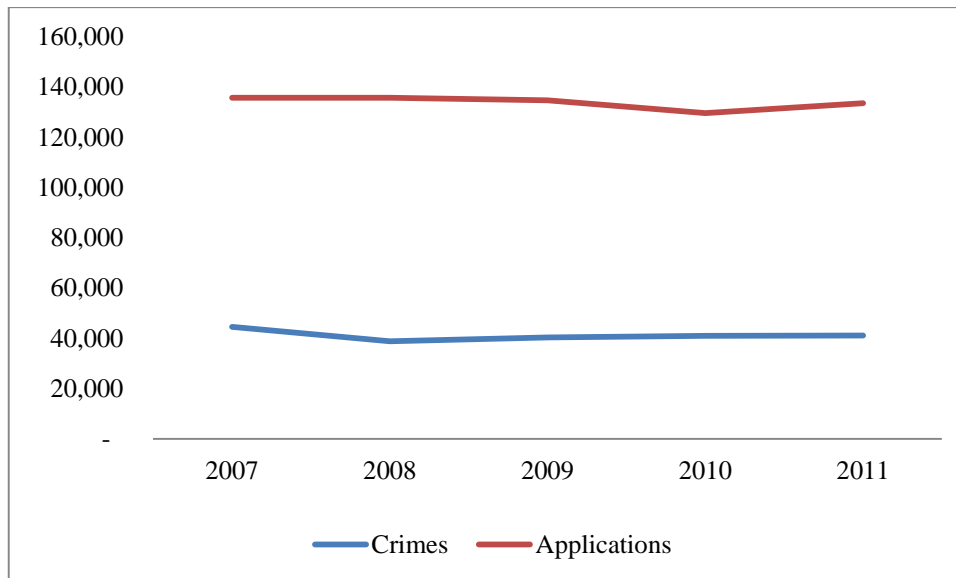
Figure 3.2: Rate of Overturn on Appeal (for *apel* and *recurs*), Tribunals and Courts of Appeal, 2007–11



Source: Team elaboration based on statistics provided by the SCM.

98. The multiple applications, both before and after the final judgment, also merit further exploration. Even if we do not count them as “cases,” they require judicial work—and in first instance criminal cases seem to represent three times the number of lodged cases (figure 3.3). Considerably more analysis would be needed to determine whether this extra work represents value added or simply another source of unnecessary delay.

Figure 3.3: Comparison of Criminal Cases versus Application for Criminal Cases Lodged, 2007–11, *Judecatorii* Only, 2007–11



Source: Team elaboration based on statistics provided by the SCM.

99. A further challenge, noted in interviews and echoing the ECHR comments on delay, has to do with certain procedural details that make dilatory practices easier and take up more of the judges' time. ABA/CEELI's 2007 review of family and other civil cases already reported similar findings:

- Excessive number of hearings, many of them simply to deliver documents with no further discussion or debate.
- Multiple adjournments of hearings, for reasons that might not be allowed in other systems or would incur disciplinary actions against those responsible—lawyer does not appear, witnesses do not come to court, papers are not all presented on time, and last-minute presentation of evidence by one party and the other party's request for more time to review it.

100. Several attorneys reported the absence of “discovery” (the last point above) to the team. Whatever is legally required, parties rarely submit all their documents and evidence on time, possibly to create delays as the other side will have to request an adjournment or because this puts the other party at a disadvantage.

101. Some of these actions are initiated by the parties, some by the judges, but they all cause more work for both as well as more delay. Hence judges may indeed be overburdened because they have too few support staff (*grefieri*) and the failure to delegate, for legal reasons or simple preference, enough work to them. In several other Central and Eastern European countries (USAID, 2012), in Western Europe and in other regions (World Bank, 2011), delegation of more tasks to qualified court staff has been a successful approach to increasing productivity and reducing delays.

102. Romania has recently adopted legislation to accelerate case disposition and, if less directly, to increase productivity, such as the SRL (box 3.2). However, although the law has been in force for some time, there has been little, or even no, monitoring of compliance with the new rules or of their anticipated effect on accelerating times to disposition. Such monitoring seems essential for two reasons:

- The new procedural codes will build on or extend these changes and thus it would be well to know whether the new practices have been adopted and with what effects (negative or positive).
- We know for a fact that it takes more than a law to alter behavior and there are certainly aspects of the SRL where compliance is likely to be less than immediate.⁴²

⁴² For example, in our interviews prosecutors still reported difficulties in accessing public sector databases as well as those held by other agencies (for instance, banks). It is unclear whether this is a technological or compliance issue. Whichever, it is another example where reform results are not monitored.

Box 3.2: The SRL of 2010

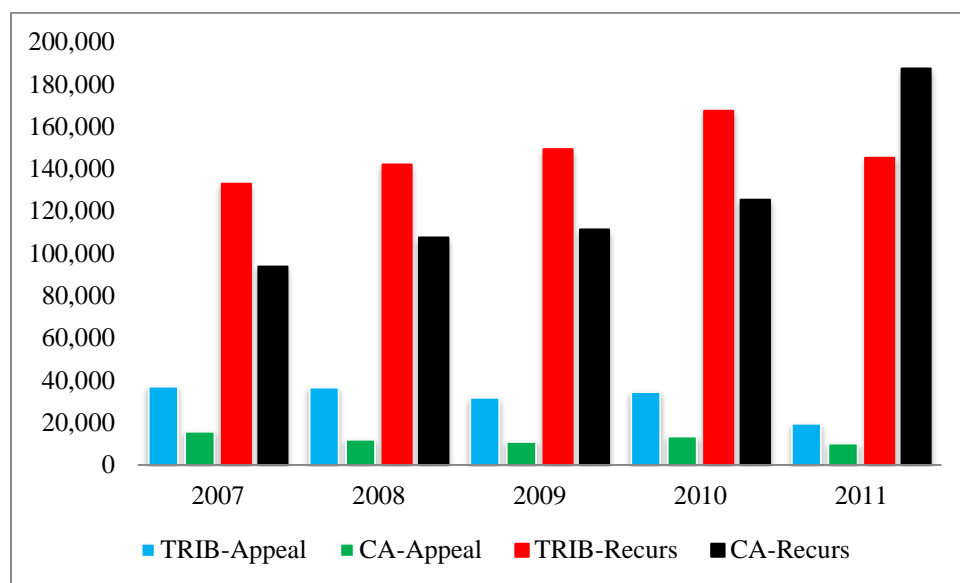
Measures in the SRL include:

- provisions to allow direct exchange of documents among parties' lawyers (article 1, item 5);
- courts' and prosecutors' direct access to electronic databases or other information systems held by public authorities (article 1, item 5 and article 18, item 20);
- presumption that once summoned initially a party will know all subsequent hearing dates (and so will not receive further notifications);
- the introduction of plea bargaining and mediation between the parties for criminal cases;
- judges' efforts to encourage conciliation and mediation for civil cases and a compulsory conciliation or mediation stage prior to lodging a complaint for commercial matters involving monetary amounts;
- setting of very short deadlines for handling reviews of enforcement of judgments and of slightly longer, but still reduced deadlines, for resolving appeals in the interest of the law;
- reduction of size of HCCJ panels for hearing the latter cases; and
- substitution of single judges for panels hearing labor and social security disputes in tribunals.

103. The SRL was also intended to reduce the number of appeals, notably by eliminating all appeals for civil cases with amounts under RON2,000, and eliminating the first appeal for civil cases with a value of under RON100,000 and for criminal cases heard in the first instance courts. Those cases without a first appeal would be subject to a second appeal (*recurs*) which would not be limited to legal questions, but would review the case on “all matters.”⁴³ But again, systematic results tracking seems lacking. The Impact Study on the new codes was asked to do this, but commented that the data that are available make it impossible (Tuca Zbarcea and others, 2011: 51). While agreeing that the data restrict what can be demonstrated conclusively, the Functional Review team managed to track some probable effects, at least on the number and distribution of appeals (figure 3.4).

⁴³ CADI (2010) refers to this as a hybrid appeal for this reason.

Figure 3.4: Numbers of *Apel* and *Recurs*, Tribunals and Courts of Appeal, 2007–11



Source: Team elaboration based on statistics from the SCM.

104. After reviewing the material graphically presented above, the team drew the following tentative conclusions on the preliminary effects of the SRL:

- The number of *apel* registered in both the tribunals and courts of appeal has decreased, and in the case of *apel* of criminal cases tried in the *judecatorii*, dramatically (according to the SRL, they are virtually disappearing).
- The number of second appeals (*recurs*), in contrast, has increased, such that in both the tribunals and courts of appeal the number of *apel* and *recurs* together has increased slightly.
- Taking into consideration the simultaneous increase in new filings, the appeals rates may still have dropped by several percentage points.⁴⁴
- These changes could conceivably mean less work overall, but only if the *recurs* for the one-appeal cases can be processed relatively fast. (This matter requires further study.)
- Although one SRL objective was to leave the tribunals more time for their original jurisdiction cases (which increased by some 30 percent in 2010–11), the combined total of *recurs* and *apel* remains close to former levels (after a considerable increase in 2010). For the courts of appeal, the number of *recurs* doubled over the same period, probably because earlier legislation had removed the two-stage appeal process for social security and pension cases (heard in the first instance in the tribunals).⁴⁵

105. Measures introduced in the SRL (and those contemplated in the new Criminal Procedures Code and Civil Procedures Code) could produce their intended results, and so far do not seem to have had any negative effects. The various performance indicators (clearance rates, operativity,

⁴⁴ We cannot calculate these very accurately as the data do not allow a separation of *recurs* by point of origin (for example, *recurs* for cases that are still allowed a two-stage appeal or those for which the *recurs* is the only stage).

⁴⁵ Reversal rates for appeals are available but not tracked for management purposes.

and disposition times) seem to have remained about the same, despite increasing demand. At least in one area—the number of first appeals (*apel*)—the intended reduction was produced, although with a simultaneous and very dramatic increase in *recurs*. Whether the overall time to disposition has been improved by this measure is another question the data do not allow us to pursue, although it is significant that the courts of appeal showed a drop-off in clearance and operativity rates in 2010 and 2011. Obviously these issues need to be tracked. While the team does not believe that the Romanian justice sector is in fundamental crisis, it would be well to know whether the SRL reduced the overall workload or simply redistributed it.

106. Several observers (Lord and Wittrup, 2005; ABA/CEELI, 2007) have noted that, given the relatively high rate of magistrates in place (compared with other European countries), reducing any “overwork” might be best, or first, addressed by measures other than adding more judges and prosecutors. In saying this, they seem to imply that human resources may not be stretched far enough, or may even be excessive.

107. Indeed, judges and prosecutors may be working too hard, but on the wrong things. Some cases take longer to dispose, either at the first instance or as a result of multiple final and interlocutory appeals; whether they simultaneously require more work from magistrates is another issue with potentially different answers depending on the type of case. Sometimes delay is just a function of waiting for others to do their work;⁴⁶ sometimes it is a result of the magistrate having to do more. The only way to make this determination is to review cases and track input and time spent on producing the system response, a difficult task probably only warranted if the slowly disposed cases can be singled out for study.

108. Longer-lasting cases are usually disputes involving commercial actors (which explains these actors’ mention of delay as the primary challenge), prosecution of high-level actors for corruption, or division of property in contested divorces. This highlights two interrelated problems affecting productivity and timeliness: complicated disputes take more (perhaps too much) time, possibly because the parties make abusive use of what both CADI and the ECHR have called “certain procedural rigidities” or simply because they request more time to work out their differences; but in addition, the surfeit of demand for less complex and often redundant cases may be absorbing too much effort by magistrates and so reducing their attention to the more complex cases.

Conclusion

109. If one assumes judges and prosecutors are doing what is needed and required under Romanian law, they are adequately productive. However, if one examines the extent to which their actions contribute to the effective and timely resolution of real disputes, they arguably have room for improvement—because they spend too much time explaining why they will refrain from doing something (prosecutors handling non-crimes), processing cases for which the outcome is known and for which returns to plaintiffs will not be hastened (government debts), handling post-judgment criminal applications usually requesting alteration of sentences, or helping complainants define their civil complaints (a task better suited to legal aid). It also

⁴⁶ It has been suggested (for example, Verdes, 2011) that this may apply to insolvency cases where judicial oversight is not continual, but rather sporadic. It is “less of a judicial dispute than a collective proceeding,” according to sources cited by the author.

appears that even with the SRL changes, judges may be accepting (and so processing) too many appeals and *recurs* for want of a better filter. If Romanians believe magistrates should perform these functions, then they will need the judges and prosecutors they have, and possibly more. However, the expectation is somewhat of its own kind (*sui generis*) and comes at some cost.

110. An extremely generous attitude by the courts on what they agree to review is admirable,⁴⁷ but as CADI (2010) notes, the right to justice does not include the right to abuse it (is not “unqualified or absolute”). In extremely poor countries where potential court users must travel days to get to a judge, are often illiterate, and have no access to lawyers because they have no money and in any event because lawyers are even scarcer than judges, this level of permissiveness might be entirely appropriate. For Romania, however, such generosity may well be exaggerated, unnecessary, and invite abuse.

111. Moreover, while judges are also expected to assist unrepresented parties in other European countries (ENCJ, 2010, especially sections 6.1–6.3), they seem to get more of them in Romania. Further research would be needed to investigate why. Much the same applies to the large number of non-prosecutable complaints going to prosecutors—in most of Western Europe, prosecutors would never see them because of their filtering by the police.

3.4 Enhancing System Efficiency with Expanding Workloads: Productivity and Timeliness

Three Potential Remedies

112. This is the largest performance area tackled by the team, because it afforded the most scope for analysis of current operations and because of its multifaceted nature. Productivity and timeliness are interrelated, and while the system still does well on both, the issue is how it can continue to do so without far larger budgets.

113. Current staffing and overall budgetary levels for the sector suggest that the challenge is not how to do more with more (as more seems unlikely to be forthcoming) but to augment the efficient use of current resources. This may imply redistribution among categories (more clerks, fewer judges? more staff specialized in areas like human resources, statistics, and ICT? more funds for legal assistance?), changes in operating procedures and laws, and some management of demand. These are the types of changes for which proactive, results-based, strategic management and planning are essential, and thus another reason for putting them first on the list of “options”—except that they are not an option, but a necessity.

114. Complaints about expanding and possibly excessive demand for services are common to nearly all contemporary judiciaries. In the case of Romania’s judges and prosecutors (as opposed to the independent professions), the numbers seem to support their complaint, but there are also issues with the numbers, and a possibility that cases actually lodged may be somewhat to

⁴⁷ As well as what they are willing to overlook, such as missed deadlines or even parties not appearing for a hearing.

considerably fewer than what the statistics show.⁴⁸ Nonetheless, we are willing to admit that many magistrates are overburdened.

115. Three options may be considered, but only the last two are recommended (with variations):

- *Add more judges or prosecutors*—this is the usual judicial answer. However, it has its limits (budgetary) and in many cases may be less satisfactory than the other two.
- *Reduce and restructure demand*—by using filters or diversion to other venues, or by eliminating certain obligatory court processes.
- *Modify internal practices, work distribution, and staffing patterns*—these are three different but related means by which existing staff can be made far more productive. Redundant or unnecessary steps can be eliminated, work can be redistributed among current staff, and work performed by a judge can be delegated to (less costly) assistants.

116. They all have different financial implications. Two other approaches, treated separately as they require a combination of demand and procedural restructuring, are *reducing the impact of government litigation* and *mediation*.

Adding More Judges or Prosecutors

117. Even in the impact studies for the new codes, Romania seems to have considered primarily this first option. We will only note that getting significant increases in staffing numbers seems unlikely and that the most urgent needs may not be for magistrates but rather for clerks and non-judicial technical specialists. Assuming the legal and political obstacles could be overcome, a slight modification of this option—efforts to redistribute existing magistrates and staff geographically—might help, but would still leave high average workloads. Thus we focus on the other two options, which have received too little attention. In other systems they have had much more dramatic impacts than this option.

Reducing and Restructuring Demand

118. Costa Rica cut its judicial workload in 2005 by nearly half through eliminating the compulsory judicial review of all traffic cases (see box 3.3 for other approaches). As it turned out, this move was also very popular with citizens, most of whom were happy to pay their fines rather than having to hire a lawyer and lose a day in court. Not all demand reduction has an equally happy ending—and indeed it took Costa Rica years to overcome opposition to bringing in the change—but the larger point is that productivity is not just about cases decided, but their intrinsic importance, too.

⁴⁸ Aside from data entry irregularities (for example, a tendency to consider associated filings and appeals as separate cases) are issues of duplicate entries of the same case or complaints owing to transfer to another judge, an initial non-admittance, or someone filing the same complaint multiple times (mentioned by prosecutors in interviews).

Box 3.3: Dealing with Escalating Demand for Judicial Services—Other Countries

The problem of escalating demand is universal, although its dimensions, sources, and feasible solutions vary by country. All jurisdictions, however, face the challenge of serving a larger and more varied group of users with a resource base that is inevitably limited. Few have been able to do “more with more,” and most must find ways to use existing resources more efficiently without undermining quality or access.

The role of government litigation—claims against the state for abuses ranging from excess taxes to failure to provide guaranteed services and pensions—in increasing court workload seems to be most critical in developing or transitional nations because of rapid changes in both laws and user expectations. It has been best documented in Latin America, which has devised several means for dealing with it: the *amparo*, a constitutional writ to protest rights violations, which must be resolved within a relatively short period; automation; batch processing of similar cases (especially applicable to pension issues); and, most recently, a call to government to put its shop in order and resolve the problems it has created through its own administrative agencies. Collective actions and the introduction of binding precedent have also been tried, but they often require that any beneficiary still file a legal action to collect what she or he is due.

While the *amparo* is very popular, it also congests the courts (since the decisions apply only to the single plaintiff) and so slows attention to other disputes. Additionally, where it can be addressed to any judge (diffuse constitutional review), the *amparo* can produce inconsistent decisions and even corruption. Batch processing has worked for countries like Brazil with money to spend on automation—court staff recalculates the amounts due in pension disputes, drafts the response using standard templates and the judge arrives once a week to push a button, releasing several thousand judgments with a digitized signature. Mexico adopted a similar method to address plaintiffs in a pension case where the Supreme Court had ruled against their major complaint—here the issue was responding negatively to most of the parties, and as several issues were involved, a separate court was set up to review the cases.

Finally, in several Latin American countries judiciaries have begun to call for improvements in the administrative agencies (especially those handling pensions) that give rise to these cases, arguing that the negative effects on their normal caseload (often pushed aside to respond to the governmental issues) are too great to warrant their taking on this extra burden. They have also argued—as have a few Romanian judges—that the apparent “savings” to the government (from delaying payments) do not take into account the costs of adding more judges and courts to process this work.

Government litigation is also an issue, if a less dramatic one, in Western Europe and other more developed regions. In Germany when such problems arise, a common response is to halt the processing of all claims until a few leading cases can be resolved. Decisions favoring the private plaintiff may lead directly to a change in government policy, and for cases already lodged, their quick resolution follows the general rule.

For recurrent, simple private disputes, use of technology is gaining ground, including online filing and sometimes case processing. England’s “moneyclaimsonline” system for reviewing debt cases takes this approach for conflicts among private parties—the creditor files online and a single court handles all such claims, usually without the need for a hearing (or an attorney).

In countries where the law prevents total reliance on internet processing, courts may use a similarly expedited paper-based procedure, only requiring the parties to appear when judges detect potential problems. Small claims courts, with simplified procedures and *pro se* representation, are another widely used solution, and of course settlement and mediation are also increasingly encouraged, so much so that some observers have begun to warn about the disappearance of the civil trial (Genn, 2010).

As this last comment suggests, there is a concern that efficiency can be taken too far and thus that courts should take care that productivity not drive out the need to consider quality and access. As in many public policy issues, all good things do not necessarily go together, and thus a balance must be struck.

119. Thus the idea in this second option is to eliminate (by filters, diversion, or simple non-admission) frivolous cases or those that might be more appropriately and expediently handled elsewhere (by notaries, mediation, or administrative offices). This would leave the judges with only their “natural” territory—truly contentious issues that they are best qualified to address. Again, productivity is not only numbers, but also the value added of what is processed.

120. The same goes for prosecutors and is increasingly recognized with the adoption of the principle of “opportunity” whereby prosecutors select their cases by their intrinsic importance—and spend little or no time on frivolous, noncriminal complaints, or those on which there is too little information to make going forward productive.

121. Our discussions with proponents of the new Criminal Procedures Code suggest, however, that the Romanian version of the principle of opportunity will not significantly reduce the work of prosecutors and police. Although no longer required by law, it was reported that both continue to “motivate” their decision not to pursue a case, subject to an appeal by the plaintiff and possibly to disciplinary action if the appeal is upheld. If the principle is being introduced to focus prosecutors (and police) on important cases, we suggest more thought is required as to how it will be carried out.

122. The simplest solution begins with reaching agreements on how complaints about noncriminal actions can be dismissed without the need to write a lengthy thesis on the matter. Dismissal should be feasible in a few short sentences or even using a form in which the police or prosecutor (but preferably not both) checks a box asserting that the complaint (which can be specified in writing, again briefly) does not match any entry in the Criminal Code. If the complainant is inclined to protest, 20 more pages of text will not dissuade them so the complaint can be counted as completely worthless and, moreover, as consuming time that could be spent on real cases that never get beyond the investigative stage.

123. As the above suggests, part of the productivity dilemma arises in how magistrates process what they receive, an issue to be treated in the third option—modifying internal practices, work distribution, and staffing patterns. Here we are concerned with demand that might be screened early or diverted before it reaches the magistrates. This is a delicate issue given Romanian and EU standards about access to justice as well as magistrates’ fears that they will be sanctioned for not attending legitimate claims. Still, there are some positive examples from other countries within and outside the region.

124. Costa Rica of course was not diversion, but simply an opportunity for citizens to opt out of judicial treatment. On diversion or non-admission, Sweden launched reforms decriminalizing certain offenses (public drunkenness, for example) and diverting others to administrative agencies, leaving first instance courts with a lower average workload of 400 new cases a year—but these tended to be the most complex and serious of the complaints entered (Svensson, 2007a,b). Thus, despite the decrease in cases processed, productivity went up in the importance of what was handled.⁴⁹

⁴⁹ This is a value judgment. Had Swedes believed it important to castigate public drunkenness, their decision would have been different.

125. Romania, too, appears to be decriminalizing some offenses although the larger problem remains complaints about actions that clearly are not criminal. Other European countries already make extensive use of administrative tribunals to handle cases that in Romania go to courts.⁵⁰ In any event, this option is probably not feasible in Romania at the moment, but might be considered later on.

126. In Romania, the principal issue may be the unnecessary judicialization of complaints, possibly because of inadequate citizen education on the existing alternatives, what must go to courts, and what courts legitimately can address. Romanian courts still receive matters (for example, registration of vehicles, consensual divorces) that could go to administrative agencies or should not be admitted at all. This arguably is also true of another significant set of demands involving claims against government for which repayment plans have already been established but for which those affected continue filing legal actions, “just in case” (appendix 2).

127. Additionally, recent reforms themselves have encouraged judicialization—for example, the probably minor addition of *tutela* (guardianship) under the new Civil Procedures Code and the new requirement for judges to review all execution orders. The latter has substantially increased caseload, although its value added remains unclear since the possibility for a debtor to appeal enforcement already existed. Thus a first recommendation is for courts and reformers to consider the repercussions of any future additions and to consider introducing better filters to avoid judicial work on non-justiciable matters.

128. Filters are also important in reducing appeal rates and in limiting appeals to those cases where there is a real issue. Romania’s current appeals rate is too high and its rate of overturn on appeals (30 percent)⁵¹ is not high enough. Again EU standards and Romanian values may prioritize a review of decisions, but on the basis of empirical studies of the results, it may be possible to find means to separate appeals meriting this treatment from those lodged only for dilatory purposes.

Modifying Internal Practices, Work Distribution, and Staffing Patterns

129. This third option seems virtually unexplored in Romania. True, the new Civil Procedures Code attempts to reduce the numbers of full hearings, but much more should be done. We make some suggestions below among the many possibilities.

130. Romanian discussions of “restructuring” nearly always mean only adding more people to do the same things the same way, yet real restructuring is something quite different—changing staffing patterns, the distribution of work, and work patterns to allow the same or fewer people to do much more—from which Romania would benefit.

131. A first issue is the extremely low judge or prosecutor/staff ratio compared with other countries. Two judges with a *grefier* each can do far less work than one judge with two *grefieri*

⁵⁰ This practice does not eliminate the ability to appeal administrative decisions, although generally there are limits placed on the reason for the appeal so that this opportunity is hardly open ended.

⁵¹ The SCM has a rather *sui generis* way of calculating this—based on reversals of rulings over all entering caseload (including, we think, even appeals, *recurs*, and applications). The conventional calculation that we strongly recommend is reversals divided by appeals (with both numbers taken from the specific category of appeal addressed). The term is, after all, “reversal on appeal,” not reversal of any and all judgments.

and the latter arrangement is also less costly. For example, a municipal judge (equivalent to a Romanian first instance judge) in the Netherlands working with two legally trained assistants can process 2,000 cases in a year—this is at least twice what a single Romanian judge with one *grefier* can do. Thus, if Romania plans to add judicial personnel, it would make sense to increase the number of support staff and allow them to perform more functions for the judge. Legally trained support staff can, for example:

- Check documents submitted by the parties to ensure they are complete and presented within legal time limits.
- Contact parties before a scheduled hearing to ensure they have complied with all requirements for the hearing to be held.
- Hold what are called *affidavit* hearings, in fact by phone, to address simple pretrial issues.
- Check with parties the day of scheduled hearings to ensure they have arrived with all their witnesses, papers, and fees paid, and if not, postpone the hearing to another date immediately so as not to waste anyone's time.
- Review the basics of enforcement proceedings, referring only difficult cases to a judge for decision.

132. It is not clear why Romania has not attempted to make better use of legally qualified judicial staff. The law may limit their functions, but the law can be changed and in fact is being revised, although not necessarily in the best possible direction. In the meantime, resources are being wasted by requiring that judges perform tasks (such as checking for payment of stamp taxes) that legally prepared—or even less qualified—staff could easily do. The law will not allow the elimination of magistrates, but one way or another the staff/magistrate ratio should be raised.

133. With or without further delegation to court staff, various steps could accelerate processing of simple cases. For example:

- The enforcement reviews (representing 32 percent of incoming cases for the *judecatorii*) might be treated much like the English practice of online resolution for simple debt collection—filed online, channeled to a single court, and processed very rapidly except for instances where a problem is identified, in which case, a separate hearing might be held in a location convenient for the enforcer, creditor, and debtor.
- As suggested in section 3.9 on access, but equally relevant here, many of the non-justiciable claims submitted to judges and prosecutors might be headed off by the creation of a legal assistance service that could inform citizens as to their rights, the appropriate form of action and take over some of the work now done by judges in shaping legitimate but poorly formulated demands. Alternatively, but in a more draconian fashion, the registration process itself could involve vetting for admissibility rather than leaving this task to the judge.
- Where diversion cannot be done, ways could be found to process redundant cases (and especially those involving government policies, actions, and laws) more expediently. As in Germany, redundant cases against a government agency might be halted while a test case is sent through the entire process up to the High Court or Constitutional Court. In very few cases will a real judicial review be required. Or as in other countries (the United

Kingdom, some Latin American jurisdictions) a few specialized courts can be set up to handle only these cases, which they usually can do very rapidly. This is how Brazilian small claims courts handle routine pension disputes (see box 3.3).

- Post-judgment criminal applications in *judecatorii* amount to twice as many actions as the number of sentences. Prisoners with spare time on their hands will inevitably make these requests, whether warranted or not. As was done in one county visited, it might be most efficient to assign one judge and a couple of *greferi* to review these requests for each court of appeals area—or in the case of Bucharest perhaps enlarge the number of personnel involved. As with the enforcement reviews, this would concentrate these issues in one location and free up other magistrates to get on with their usual business. While the MOJ claims that the new provisions for video conferencing on these cases will cut costs and incidence, only the first is likely to occur. Whether or not the protests are “fictitious,” the team thinks that they are unlikely to decrease because of video conferencing.
- Thought might be given, but with adequate reflection, to strengthening legislation punishing false accusations since, at least according to prosecutors, many of the complaints they receive originate in arguments among neighbors where nothing criminal has occurred. If the complaint is legitimate but involves a municipal ordinance (as on levels of noise or environmental pollution) it should be referred by the police to the appropriate administrative agency or to a legal assistance agency that could vet it first. In this case, one hopes the prosecutor and police would not feel compelled to write a motivated justification for this action. However, if the complainant is just out to “punish” a disliked neighbor, she or he should be dissuaded from this practice, at least referred to mediation, and at most fined. This is what CADI calls an abuse of the principle of access to justice, with which we are very much in agreement. Everyone may have a right, as the MOJ holds, “to seize any state bodies he/she wants,” but whenever that right or any right (for example, yelling “fire” in a crowded theater to see what happens) is used abusively, sanction should apply.
- Finally, the concept of differential case management (different levels of effort for different types of cases) should be introduced and promoted. It appears Romanian courts tend toward a first in, first out approach to caseload management, but this is evidentially not the most efficient way to handle caseload of differing levels of complexity.

134. For other changes in practice, it would be well to do a statistical and on-site analysis of courtroom proceedings to see where time could be saved by eliminating unnecessary steps, delegating functions to support staff, or assigning certain functions to a single court or group of judges. The Netherlands judicial authorities seem to have advanced far here and their assistance might be used. On this topic, certainly legally qualified staff should not be used to do ordinary clerical work which in turn should be delegated to another category of clerks. Internationally, some judiciaries have experimented successfully with the creation of shared or pooled staff to perform such functions as archiving, entry of data into electronic registries or production of common documents (using templates that also can be connected to an electronic database).⁵²

⁵² Eventually the CMS can be organized so that data are entered (and retrieved) as documents are generated, but before that some more basic problems with data entry need to be resolved.

135. Most modern court systems use a combination of staff assigned to a single judge and those shared by all, and while the team did not have time to explore the possibilities here, these approaches should be considered. Any of the suggested variations as well as others would require the addition of support staff, but this is far less expensive than adding judges, and could make overall work run more efficiently.

136. Finally (as discussed in appendix 3 on the new codes), any change in procedures for whatever purpose should be tested in pilot applications before being rolled out nationwide. This includes the options suggested here. Each country offers its own complications so that even a tried and true time saver may have the opposite effect in a different setting.

Impact of Government Litigation

137. This issue is treated separately as its resolution requires a combination of the two recommended options. It is a judicial challenge only in that it judicializes issues that in many systems (including much of the EU) are handled administratively or do not require handling at all, because legislation and government practices are not so quickly and abruptly overruled.

138. Other parties have made ample recommendations on how government practices might be improved and it is beyond the scope of this report to evaluate or add to them. Here we would only reiterate their suggestions that better use be made of prior consultation with stakeholders, studies be contracted to assess likely costs and consequences, and the ability of the Romanian Constitutional Court to provide a pre-enactment consultation on intended legislation be used more frequently. However one evaluates that court's rulings, it has the last word unless a case later goes to the ECHR. Thus prior consultation, if used more often,⁵³ could resolve some issues before they create a new burgeoning caseload.

139. Over time, the problems resulting from austerity measures prepared under time pressure and other policies constructed under tight deadlines are likely to decrease as the system continues maturing. Over the short term, however, their impact on the judicial caseload is likely to remain, even if the government improves its own practices in drafting, vetting, and consulting on legislation before putting it into effect.

140. Among steps that might be taken while awaiting the introduction of better practices are the following:

- The practice, followed in other countries, of halting mass processing of redundant legal actions until a few leading cases can be sent through the system and decided. This would certainly save work for the judges who are currently trying to resolve them all on a one-by-one basis.
- Once it has been established that a government practice is illegal or unconstitutional, those seeking redress should be “batch processed” as the answers to their complaints will be identical or very similar. The same is true of multiple redundant complaints that are not upheld.

⁵³ We do not know whether it applies to executive decrees, which seem to be a major part of the problem—emitted rapidly with little prior consultation with anyone.

- Alternatively, as some SCM members have suggested, such mass, redundant claims related to government policies could be redirected to administrative agencies if all that is now required is registration to get moneys refunded. Where such claims already have a known legal outcome (and a government commitment to honor them) it seems excessive to require that those affected file a legal action. We know that governments sometimes prefer that, as many potential beneficiaries fail to do so—or in the case of pensions, pass away before the claim can be honored (World Bank, 2004).

Mediation

141. This theme is also given special treatment as it involves both demand reduction and a modification of how cases are processed. In Romania, as in many other countries, mediation is held up as the key to resolving challenges of excess caseload and insufficient staff. While the team believes in the merits of mediation (and related alternative dispute resolution practices), it cautions the Romanian authorities that it is no panacea.

142. It took Latin America nearly 10 years to see the merits of alternative dispute resolution, which even now is the target of complaints that it is misapplied—parties are bullied into negotiating, mediation is applied to cases (like intra-familial violence) where it is not a good idea or may even be illegal, and the results, whether the process is run by state or private actors, are not transparent. It thus leaves room for many errors but also fails to produce a record to convince other parties on the likely outcomes of their own disputes. There is also, as Landes and Posner (1979) note, what they call the “submission problem”—mediation only works if both parties agree to it and accept the outcome.

143. We know that some preliminary steps have been taken in Romania—enactment of a mediation law in 2006, the introduction of compulsory, pretrial mediation for commercial cases, and the establishment of arbitration services by some chambers of commerce. However, use of what exists remains limited, and means must be found to make mediation’s presence known and encourage people to try it. As with other reforms, there has been no follow-up to determine the impact of pretrial mediation for commercial cases or even to track its real use.

144. The more important question though is what Romania is doing (or not doing) that makes use of mediation so infrequent. This could be cultural, but we doubt it as mediation has become extremely popular in other countries, often in Latin America. In developed regions it has been both less necessary and has occurred over a much longer period.

145. Three factors may encourage the Romanian authorities to consider mediation carefully. First, enforcement of mediated solutions can be another challenge—while some jurisdictions report high levels of spontaneous enforcement (USAID, 2012) it is not always the case. Brazil’s early experiments with mediation attached to its small claims courts indicated that many individuals did not understand that they had committed themselves to honoring the agreement and providing whatever it stipulated. Second, most experts do not advocate compulsory pretrial mediation, especially if it costs the parties anything. Where access is already limited because of court costs, this can be another barrier for the poor. In initial experiments with the system, attention is warranted to both issues. They are less likely to be an issue for commercial cases, but their extension to other civil matters could be. Third, mediation is rarely recommended between highly unequal parties—the more powerful is likely to prevail through implicit threats.

146. Finally, there is the question of who would finance such services—the parties, the state, or some combination of the two. Underused private attorneys might be interested, as they have been in other countries, but only if someone pays them. Conceivably, should Romania successfully introduce the principle of opportunity for prosecutors, some of them might be reassigned to this service, after adequate training. This would cost the government no more, but under current law would have to be a voluntary transfer, require additional training, and would certainly have to retain the same salaries and chances for advancement. Judges, especially in the *judicatorii*, might be better candidates as many of them already provide advice to disoriented system users, and seem to like doing this.

Resource Implications

147. The overall financial implications depend on the methods and options selected, the speed and comprehensiveness of adoption, and the additional measures required to reduce stakeholder resistance and to enhance buy-in. The last set of costs may be high as it could require retaining existing, less productive practices and resources, even as new ones are introduced—otherwise, resistance to change may be too great to overcome. The following are only illustrative examples as the resource needs vary by method and specific option—box 3.4 outlines some general resource implications.

Box 3.4: General Resource Issues

Both of the recommended options—reduce and restructure demand, and modify internal practices, work distribution, and staffing patterns (along with the Romanian attempts to relocate staff and close underused courts)—aim at enhancing productivity, but while the first works on demand, the second works on supply.

Ideally, some combination of the two would be used. Whatever is decided, three initial requirements are apparent: a consensus on a long-term move in this direction, agreements with affected stakeholders on a gradual implementation plan that will not harm their immediate interests, and a selection and piloting of options that should produce tangible results with minimum resistance from affected parties. Transition costs may be high, partly to finance plans and processes, and partly to maintain some less productive arrangements in parallel for a while.

A democratic regime or justice system that values judicial independence cannot simply dictate a redistribution of sector resources and impose new rules. Nor, unless it wishes to raise costs substantially, can it strike a better balance by simply adding the ideal complement of resources (for example, twice the number of *grefieri*, or more ICT and other specialists) to what is already there. The latter system might be better balanced, but measured against existing demand, a far less productive one.

Except for the costs involved in analysis and legal and procedural changes, restructuring demand would be less expensive than reorganizing staffing and internal procedures, but both methods face the challenge of overcoming opposition from internal and external stakeholders. In any event, quick changes usually generate their own set of negative consequences as well as inevitably falling short of the promised improvements.

Hence having to work gradually and incrementally has certain advantages in ensuring that changes succeed (having been adequately tested) and keeping in check additional costs of the transition. The ultimate aim is greater cost efficiency, but over the shorter run costs will increase because of necessary investments and the inability to impose drastic change.

148. *Human resources.* Gaps and imbalances are in evidence. Filling the gaps means recruiting more individuals with specialized skills. Many of these are in non-judicial positions (for example, ICT specialists, process reengineers, managers, planners, statisticians, and mediators). The imbalances, aside from geographic location, are largely in the staff/magistrate ratio, and over the short run can only be improved if more *grefieri* are hired.

149. Eliminating magistrates is not an option, however, although some of them might willingly transfer to other positions—as mediators, for example, or in judicial information services. Moreover, a better mix of human resources will not work by itself, and financial resources and staff will be required to redesign internal processes and to draft new rules and laws where the existing ones impede their adoption. A judge with two *grefieri* may not delegate any more work to them, meaning that productivity will not increase; she or he will need guidance and rules.

150. The options focusing on consolidating certain cases (enforcement reviews, handling of post-judgment applications for criminal cases) with a single court or judge might be tried first, given their less dramatic impact on human resources.

151. *ICT.* ICT investments (largely in an enhanced ECRIS) will also be required to support these new approaches, as well as training in their use. Here training does not mean only the obvious ability to enter data into the system or track individual cases, but (for magistrates, higher-level clerks, and management) the ability to use the system to manage caseload. Funds will therefore also be needed to develop a more useful set of management reports, and to train staff in how to interpret them, do their own data analysis, and follow a set of recommended actions once a report is presented.

152. Judges, too, ought to do something on discovering that 20 percent of their caseload is inactive or that parties are requesting too many adjournments, not showing up for hearings, or not presenting documents on time. It would be extremely helpful to develop a set of recommended responses to these and other findings. Judges are good at deciding cases—managing their caseload is an entirely different proposition and one where more guidance for them would surely be appreciated.

153. Thus, as in all the other areas, funds will have to be invested in short-term development of suggested protocols, whether for quick processing of certain types of cases, managing a mixed caseload, delegating work to staff, or dealing with unrepresented parties with non-justiciable complaints. Much of this can be done by comparing good practices among Romanian judges, but financial resources will still be required for this type of review.

154. *Conclusion.* It will take heavy up-front investment to increase productivity (value for resources), including the financing of some less productive arrangements, and to diffuse opposition.⁵⁴ In short, the road to higher productivity in the face of political, institutional, and legal obstacles is unlikely to be completely direct. This is all the more reason for having a

⁵⁴ One cannot improve the magistrate/staff ratio by firing magistrates, so the only solution is to hire more clerks and hope that over time, the number of magistrates will decrease by attrition, voluntary transfer to some other positions, or that demand will increase sufficiently to warrant their staying.

strategic plan extending over the medium and long term, and commitment by political leaders to implementing it.

3.5 Quality: Corruption

155. Three issues are interrelated and unfortunately often conflated in Romania: prevalence of overall public sector corruption; institutions for combating it; and effective mechanisms to combat it in the justice sector. The Functional Review team focused primarily on the third issue, with some attention to the second.

Perceptions of Prevalence

156. Perceptions of judicial corruption (according to public opinion polls) do not appear to have dented growing demand for justice services. This may be because citizens have lower trust in administrative agencies than in courts, use the courts as a last resort or to address issues unlikely to be resolved by other means, or simply have no choice. They may also calculate that high-profile or high-value cases are more likely to be affected by corruption than ordinary cases brought by ordinary people.

157. Opinions vary widely on incidence of corruption in the sector. We know it exists, as it exists worldwide, but our ability to say in what dimensions is fairly limited. The few available surveys suggest some reduction in incidence from a fairly high level in 2001—see figures in Transparency International Romania (2011) and Danilet (2009). The 2006 and 2010 Life in Transition Surveys⁵⁵ carried out by the EBRD in 39 countries across the region finds decreasing but comparatively high prevalence of perceived unofficial payments in civil courts (10 percent compared to 18 percent in 2006 and 1 percent on average in Western Europe). While these same surveys find low but increasing satisfaction with service delivery in civil courts (33 percent compared to 27 percent in 2006 and 40 percent on average in Western Europe), trust in the courts has been decreasing (only 14 percent of respondents have some or complete trust in the courts, compared to 28 percent in 2006 and more than 50 percent on average in Western Europe) potentially due to the perception by the general public of the judicial system’s limited ability to attack corruption in the broader public sector. This would explain why the trust of actual court users as assessed by the court user survey carried out for this review is higher (at 3.16 on a scale from 1, lowest, to 5, highest). However, larger, more comprehensive and more detailed surveys would be required to adequately track not only levels but also types of bribes requested and provided, types of cases, where, and by whom. Business groups in particular suggested that its incidence is uneven throughout the country and that they thus preferred not to lodge cases in some places if they could avoid it. The only other evidence lies in NAD investigations and convictions of magistrates, but most observers believe the investigations (within the courts or throughout the government) only touch the proverbial “tip of the iceberg.” We are in no position to say whether this is true, but we do think a more proactive approach is in order.

158. The proportion of respondents in the most recent surveys who reported paying a bribe or having been solicited by judges or prosecutors (as well as by other sector actors) may well suggest that the NAD figures are indeed the tip of the iceberg, if only because, as also reported by respondents, many self-identifying victims do not bother to complain. Also, the NAD does

⁵⁵ EBRD 2011.

not prosecute corruption cases for magistrates' staff (*grefieri*), but rather leaves these to ordinary prosecutors. So we can just posit that, at least within the courts and based on NAD data, such incidents may have become less common, thus accounting for the declining but still undesirable number of survey respondents who reported having paid a bribe. However, other authors (Danilet, 2009) have suggested that “speed money” and similar payments may still be extracted.

159. Interviewees within the justice system understandably appeared reluctant to discuss corruption. They were more likely to point to the actions of independent professionals—notaries, bailiffs, bankruptcy trustees, and attorneys. Here the most common remark—about others—is excessive fees and make-work practices intended to increase what could be charged. Even lawyers suggest friendship and political ties between the judge and a party as more likely to influence outcomes than out-and-out bribes. Other informants mentioned that friendship or other ties might involve a higher judge putting pressure on the one presiding over a case, with any gratuities benefiting only the former. The only lawyers who mentioned corruption in interviews were those with chambers of commerce or foreign lawyers.

160. Recent years have seen some positive measures to combat corruption in the sector. Not all were directly aimed at this end, but that does not detract from their impact. The assumption that higher salaries for magistrates and staff would reduce corruption, if only by decreasing the temptation to accept minor bribes, may have been borne out in part. Most human resources experts, however, see little relationship between salary levels and corruption, except possibly at the extremes—very high or very low wages.⁵⁶ Although the steep declines in reports of bribery reflected in surveys carried out in 2001–08 coincided with a period of rising wages, the effect is more likely linked to increased action by the agencies combating corruption more directly—the NAD and to some extent the Judicial Inspectorate.

161. Self-identifying bribe payers may not know who gets the money, especially if it is solicited by an attorney. As Danilet (2009) documents, corruption in the justice sector (in Romania or anywhere)⁵⁷ has a multiplicity of forms and agents, and less knowledgeable court users have even been known to confuse legitimate fees with bribes. Greater familiarity with sector operations may be a way to reduce this error and thus the incidents reported.

Institutions for Tackling Corruption

162. Several institutions—the NAD, Directorate for the Investigation of Organized Crime and Terrorism, National Integrity Agency, and Judicial Inspectorate—were created to address corruption. Their operations seem to have been affected by legal and political constraints through much of their existence, but their performance has gradually improved.

163. Only the NAD and Judicial Inspectorate are reviewed here, and both—in line with citizens' expectations and following CVM reports as well as some legal changes—seem to have

⁵⁶ By extremely low, we mean salaries not giving enough to live on and so forcing those receiving them either to take on outside work (often illegally) or to request bribes. Some governments in very poor countries appear to have adopted this as an informal policy in part to reduce judicial credibility still further. As for very high salaries, the positions may become so attractive that incumbents will do anything to keep them—they may not accept bribes from normal users but may be more susceptible to “telephone justice” or directions from political leaders.

⁵⁷ On this see Hammergren (2012) for a justice-sector value chain listing many of the potential sites and its application to Ethiopia.

stepped up their work and improved their outputs. Moreover, since the date of the fieldwork for this report, the Judicial Inspectorate has become independent, with a larger staff, different rules for appointment and tenure, and some additional powers.⁵⁸

164. Still, both entities demonstrate a large gap between, on the one hand, the number of complaints lodged and, on the other, the number of convictions (NAD) or disciplinary actions (Judicial Inspectorate). This discrepancy is not unusual because citizens commonly use this type of agency as a recipient for all manner of grievances, with many people registering dissatisfaction with actions that have nothing to do with corruption or breaches of ethics. Over time complainants may reach a better understanding of what constitutes a legitimate complaint, but even in countries where these mechanisms have existed for years or decades, such agencies usually have to sift through reports on a variety of irrelevant and possibly fictitious malfeasance.⁵⁹

165. Of the two agencies, the NAD has made the greater progress on indictments and convictions. However, while its investigations, indictments, and convictions of all public sector actors show a sharp rise over 2006–11 (table 3.2), the number of magistrates indicted and convicted demonstrates no clear pattern. The fact that six members of the HCCJ are officially under investigation (not shown in the table as it only runs through 2011) is both positive and disarming, and may counter the criticism voiced by some that the NAD has focused largely on mid-level functionaries.⁶⁰

Table 3.2: NAD Performance, 2006–11

No	Statistical Element	2006	2007	2008	2009	2010	2011
1	Complaints	2,615	3,319	3,959	4,866	5,827	6,615
2	Investigations completed	1,509	2,070	2,302	2,642	2,957	3,313
3	Indictment	127	167	163	168	220	233
4	Magistrates—Indicted	5	10	9	3	13	5
5	Magistrates—Convicted	2	4	2	6	2	4

Source: Team elaboration based on statistics from the NAD.

166. Although the Judicial Inspectorate receives complaints about actions that may indicate corruption, it is charged with investigating only disciplinary and ethical violations (Law 317/2004 on the SCM)—these include violations of provisions regarding declarations of assets, interests, and incompatibilities; intercessions to resolve requests or interference in the activities of another magistrate; carrying out public political activities; and recurrent failure to comply with legal provisions on prompt resolution of cases.⁶¹ Legal amendments in 2006 added abuse of

⁵⁸ Professional staff, while still magistrates, are no longer officially “seconded” from their initial positions but appointed for six-year terms, after which they will return to the magistracy but in different locations. This is intended to reduce any pressure on them from their former and future colleagues. Because the new systems went into effect at end-May 2012 (and most staff remained in their positions), the review could not cover the more recent period, and in any event, changes in operations will probably take some time to make themselves visible.

⁵⁹ A study in the U.S. state of California, for example, found that 21,000 complaints were made about judicial actions in 1990–2009, resulting in 700 disciplinary actions—about 3 percent of the initial filings.

⁶⁰ The presumption of innocence holds, of course, while trials are going on.

⁶¹ The list, found in article 99 of the Law on the Statute of Magistrates, has 14 items, all of them consisting of several parts. Only a few are included above.

power and error in judgments relative to criminal trials as actions subject to disciplinary sanctions.

167. The Inspectorate commonly receives several thousand complaints annually. The number of disciplinary actions remains very low (less than 1 percent of all complaints received and under 10 percent of dossiers officially opened) (table 3.3). We have no doubt that the vast majority of complaints have no merit, but the low number of disciplinary actions and the time taken to process them may warrant attention. If, as those promoting its change to independent status argue, pressures from colleagues inhibited its actions, then its post-May 2012 status may make a difference.

Table 3.3: Investigations by the Judicial Inspectorate and Results, 2008–11

Investigations and results	2008		2009		2010		2011	
	Judges	Prosecs.	Judges	Prosecs.	Judges	Prosecs.	Judges	Prosecs.
No. of investigations opened	1,131	266	489	177	246	65	158	49
No. of sanctions	10	3	15	6	9	4	14	4
Recommended for action, of which:	12	6	27	11	15	10	18	8
Dismissed on SCM review	2	3	12	5	6	6	4	4
Warning given	3	1	2	2	4	2	5	2
Salary reduction or transfer	5	1	9	1	3	2	6	1
Exclusion from judiciary	2	1	4	3	2	—	3	1

Source: Team elaboration based on statistics from the Judicial Inspectorate.

— = not available.

168. Again there is no clear pattern in the Inspectorate’s activity, except for the steep decline in the number of investigations undertaken annually over the four years and, possibly as a consequence, a slight growth in the number of recommendations for disciplinary action. Considering the broad range of violations subject to review—some of them quite minor—it is a little surprising that so few recommendations for action are made. This may be a result of a better culling process (in the face of what are likely to be thousands of irrelevant complaints) or a decision to focus only on a subset of more important issues. Or it may be a sign of success in dissuading violations. It was apparent from interviews that magistrates had the Judicial Inspectorate very much in mind and that some of their actions, that might otherwise be considered superfluous, were intended to ward off complaints, perhaps investigations, and possibly disciplinary sanctions.

169. It remains to be seen whether the figures will change, and in what direction, with the Inspectorate’s graduation to independent status and addition of staff. In any event, its efficacy in improving performance—and which aspects of performance—deserves further exploration. It is interesting and potentially significant that, while the NAD has expanded the number of investigations it conducts annually, the Inspectorate has reduced them while maintaining the level (number) of sanctions.

170. Moreover, some of the things the Inspectorate has been asked to do (SCM instructions to check on data input in ECRIS, and checking on whether assets declarations are filed and on magistrates' ability to keep up with caseload) should arguably be done by another entity. In other countries, many of these tasks are performed by higher courts responsible for monitoring general performance of individual judges and/or courts operating below them, and are in turn assessed on the basis of overall performance. Some of the courts of appeal interviewed were already doing this, and seemed to believe it was a normal part of their duties. Were this division of labor effected, it would allow the Inspectorate to focus on serious disciplinary breaches and complaints about the courts, and possibly allow for a smaller staff to do this.

171. Likewise, issues involving failure to submit asset declarations and reports on potentially conflicting interests and incompatibilities are already monitored by the National Integrity Agency. However, we do not know whether the Inspectorate does more than channel information from the National Integrity Agency to the SCM, but if it does, this may be an example of redundant work.

172. The Inspectorate also has additional functions and, among them, conducts a number of studies on performance problems, as agreed annually with the SCM. While the team was supplied with the list of studies, no information was provided on the conclusions or impact. These studies are important, but contrary to what their titles suggest are really in-depth investigations to identify examples of problematic performance (for example, cases with extreme delays) and so encourage courts to take immediate action to resolve them.⁶² They do not constitute analytic research to identify causes of problems, except those due to inattention by the responsible parties.

173. Such analytic studies are needed, but even a newly independent Inspectorate may not be in a position to perform them. They should be part of a general management plan for improving performance and thus logically located within the SCM, assuming the latter is adequately staffed to conduct them. Giving them to the Inspectorate conflates two functions with different requirements—tracking of breaches of conduct and efforts to find ways to prevent their occurrence. By its very nature, the former is not likely to get much cooperation from its targets; the latter, however, requires such cooperation to function well. It also requires a different set of skills from those conducting the studies—not skills of investigators, but rather those of researchers, preferably from multidisciplinary backgrounds.

174. Some other aspects are common to both the NAD and Judicial Inspectorate. They both seem to be largely reactive in their approach to handling suspected malfeasance, because they focus on dealing with cases brought to their attention. Both conduct some *ex officio* investigations, but contend that their normal duties detract from their ability to do this. It may now be useful for them to adopt a proactive methodology as well. Fighting crime (or corruption) is not just about catching the villains, but requires a strategic approach intended to enhance the leverage of the relevant agencies in discouraging its occurrence. This may mean going after the

⁶² A study on delay that was eventually provided to the team thus only identified cases with extreme delay. It made no attempt to uncover reasons, types of case most affected, and so on. A study on the efficacy of anti-corruption cases only looked at increases in the number of cases handled and disposed, thus establishing that performance was improving. It made no effort to identify causes of delays or other criticized practices, to explain the improvements, or to suggest measures to continue or escalate these gains.

worst crimes or the worst offenders or working on the basis of hypotheses of where these actions occur, but it is clearly more than just taking what is reported. Both the NAD and Judicial Inspectorate may need more resources. This does not necessarily mean more staff, but legal and material means to track problems and possibly, for the Inspectorate, a clearer definition of its aims and the results it is supposed to produce.

175. More important, the SCM seems to have no particular policy on justice sector corruption. Instead, this is part of a broader national strategy. An SCM approach to judicial corruption was not mentioned in interviews, and SCM staff reported they “do not know about corruption” and got their information from the press. CADI (2010) also noted this attitude as does Transparency International Romania (2011). Along these lines, the CVM in earlier reports described the SCM as somewhat of a “judicial union.” A consultant working on a report on corruption in the sector commented that neither the MOJ nor the PM would or could supply figures on the categories of judicial personnel sentenced for corruption and that the SCM was only able to do so for the prior three years (Danilet, 2009: 18), concluding that this “clearly indicates a lack of intention to outline an anti-corruption strategy.” The SCM says it now has a strategy, but this is part of the National Integrity Plan. SCM ownership of implementation in the judicial system therefore appears limited.

Moving from Tolerance?

176. Where corruption is perceived by many as such a big issue it is well to call it by its real name, and incorporate steps to catch the culprits, reduce vulnerability to corruption, and announce a no tolerance policy. The current approach in Romania reportedly tends to mean a lengthy and inconclusive investigation, and if faults are found, forced retirement (previously possible with a pension) or a jail sentence (often suspended), but reportedly often neither (CADI, 2010).

177. In fact, all corruption cases suffer from widespread use of suspended sentences. Aside from possible corruption or political pressure, there are two likely explanations, both of which require attention by the SCM and HCCJ.

178. First, Romanian criminal law favors the individualization of sentencing, and judges often use their own interpretation to apply suspended sentences for those accused of corruption—because they have no criminal record, and because the “social damage” is perceived as minimal. This was discussed in a paper presented by a special commission on individualization of sentences in corruption cases, prepared for the CVM (Romania, MOJ, 2009, Annex 24).

179. Some interviewees also mentioned, without necessarily endorsing them, judges’ beliefs about the lesser social damage from corruption (as opposed to a violent crime, one supposes) and the status of the defendant, who most likely had no prior convictions and moreover occupied a prominent position. However, as noted by others, it is because of that prominent position that the person was able to be corrupt. Paraphrasing one interviewee: “If you steal someone’s Rolex, you go to prison; if you embezzle government funds to buy the Rolex (or get it as a bribe), you are less likely to do so.”

180. Second, the minimal social damage argument may be supported by prosecutors’ purported preference for an open and shut case (to maintain their high conviction rates) and thus

to accuse someone of the lesser bribe or extortion. Some of the amounts involved are risible, although the accused had been investigated for far more important sums.

181. Some types of corruption potentially affecting the judicial sector do not seem to be investigated. For example, government ministries hire attorneys to represent them in big cases. Some interviewees believed that the selection process can be biased and influenced by the promise of a certain percentage of the contract value. Foreign attorneys, the only ones to mention this, said they can recognize the firms that devote themselves to this business, charging relatively high hourly rates.

182. Finally, even the new Civil Procedures Code and new Criminal Procedures Code have been unable to affect the immunity (unless waived) of parliamentarians, who may only be investigated if Parliament agrees to lift it. If Romania wants to make it easier to bring cases involving Members of Parliament to trial, it may consider a constitutional amendment—to be, no doubt, resisted by them.

Conclusion

183. Other parts of the public sector also suffer from the perception of a certain level of corruption. Its real incidence within the justice sector can only be approximated, although we agree with most published reports in that it does not appear to be an everyday occurrence. It seems, however, that the measures taken to combat corruption (either that within the justice sector or outside) could be stepped up. This is not necessarily the fault of the judiciary, although the SCM's reluctance to more proactively acknowledge its presence is seen as an issue. While some interviewees believed the situation had improved in recent years, most saw a post-EU accession lagging of efforts, whether as attempts to root out corrupt magistrates and their staff or to control corruption elsewhere.

3.6 Quality: Non-Uniform Legal Interpretations and Consequent Unpredictability of Judgments

Issue

184. The importance of this issue seems to differ among stakeholders. Except for representatives of the EU (CVM), local academics, and nongovernmental organizations, as well as foreign attorneys (including those with chambers of commerce), no interviewee mentioned it spontaneously or reacted very strongly to a direct question. Inconsistent legal interpretations are frequently mentioned as a challenge in blogs and websites run by local law firms, but generally also without specific referents. The interviews did produce some anecdotal evidence, but the problem with anecdotes, even if confirmed, is that they are not necessarily representative. Moreover, some of the examples did not make it clear whether the interviewees believed the issue was corruption or legitimate differences of opinion on how laws should be applied.

Analysis

185. As a direct response to the CVM concerns there have been a few local studies of the matter, most notably one reported in Romania, MOJ, 2009 (Annex 24), which reviewed sentencing of those convicted of corruption, and a second (CADI, 2010), which reviewed reasons for inconsistencies as well as the likelihood that changes under the new Civil Procedures Code

would address them. Only the former reviewed actual cases, but while it found many inconsistencies (especially on the use of suspended sentences for these as opposed to ordinary crimes), its statistics and methodology were not included in the published report.

186. Lack of uniformity of legal interpretations as a cause of unpredictability is often blamed, by those who mention it as an issue, on judges' sense of independence and lack of access to jurisprudence. The two main electronic sites for published opinions, ECRIS and Jurindex, are incomplete in their coverage and apparently, except for HCCJ rulings,⁶³ judges generally have access only to judgments from their own courts of appeal. It was not clear whether they could access rulings from other courts of appeal and if they could, whether they had any incentive to read them. We doubt the CVM's view that publication of more judgments would have much impact (judges have no incentive to read them and the non-uniform interpretation may well not figure in the judgment since it referred to an interlocutory matter). However, this lack of awareness of how others decide similar cases may explain part of the lack of attention to the issue. If judges do not know what others are deciding, they will not be aware of inconsistencies. This, rather than "excessive independence," may explain a good deal. In all judiciaries there are always judges with different views, but unless Romanians are very unusual, a majority would probably be just as happy ruling like the rest—if they knew what the rest were doing.

187. Odd rulings are also blamed on factors other than lack of access to judgments or some alternative means of knowing the common trends. These factors include corruption, special relationships among the parties, haste caused by too much work, and an unstable legal framework. In short, critics believe that wildly different outcomes for "similar cases" are best explained not by inconsistent legal interpretations (the focus of this section) but by extraneous and probably illegitimate influences on judicial rulings (treated in the previous section).

188. Despite the lesser attention given to the topic by judges and some outsiders, steps have been taken, so far with uncertain results. CADI (2010) reports meetings among judges to discuss inconsistent views on how laws should be applied, but claims they do not work because any decisions "are not binding." However, the mechanism probably deserves more tries, as it has been used successfully in other European countries. Huls (2012) reports positive experience among lower instance courts in the Netherlands, despite the High Court's initial resistance to the practice. The Functional Review's two external judicial advisors, one from the Netherlands and the other from Germany, endorsed the practice as having worked in both their countries. The CVM also reports efforts by some courts of appeal to create more uniformity of decisions among the courts under their supervision. As no mention was made of such initiatives to the Functional Review team during its field visits, and as the CVM did not provide specific examples, we cannot say to what extent this is occurring and with what results.

189. While the new codes are intended to address the challenge, as was the SRL, we have some doubts about the immediate impacts. The codes will produce their own differences as to interpretations and they will have to be resolved, through the new mechanisms introduced within the HCCJ (the preliminary ruling, smaller review panels for *recurs* in the interest of the law) or by some other means.

⁶³ The HCCJ reports that it has accelerated the online publication of its judgments. From June 2012 to March 2013, 14,000 additional HCCJ decisions have been made available on the HCCJ's website at <http://www.scj.ro/jurisprudenta.asp>.

190. Another aspect cited by CADI (2010) is the HCCJ's reported past failure to perform its role in unifying jurisprudence. Its size (121 judges) certainly complicates matters, as does its prediction that it will need three times that number to handle the unifying mechanism introduced by new legislation. While the HCCJ is a large high court, it is not the only such body in existence. There is no single best practice to follow, but other courts in Europe and beyond struggling with this challenge and with comparable or even larger caseload often strive for an internal organization allowing more specialization in different materials. A "specialized" panel may not reach the best decision, but it is more likely to impose consistency, whereas Romania's HCCJ, even under the new SRL rules, seems bent more on adequate representation of many views, including those of non-specialists. At least over the short term, this strategy might be rethought.

Conclusion

191. Some degree of unpredictability is inevitable in a new system, which in Romania is exacerbated by a rapidly changing legal framework. It will take time to resolve. However, Romania may have added complexity to the challenge by creating a very large HCCJ that some local observers (CADI, 2010) believe does not maintain consistency even within its own rulings.

192. However much the criticisms are valid, the HCCJ's impact on fulfilling its role in unifying criteria can be strengthened. Obviously, consistency depends on those in charge to set standards and on some means of enforcing them. Transferring some of the decisions down to courts of appeal, and having the HCCJ rule on differences among them, might be a more practical alternative. While excessive "judicial independence" is mentioned by some for this non-uniformity, a promising approach may be to set standards at the top and to identify and focus on the most problematic areas.

193. Romanian judges may insist on their independence but they also clearly fear disciplinary repercussions. Hence it is up to the higher levels of the judiciary (whether the HCCJ or the various courts of appeal) to identify the most common problem areas and set standards for them (based so far as possible on participatory discussions involving other judges), and if compliance were monitored effectively, we suspect the issue might be resolved more rapidly. It will in the end be a question of political will and no outsider can fix that. Only local ownership and commitment can.

3.7 Quality: Enhancing Performance

Tackling Corruption and Breaches of Ethics

194. The focus on corruption was directed at reducing its incidence within the judicial system and to a lesser extent on improving sector treatment of corruption in other parts of the public sector. Limited in its capacity to measure directly the incidence, the team focused on vulnerability to corruption and thus on changes that could be made to reduce opportunities or incentives for corruption and ethical breaches.

195. Most crucially, the SCM—as part of its work in protecting judicial independence—needs to address judicial corruption, ethical breaches, and obstacles to magistrates' ability to

investigate, prosecute, and adjudicate corruption cases. It cannot afford to ignore the weight of popular opinion or the reality of cases that have been investigated and brought convictions.

196. A frank admission that a challenge exists, of perception and in reality, would be a first step, following which some of the next steps might be taken:

- *Periodic, at least annual, opinion and experiential surveys.* These would be among the general public and court users to determine whether perceptions and experience are changing. The surveys should be announced and the results publicized as an indication that the SCM is taking the challenge seriously.
- *A public relations and educational campaign.* This would advise citizens of their rights in judicial proceedings, and of the means to register complaints about illegal or unethical actions, whether by magistrates or court staff, or by other officers of the court, including private attorneys. Although judges have often objected to this in other countries as an insult to their performance, it might still be useful to post notices in courts and prosecutors' offices about the illegality of offering or soliciting bribes, including speed money.
- *Creation of the office of judicial ombudsperson.* This practice has been adopted in Brazil and elsewhere, to give citizens a user-friendly place to register complaints. This would be in addition to the Judicial Inspectorate, as it is in Brazil, but where corruption or just bad service is an issue, redundancy is often worthwhile. The ombudsperson's investigations and findings need not have legal weight, and one of their services might be to mediate disagreements among the parties, or simply to let judges know that they should be more careful in their behavior (without of course revealing the source of their information, feasible because the ombudsperson cannot impose sanctions and if they report any irregularities to the SCM or the Inspectorate, any ensuing investigation would give the "accused" the right to know the sources).
- *Review of the Judicial Inspectorate's mandate and performance.* This would ensure that it is productively focusing its efforts on serious malfeasance without, as may be the case, encouraging excessive formalism on the part of magistrates for fear they might unintentionally engage in actions subject to sanctions. The list of activities subject to sanctions arguably needs revision as it is very long, tends to overlap with some clearly corrupt actions, and may also target issues better subjected to other types of control (by the National Integrity Agency, the courts of appeal, or for corruption, the NAD and the PM). Judicial Inspectorates have a varied mandate throughout Europe, with no clear model for what works best and why. That of Romania's agency seems to have grown over time with no clear direction, and thus it may be time to reconsider where it is most needed and what it might eliminate.
- *Explanation by the Judicial Inspectorate of its purpose and the types of behavior it is targeting.* Because the Inspectorate is one of the institutions least understood by outsiders, it should undertake this campaign, even for the better informed. Its few disciplinary actions suggest some inefficiency, but it may stem from a focus on certain types of behavior—if so, the campaign needs to make this explicit.
- *A series of empirical rather than legal investigations to identify where and how common, more systemic forms of corruption occur.* Conducted by, for example, research institutions, the investigations' aim would be to produce a better overview of what is

happening and so to measure the incidence and risks of occurrences rather than to focus on identifying the guilty parties (something to be handled by the NAD and the Inspectorate). That distinction should be preserved so as to gather as much information as possible, including rumors, suspicions, and allegations that would never stand up in court.

- *On the basis of that overview, development of mechanisms to reduce vulnerability*—places where corruption is frequent, harder to detect directly, but most visible to the victims. These initiatives should also be publicized as further evidence of the magistrates' willingness to improve matters.

Making Legal Interpretations More Uniform

197. None of our interviews mentioned unpredictable outcomes due to lack of uniformity of legal interpretations as the highest priority. Similarly, studies by Romanian and outside observers, while often mentioning this phenomenon, give it lesser place. When non-uniform interpretations are mentioned they are often linked to two other challenges—corruption, for obvious reasons, and delay, but as a side effect of its precursor, overworked judges. The following few suggestions are largely drawn from the literature reviewed. Even interviewees who complained about unpredictable outcomes had no remedies to suggest, and in some sense they may be correct, if only because the underlying issues lie elsewhere and will take time to resolve.

198. A first issue, most frequently mentioned, is the rapidly changing legal framework and the frequent reversals in or amendments to laws and government ordinances. This is not a judicial issue except in its effects, and the resolution will lie in improved practices by the executive and Parliament in legal drafting and vetting of laws before their passage. The government seems increasingly aware of its responsibilities here, and it is hoped that it will take the necessary actions, but we have nothing to add to what others have suggested, except to stress that “impact studies” like those done for the new codes are both too ambitious in their aims and too narrow in their eventual focus (in the case of the codes, focusing on the need for more personnel and infrastructure—appendix 3).

199. The CVM insistence on the publication of more or all judgments strikes us as valuable but not something that will fully address the challenge. Judges will still need to have an incentive to read them, and so far it is not evident that one exists. Moreover (see next paragraph), the way many decisions are drafted may reduce their usefulness as guidance.

200. A more useful suggestion, offered by another Romanian source, the Society for Justice (SoJust, 2006), which includes magistrates among its members, is an improvement in the format for judgments themselves:

There are few judgments organized or structured on an argument ... the rule of thumb consists of presentation of all matters, without using numbers or paragraphs...Moreover, the justification for a judgment is often no more than a useless description of all the procedural acts developed by the parties or by the court, followed in the end by the dry quotation of the applicable legal text.

201. Development of a uniform format similar to practices in advanced Western European countries is likely to be resisted as interfering with judicial independence, but it would be a boon toward identifying the reasons for decisions and thus the points of disagreement. Some of our interviewees made similar criticisms of a tendency to overlong opinions where the *ratio*

decidendi was virtually invisible. It is worth mentioning here that according to Pompe (2012) some judiciaries have limited the length of written judgments—in Norway, one court of appeal allows only 12 pages unless a special waiver is granted.

202. When more judgments are published, they—along with judicial statistics⁶⁴—should be made available to citizens in general and especially to academic institutions and nongovernmental organizations. This will allow observers to “judge for themselves” the level of inconsistency and permit independent research. In many countries, some of the most valuable findings about this and other issues have come from external research, which can also be useful in dispelling inaccurate myths, some of them highly prejudicial to the courts.

203. The topic should be given more attention by the SCM (with the HCCJ), which might:

- Conduct one or more studies to identify the points of law on which disparate interpretations are most common and/or most disruptive. As part of the studies and as a prelude to an empirical examination of judgments, public participation should be invited.
- Encourage broader discussions among judges of their own appreciation of the extent and causes of the phenomenon—perhaps earlier attempts to focus discussions on issues deemed to be critical started too early in the process, and might have benefited from the prior studies and discussions first on the general issue rather than on specific cases.
- Only then proceed to the participatory examination of real cases in an attempt to build consensual interpretations among the magistrates. While the HCCJ should be encouraged to participate in the two earlier activities, its agreement to and possible participation in this last one will be critical.
- The HCCJ will need to focus on and determine how it can best carry out its role in creating uniform criteria for legal interpretations. In some sense the HCCJ is the key to any solution, but most observers seem to agree that for whatever reason it has not been able to perform this role adequately. Consultations with members of other European high courts might be useful if only to mobilize HCCJ commitment and to demonstrate that there are mechanisms for improving this function.
- An alternative approach to the focus on the HCCJ would be to use the practice, already adopted by some courts of appeal, to begin the review of inconsistencies at that level. This might constitute a sort of filter for the HCCJ, which could then focus on the differences among courts of appeal rather than attempting to address the entire range at once.

Resource Implications

204. *Human resources.* Investments in tackling corruption and making legal interpretations more uniform may be relatively less than in other areas, and except for technical support for analytic research and the development of new protocols and programs, will not require additional human resources. These needs can also be addressed through consultants, although it would be desirable to build up some internal capacity in these areas. The entities responsible for controlling corruption (within and outside the sector), ethical breaches by sector members, and non-uniform interpretations are all adequately staffed. The HCCJ might disagree on its own staffing, but organizational alternatives as well as using the courts of appeal as a first filter might

⁶⁴ Both adequately purged of means to identify parties, though not necessarily judges.

be explored before more justices are added. Some suggestions as to additional bodies (an ombudsperson) would require more (or transferred) staff, but these are not short-term priorities.

205. *ICT*. In the area of corruption, the findings of the ICT team tend more toward creation of protocols with other agencies managing databases essential to investigation of crimes. Better databases to track their actions, access to those they do not control, and better organization and development of results-based strategies are needed by all agencies, but the need for improvement first has to be recognized or all the technical assistance in the world will not help. The recommended creation/expansion of a library of judgments is another ICT project, but given doubts on its immediate benefits and questions over its most useful format, it might be adopted gradually while less high-tech alternatives are pursued over the shorter run.

3.8 Access to Justice

Issue

206. Interviewees did not mention access as a concern, and while CADI (2010) does, it is not a major focus there either. Access does not statistically appear to be a major issue: the annual litigation rate approaches a relatively high 10,000 per 100,000 inhabitants. Unfortunately we cannot tell whether the nearly 1 in 10 Romanians lodging new cases every year are the same individuals (or organizations) with repeated filings or how many of their cases are double-counted. Some clearly are counted twice or more, where, for example, a review of an enforcement proceeding involves a prior court ruling, as opposed to an executive title or an application counted as a separate case.

207. Yet regardless of the numbers of those who get to court, the question stills stands of whether all those needing judicial services can access them and if they do, how satisfactory results are. Satisfactory obviously cannot mean that they prevail in their disputes, but that they get fair, equitable treatment, and while we are most interested in the situation for poor citizens, the same question applies even to the better off.

208. The 2013 survey carried out by the review team looked at some of these issues and found mixed results (CURS, 2013). Judges and court staff got rather positive feedback. On a scale of 1 (low) to 5 (high), respondents rated their satisfaction with the impartiality of the judge at 3.68, the attitude and politeness of the judge at 3.95 and that of court staff at 3.97, and the competence of court staff at 3.92.

209. It found that the level of satisfaction among respondents of how the court deals with their case is not very high. On a scale from 1 (low) to 5 (high), the satisfaction across all levels of jurisdiction was only 2.69. Interestingly, the rate among those who won their case was not significantly higher (2.91) than those who lost their case (2.36). The satisfaction with the ease of finding useful information about their rights was just above average at 3.23, similar to the satisfaction with the ease of getting to the court and the clarity of information provided by the court (both 3.19). Signs inside the courthouse got a somewhat better satisfaction rate of 3.89.

210. Members of the Romanian judiciary expressed the importance they attach to treating every claimant reaching the courts with the same amount of effort. The team is not sure this is

sufficient and wise. It is not sufficient to comprehensively address access to justice challenges. Aside from satisfaction with treatment, there is also the issue of possible impediments to using the courts in the first place, and it is curious that so little attention seems to be focused here. As for wise, some thought should be given to the impacts on timeliness (as effort spent on patently non-justiciable complaints is effort that cannot be spent on those with merit), on impartiality (an equally important value that is clearly undermined by a judge's offering assistance to a party in forming his or her claim), and on the rights of the opposing party (who might simply be the victim of a vindictive attack by another).

Analysis

211. Romania spends one of the lowest shares of GDP on free legal assistance among the 45 European countries covered in the 2010 and 2012 CEPEJ reports (see sections 5.2 and 6.2). Even though allocations have increased sharply over the past few years, given their extremely low base Romania remains among the countries providing the least funding. The 2013 review team survey found that 6 percent of parties had received a lawyer from the state (CURS, 2013).⁶⁵ As reported by judges and prosecutors, many individuals approach them without an attorney, and the 2013 survey found that 21 percent of parties were not represented by a lawyer (CURS, 2013).⁶⁶ According to a 2008 survey (Gallup Organization Romania, 2008), only 63 percent of court users arrive at court with a lawyer, and only another 8 percent are later supplied one paid by the state. Of the 51 survey respondents (29 percent of the total) who reported self-representation, 47 percent said this was because they believed they did not need a lawyer and another 38 percent said it was because they could not afford one.

212. Self-representation is also encouraged, whether intentionally or not, by judges and prosecutors. Both groups reported that they make the utmost effort to attend to poorly formed complaints, suggesting more service than is usually provided elsewhere—although conversely, this may mean more nuisance value for those unjustly accused, many of whom may also require assistance.⁶⁷ There are also concerns about the quality of legal defense and assistance when it is provided by state-subsidized lawyers and possibly about those who do not qualify for assistance and so either depend on judicial help or just do not go to court.

213. The fees for lawyers providing government-subsidized assistance seem very low. The team was told that as of May 2012 the usual reimbursements for representing a case in a single instance were in a range of RON100–300, or about \$25–\$75.⁶⁸ In areas where established lawyers seem to have more work, the jobs are often given to interns (according to information from interviews). Owing to the lack of centralized records on this matter, it was impossible to tell how many individuals nationwide receive this assistance or how many lawyers are engaged to provide it. The ECHR for obvious reasons (you would need legal assistance of some sort to get there) does not have many cases on this issue, the one exception being prisoners complaining about the lack of access to attorneys (presumably state financed).

⁶⁵ Of the 6 percent: *judecatorii* 4 percent, tribunals 4 percent, courts of appeal 13 percent.

⁶⁶ Of the 21 percent: *judecatorii* 20 percent, tribunals 25 percent, courts of appeal 16 percent.

⁶⁷ It was unclear from interviews how this situation would be handled—an unrepresented party presenting a complaint against an individual who also could not afford to hire a private lawyer. In the case of a criminal complaint, presumably state-subsidized defense would be provided, but for civil complaints, there is still an issue.

⁶⁸ They have possibly been increased since then, but we doubt to anything like princely amounts. Further, lawyers report that their expenses are not reimbursed separately.

214. Interviewees also mentioned the need to pay stamp fees after a case is registered—but before the court takes it forward—as a possible constraint. Typically the amounts involved would not seem large enough to dissuade someone with a legitimate case, unless of course a large monetary amount is involved, in which case the fees require a proportion of the claim to be paid as well. The review team’s 2013 survey found that 29 percent of parties were exempted from paying court fees (CURS, 2013).⁶⁹ At the same time, when asked about their level of satisfaction with the cost of using the court (excluding lawyer fees), the overall satisfaction of respondents rated 2.54 on a scale from 1 (low) to 5 (high). However, the fees are relatively low and, unfortunately, low fees are also not much of an obstacle for those lodging nuisance complaints. For criminal complaints there is no charge, and it would thus be interesting to explore whether the rules on abuse of this potential—especially in a case that a prosecutor decides not to pursue—are being enforced (and if so, with what results), and whether the alleged perpetrator has access to any kind of assistance before the prosecutor makes this decision.

Conclusion

215. The issue of access requires more exploration. Even if nearly 10 percent of Romanians are filing a case every year, there is still the question of whether they are adequately served. More important, the quantity and quality of legal assistance provided by the state raise questions, but we heard few suggestions for how to resolve this. The fact that even in a limited survey, 29 percent of court users reported never hiring or being provided an attorney touches on an aspect that deserves further attention. If they benefit from judicial assistance in shaping their claims, this may limit the negative impacts on them, but this raises many questions whether this should be done by judges—from both an economic and due process standpoint.

216. A further issue is what a judge does if both parties lack lawyers. Some suggestions on how the need for legal assistance might be addressed are included in section 3.9, as is a recommendation that more research be done to determine who may be excluded or adversely affected by current policies.

3.9 Enhancing Access

217. Many of the following options could in some sense be addressed under the first performance criterion—increasing efficiency. This is because they are aimed at reducing the judicial workload by adding pre-court services for those with disputes that might (or might not) be judicialized. We add some ideas based on experience in other countries.

- *Determine the extent to which any obstacles to access exist, for whom, with what results, and why.* The SCM or some other entity might contract studies on this, given the general lack of concern about access. The litigation rate in Romania seems relatively high, but that is no guarantee everyone has access to justice.
- *Invest financial resources in a program of popular legal education.* This would inform citizens about what the courts and prosecutors do, what constitutes a justiciable complaint, how to enter one, and why the use of a lawyer might be recommended. The program should include a warning about using non-accredited attorneys and insist that courts check that any legal representative is in fact accredited.

⁶⁹ Of the 29 percent: *judecatorii* 29 percent, tribunals 21 percent, courts of appeal 40 percent.

Part I: Performance Assessment

- *Provide a legal assistance program to inform complainants prior to their registration of a complaint (civil or criminal).* This would still cost the state something, but certainly take pressure off the judges and prosecutors who now must try to figure out what the complainant wants, and whether it has a legal basis. Although in some countries (for example, Sweden) the reviewing lawyer may also take on the case, we believe that this is not recommended for Romania, and that initial legal assistance should refer complainants with legitimate cases, which the service should help to formulate, either to public assistance programs or to a list of accredited private attorneys.
- *Expand the public defense and legal assistance programs so that they can cover more court users and provide higher quality services.* Although moving up, Romania is still near the bottom of the table on share of GDP spent on this service (despite a high proportion of GDP spent on justice in general). Yes, judges claim to do the work that a better legal aid program might do, but this is not their natural work, and probably a more costly way of meeting these needs.

Resource Implications

218. Most of the financial and other resource implications involve creation or expansion of extra-court services: more investments in targeted research, information services, pretrial counseling and legal assistance for those who lodge cases, and mediation. Some of these will involve expansion of ICT services to support them and at the very least to track use by targeted groups and evaluate their impact. Should some of the “productivity-expansion” measures be successfully adopted, thought might be given to transferring some magistrates to the new services described above, such as mediators. This would have to occur voluntarily and with guarantees of adequate salaries and chances for promotion, but its advantage would be the use of human resources already budgeted in the system. Some countries (for example, Costa Rica) have a three-track career system for judges, prosecutors, and public defenders, with comparable salaries and benefits at each level and the opportunity to shift from track to track.

4. CONCLUSIONS

219. Transitions are difficult and Romania's was certainly complicated by the damage wrought by decades of Communist rule, the persistence of many political practices held over from that era, and the exigencies of the EU, both for accession and under the CVM. In a sense, Romania's good performance on the judicial indicators it has chosen—disposition times, clearance, and operativity rates—as well as those for prosecutors (conviction rates) contradict the overwork or insufficient-resource argument. A 100 percent or better clearance rate and an operativity rate of 75 percent or higher are about as good as it gets, suggesting that staffing is either just right or perhaps too high, despite demand having risen considerably in the last five years.

220. Yet the sector's productivity is somewhat lower than appears, especially when one looks at what is being processed. Prosecutors in particular seem to spend a large portion of their time explaining why they will not take complaints forward. Judges as well spend too much time (according to their reports) on things that might be delegated to clerks, or to legal aid or administrative agencies.

221. Romania should therefore now focus on how to use its existing resources and new laws and institutions more effectively. The focus should be value added against the resources invested to attain it—efficiency. The authorities might want to reassess their approach before adding any more staff especially, and restrict additions to the personnel roster to clerks and non-judicial experts. It might also want to consider alternatives for increasing the productivity of existing staff, by better filters, more delegation of routine work to clerks, and the diversion of disputes to other forums.⁷⁰

222. Our analysis of the overturn rate for the various appeals, and especially for those targeted at a decision not to prosecute, also makes it clear that better filters are needed. The day of the appeal based on not liking the initial judgment simply has to end, and if this cannot be done through filters, it could be done by a punitive assignment of court costs to the insistent appellant (and her or his lawyer). If state attorneys and prosecutors are appealing needlessly, they should be assessed as costs as well.

223. Another measure—admittedly a controversial suggestion—may be to reduce some procedural checks and safeguards on the assumption that sector institutions have become more effective and thus do not need to function in the context of redundancy of efforts. For example, while nuisance complaints afflict criminal justice systems everywhere, the number of them that get beyond the police to the prosecutor's desk seems excessive in Romania—as is the requirement that both the police and the prosecutor indicate, in a motivated opinion, why the case should not be pursued.

224. As for the preliminary ruling introduced with the new Civil Procedures Code, this obviously will have to be regulated and organized so as not to produce still more unnecessary

⁷⁰ The need for effective filters is not unusual, but to introduce them, Romania may have to reexamine its assumption that any case that is filed merits equal attention, even if it involves the accusation of an “impossible crime” or a clearly non-justiciable civil issue.

delays (and possibly more confusion). Romania's real litigation rate (once the things that should not be counted are removed) is still on the high side, and while we recognize the right to justice, we also agree with CADI that that right does not extend to abusing the system. We also recognize, however, that before drastic measures are adopted, it would be well to understand better what is happening within the system, and many of the options in section 1.1 aim in that direction too.

225. In quality and access, some measures have been adopted, but do not appear to have eliminated all reported issues. The NAD's handling of corruption cases is improving, although it may take time for the immediate results to improve the sector's popular image, simply because change takes time to translate into a change of perceptions. This is to be expected; people may applaud the convictions, but still question the time they have taken and may also speculate that this may just be the "tip of the iceberg" and more evidence that "the entire system is corrupt."

226. The Judicial Inspectorate's role and objectives (for improving performance) remain unclear and might be worth reconsideration. Its activities result in very few sanctions, and they may have a counterproductive impact in encouraging judicial and prosecutorial formalism. It would certainly be useful for it to define and publicize its objectives, along with its results.

227. Encouraging more uniform legal interpretations is an area where little progress had been made, it seems, and a better strategy is arguably needed. The main obstacle is a nearly complete lack of information on the dimensions of the problem, its impact, and where the problem is most frequent and damaging.

228. The last performance area, access, is similarly unexplored. Based on the data, it remains unclear whether and to what extent there are groups of citizens, defined by geographic location, income, ethnicity, gender, or other characteristics, who still face insurmountable obstacles to effective resolution of their disputes and protection of their legal rights. Despite the greater funding for legal assistance, the system is not perfect (especially the low fees paid to private providers and the lack of monitoring of their services). However, the changes are recent and thus a first need is to determine whether they have had the intended effect. A good system of legal assistance would also reduce the time that judges and prosecutors spend with *pro se* clients and so free them up to do other work.

229. Overall, planning and piloting reforms seem warranted—as does better monitoring—based on our assessment of the various performance dimensions. Although it was as empirical as possible, the assessment necessarily involved some interpretation and extrapolation given the poor data. Within the justice sector itself, informed observers' most frequent explanation for any reputed performance issues was paucity of resources. The argument was that too few magistrates and other personnel faced with fast-rising demand for services lead directly to congestion and delays, and, if less directly, to non-uniform legal interpretations (no time for judges to study higher court rulings), corruption, and inadequate access. Such observers offer other explanations, but because the vast majority of them within and outside the sector mention resources first and sometimes exclusively, it seems important to review the situation in more detail, which we do in part 2.

PART 2: SYSTEM RESOURCES

This part reviews system resources in three chapters: human resources (state institutions and independent professionals), financial resources and budgeting, and ICT. As foreshadowed, our findings do not point to great scarcities, but do suggest that what exists could be better used and that other measures could further improve the contribution of available resources to service delivery.

5. HUMAN RESOURCES

5.1 Human Resources at State Institutions

230. The human resources component of the Functional Review is intended to assess the adequacy of human resources levels, allocation, and management in the judicial system (box 5.1). It focuses on three issues: whether staffing levels of judges, prosecutors, and auxiliary staff are appropriate; whether the system of recruitment, evaluation, and promotion is effective in ensuring that qualified staff enters the system and suitable candidates are promoted; and whether wage levels are sufficient to attract and retain qualified staff.

Box 5.1: People and Performance

Human resources are a key factor for judicial system performance across all performance measurement areas:

Strategic management. To be successful, strategic management needs adequate capacity.

Efficiency. The right mix and quantity of human resources in the right place, to meet demand effectively, contributes to overall system efficiency.

Quality. The entry of competent (and non-corrupt) judges, prosecutors, and staff into the system is absolutely key for overall performance.

Access. Human resources need to be where the demand is, to ensure access to justice.

231. Findings of this section are closely tied to the other components of the review, particularly on the question of staffing levels. While too few magistrates (particularly judges) are a constantly reported issue, the quality of data on caseload is questionable. It is also clear that at least part of the problem lies in the flood of trivial complaints that both the judges and prosecutors feel they must consider. These include complaints arising from what is referred to as “broken government promises,” such as wage increases that the government has granted but then has been unable to pay for. (As chapters 3 and 4 elaborated, the solution is not necessarily to increase staffing but rather to reduce the number of complaints that reach judges and prosecutors in the first place. This section is also closely tied to chapter 6.) The judiciary as a whole devotes the majority of its budget to salaries, with the overall wage structure determined by law. But the ability of the judiciary to add staff will depend on its ability to extract additional funding from the budget.

232. The judicial system as a whole seems to pay little attention to the situation and quality of non-judicial staff (box 5.2)—that is, those who are neither magistrates nor their clerks. The system recruits ICT professionals, economic managers, and people for low-level jobs like drivers or maintenance staff. However, for other non-judicial positions it tends to second magistrates and clerks to these positions, without sufficiently taking into consideration their need for special preparation for them to be able to do these jobs with the required professional rigor. The numbers, quality, and reimbursement of disciplinary specialists are inadequate and thus their contribution to overall sector management is limited. We add more on this below, but note there

that this represents a significant obstacle to the sector's ability to improve its performance and make better use of the financial and other resources it manages.

Box 5.2: A Note on Non-Judicial Specialists

These specialists do not seem to be part of any human resources planning, of which there appears very little. Some of them are managed and recruited by the MOJ, but most seem to be hired locally, once the MOJ authorizes positions, by courts and prosecutors' offices. There is also a tendency to fill many of the higher-level positions with magistrates or their clerks.

While the perspectives of these individuals are important and need to be reflected in the work of the resource-management departments, they clearly lack the skill set required for the work. When real specialists are used, largely for economic management and ICT-related tasks (including ICT development), their salaries are often too low to interest highly prepared individuals. Requests for personnel to implement the new codes, for example, and even the impact studies carried out by outside contractors, do not mention this category of staff.

This tendency is evident across the sector, in the SCM, the MOJ, the PM, or any other entity. While some of them have large complements of, say, ICT staff, except for core staff in the MOJ and those occupying the highest positions in the other agencies their professional capacity is insufficient for the required work and they are often seconded from the pool of clerks and magistrates. Much the same is true of statisticians, who moreover often hold a joint ICT-statistical position.

As a key first step it will be crucial for the judicial system to introduce strategic planning and management and begin to recognize the importance of other disciplines for improving its performance (and for treating human resources management as a distinct function).

Staffing Levels

233. The two main parts of the justice sector—the court system under the MOJ and the prosecutorial system under the PM—employ about 19,000 staff (funded positions in 2012).⁷¹ According to data provided by the MOJ, 13,251 positions in the court system were financed in the 2012 budget (meaning that the positions were both authorized and filled). Of these, 4,186 were judges, 6,343 were court clerks (*grefieri*), and 2,722 were other personnel, including probation officers, clerical staff, and drivers. (The MOJ itself also employed 312 staff, engaged in such functions as preparing and approving drafts of proposed legislation to be submitted for the government's approval, and administering the payroll of the judiciary.) The prosecutorial system had 2,798 prosecutors financed under the 2012 budget, 1,603 *grefieri*, and 1,308 other staff (table 5.1).

234. Staffing levels for judges and prosecutors are, in per capita terms, in line with European standards. This conclusion is based on ratios of judges and prosecutors to population, using data from the European Commission for the Efficiency of Justice (CEPEJ) for 2008 and 2010. The number of auxiliary staff in the judicial system, however, is much lower than European medians. In 2010, the court system had 39.6 (40.2 in 2008) auxiliary employees per 100,000 inhabitants, while the median in Europe was 62.3 (55.6 in 2008). This also means, more significantly, that the staff-to-magistrate ratio remains at the lower end of the European range, around 2.1 in 2010.

⁷¹ The PM is headed by the procurer general (attorney general).

Part 2: System Resources

235. Owing to the relative shortage of support staff, judges and prosecutors alike take on a heavy administrative burden on top of their ordinary judicial functions. Planned (and recently introduced) changes to the Criminal Code, the Criminal Procedures Code, the Civil Code, and the Civil Procedures Code have generated speculation that—regardless of the adequacy of staffing—more positions will be needed in the near future. According to the Impact Study (Tuca Zbarcea and others, 2011), roughly 318 new positions for judges and 91 new positions for prosecutors will be needed to cope with the new legislation.

Table 5.1: Funded Positions in the Judiciary, February 2012

Courts (MOJ)		Prosecutors (PM)	
Judges	4,186	Prosecutors	2,798
<i>Grefieri</i>	6,343	<i>Grefieri</i>	1,603
Senior ^a	3,581		
Junior ^b	3,704		
Auxiliary personnel	942		
ICT specialists	458	ICT specialists	112
Advisors	448	Advisors	290
Probation officers	292	Procedural agents	433
Other staff	582	Other staff	473
Subtotal	13,251	Subtotal	5,709
Plus MOJ central staff	312		
Grand total	19,272		

Source: Team elaboration based on statistics provided by SCM, MOJ, and PM.

a. With higher education. b. With middle school education; source: SCM files on staffing and salaries. Excludes 400 additional positions authorized by Government Decision 1056 of October 2012.

236. Even larger increases in numbers of *grefieri* will be required, according to the Impact Study (Tuca Zbarcea and others, 2011). Under the new Civil Procedures Code, for example, parties to a civil case can demand that hearings be transcribed by clerks. The Impact Study estimates that if 10 percent of such hearings are transcribed, 1,500 new clerks will have to be hired. A more recent survey of court administrators (Romania, MOJ, 2012) reported that, in the view of participants, 1,391 new judges and 3,883 new *grefieri* would be needed in the court system alone. But both studies assume that existing staffing and workloads will remain intact, that is, judges and prosecutors will continue to be inundated with trivial complaints and will feel compelled to address them themselves, rather than handing them to *grefieri*. If workloads were diminished or delegated, the need for more magistrates would presumably diminish.

237. Vacancy levels (which in theory might be an indicator of true understaffing) are difficult to define, let alone quantify. All courts have a defined number of authorized positions. Some of these authorized positions, however, may not be funded—that is, budget allocations to the MOJ, the PM, and other budget holders may not be sufficient to finance all authorized positions. Of the funded positions, some may not be occupied, due to the retirement or promotion of their previous occupants.

238. The detailed data on staffing in the court system, as provided to the team, list the number of positions in each court according to two categories; *schema* (authorized) and *ocupate*

(filled).⁷² As this indicates, the vacancy rate appears fairly modest, particularly among judges and “other staff”—a category that includes archivists, ICT specialists, ushers, and drivers. The vacancy rate among judges appears to be 7 percent, and among “other staff,” 8 percent (table 5.2). This vacancy figure for judges is consistent with the figure reported in the SCM’s spring 2012 progress report to the CVM (Romania, SCM, 2012b), but is slightly higher than the vacancy figure reported in the MOJ’s September 2012 report (Romania, MOJ, 2012). The SCM’s report to the CVM shows a higher vacancy rate for prosecutors: 16 percent.⁷³

Table 5.2: Number of Occupied and Vacant Positions in Court System, February 2012

Position	Schema (authorized)	Ocupate (filled)	Vacant	Vacancy rate (%)
Judges	4,399	4,086	313	7
<i>Grefieri</i> —senior	3,224	3,134	90	3
<i>Grefieri</i> —junior	2,321	2,201	120	5
Other staff	3,935	3,627	308	8
Total	13,879	13,048	831	6

Source: Team elaboration based on statistics provided by SCM and MOJ.

239. The figures for judges and staff are also roughly consistent with the figures reported in mission interviews. According to interviews with the MOJ, the court system has a backlog of 283 judgeships, 281 *grefieri* positions, and 145 positions for probation officers and administrative staff, etc. in the court system—all authorized but not occupied—bringing total funded vacancies to 709.

240. Recent data on staffing levels suggest that vacancy rates are somewhat higher in prosecutorial positions (table 5.3): rates range from 6 percent among prosecutors attached to courts of appeal to nearly 20 percent among those attached to tribunals.

Table 5.3: Vacancy Rates, Prosecutors

	Positions	Vacancy rate (%)
HCCJ	584	14
Appeals	249	6
Tribunals	646	19
First instance	1,330	12
Total	2,809	14

Source: Team elaboration based on statistics provided by PM.

Note: As of November 1, 2012. Excludes military prosecutors.

241. The level of vacancies, at least among judges, is an anomaly and mainly reflects recent strategic behavior. In 2008, a large (but as yet unknown) number of judges qualified for retirement (they had at least 25 years’ service in the judiciary) but were still working. They faced two threats: that a wider pension reform proposed at the time would eliminate the so-called service pension, under which pensions for magistrates were fixed at 80 percent of exit salaries;

⁷² A similar table, for prosecutors, is under preparation by the authorities.

⁷³ The *schema* figures for judges and prosecutors are higher than the corresponding figures for funded positions in table 5.1; the *ocupate* figures are lower. This suggests that *schema* does, in fact, represent the number of authorized positions and *ocupate* the number of positions that are both funded and filled.

and that a 50 percent bonus that had been granted to magistrates would be taken away. By retiring immediately, judges would get both; if they waited, they might lose both. Reportedly, so many judges retired that they could not all be replaced at once. As things turned out, the service pension was retained (at 80 percent), but the 50 percent bonus was abolished. Judges who retired thus chose wisely.

242. The impact of these events on vacancy rates will be only temporary. Now that the pension base has stabilized, judges (and prosecutors) can be expected to retire at a normal rate. In the short term, however, the court system will have difficulty filling all the vacant positions, because of constraints on the supply of new recruits. In August 2012, the government committed to funding all existing authorized vacancies in the court system, which will create an immediate demand for roughly 800 new recruits in that system alone.⁷⁴

Establishment Control

243. The process for determining the number of authorized positions in the judiciary is in principle set out in Law 304/2004. Article 133 states that “each court and prosecutor’s office shall be provided with the necessary number of judges or prosecutors, as well as of specialized auxiliary personnel and personnel within the economic-financial and administrative department.” Article 134 authorizes the government (that is, the prime minister and cabinet) to set a ceiling on the aggregate number of positions in courts and prosecutors’ offices, acting on “the proposal of the Minister of Justice, with the endorsement of the SCM.”⁷⁵ To assist in that process, the president of the HCCJ and the presidents of the courts of appeal, with the minister of justice, the attorney general,⁷⁶ and the chief prosecutor of the NAD are to “analyze, yearly, the workload of courts and prosecutor’s offices and, according to the results of the analysis, adopt measures to supplement or reduce the number of positions, with the endorsement of the SCM.”

244. The process does not appear to be particularly systematic. Instead, the ceiling on the number of authorized positions reflects an accumulation of ad hoc decisions stretching back over several decades. The process for allocating financed positions among the various courts and prosecutors’ offices is similarly ad hoc. The process normally originates at the level of an individual court or prosecutor’s office, which refers the request to the appropriate court of appeal. The president of the court of appeal then checks to see if the request can be accommodated by moving a position from another court. If not, the request is referred to the human resources department of the MOJ. The MOJ has no explicit criteria for determining whether a new position is needed. It relies, instead on “custom.”

245. According to a report by Wittrup and others (2011), there have been attempts to systematically determine staffing needs in the judiciary. It states that a joint working group established by the SCM and the MOJ has twice in recent years (2009 and 2010) carried out such studies. They essentially argue that the judges have been facing a steady increase in workload without a corresponding increase in funded positions. The studies also note wide discrepancies in workloads among courts, with the number of overloaded judges (928) far exceeding the number of under-loaded ones (577).

⁷⁴ Government Order 13/2012.

⁷⁵ For the HCCJ, the maximum number of positions is also to be established by government decision, on proposal of the minister of justice and the president of the HCCJ, with the endorsement of the SCM.

⁷⁶ That is, the general prosecutor of the prosecutor's office attached to the HCCJ.

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246. On this basis, they propose funding for an additional 523 judge positions and 921 court clerk positions. The 2010 report explains, albeit tersely, the method used to arrive at this conclusion. Estimates of caseload per judge, for example, are based on a complex formula that reflects not only variations in the complexity of cases⁷⁷ but also the number of volumes in a case file and the number of parties involved. Estimates of the number of required *grefieri* assume that existing ratios of *grefieri* per case will remain unchanged. According to the SCM's spring 2012 report to the CVM, the number of positions for judges increased by only 122 between 2010 and 2011. This suggests that the working group's recommendations were not entirely accepted.⁷⁸

247. There is yet another working group, charged with defining criteria for evaluating staffing needs. As of May 2012, its members had met and come up with proposals, but had not made a final recommendation. Their last meeting occurred on the day the government fell in 2012. They have not reconvened since the Ponta government formed.

248. In the short term, the ability of the minister of justice to increase the number of positions in an individual court is fairly constrained. Because the aggregate number of authorized positions is already close to the ceiling set by the government, any increase in positions would require its approval. (The MOJ is free to fill existing vacancies as it chooses, provided that the Ministry of Finance is willing to finance them.) Current legislation also restricts the MOJ's ability to move positions from one court to another. According to article 2 (2) and 3 (2) of the Statute of Judges and Prosecutors (Law 303), judges who are "immovable" and prosecutors "who enjoy stability" may not be transferred, delegated to another court, detached to another court, or promoted to an upper court without their specific consent (Wittrup and others, 2011)⁷⁹—which is rarely forthcoming. Thus the MOJ must wait until a position is vacant before reallocating it to another court, unless the magistrate holding it is willing to move.

249. Judges attain immobility rather quickly in their careers, after a short probationary period in their initial assignments. In other European countries (Germany, for example) the period during which they can be transferred freely is often longer (in this case three to five years). Promotion and career systems are sometimes structured so as to encourage or even require movement. European countries that have recently closed many courts (for example, the United Kingdom, France, and the Netherlands) have clearly found a way around this problem (the immovable magistrate) that might be worth exploring.

250. In Romania, however, recent efforts to close underused courts have had little success so far. Law 148/2011 provides the legal authorization for doing so. But efforts to implement it have been resisted by the Members of Parliament who represent the (mostly rural) jurisdictions where the courts would be closed. According to interviewees, 25 courts were originally slated for closure. To date, only three formerly active courts have been closed. Another nine, which were not operating anyway, have also been officially shut down. Again experience in other European countries would be worth exploration as, one way or another, the closing of a court is usually resisted.

⁷⁷ Measured according to a rating system developed by SCM and set out in SCM Decision no. 830A/2007.

⁷⁸ The progress report (Romania SCM, 2012b) does not explicitly state whether the increase is in the number of authorized positions or the number of funded positions. Presumably, it is the latter.

⁷⁹ The report does not provide the definition of "immovable" or "stable". The relevant legislation presumably does.

Recruitment, Promotion, and Evaluation

251. Judges and prosecutors and their respective *grefieri* are recruited by the SCM. Magistrates are evaluated by a commission consisting of the president of the court/the head of the prosecutor's office and two judges/prosecutors. The clerks are evaluated by the president of the court/the head of the prosecutor's office. Complaints against these appraisals are solved by the SCM. The magistracy offers two entry routes. The first is through the National Institute of Magistracy—the NIM—to which entrance is reportedly highly selective and entails tough entry and graduation exams. Until recently, both exams were multiple choice and tended to focus on theoretical knowledge. The multiple-choice tests are now supplemented by interviews, which account for 25 percent of the candidate's rating. On graduation, candidates for the magistracy undergo a one-year internship, which is then followed by a third "readiness" (*capacitate*) exam. They are then eligible to move directly into the magistracy, as judges and prosecutors in courts of first instance.

252. The second route bypasses the NIM, allowing candidates to be hired directly from the private sector. Candidates on this route must have a law degree and at least five years' experience in a legal profession. Article 33 of Law 303 lists the professions that qualify: private lawyers, as well as notaries, bailiffs, and attorneys working in government agencies. (See the next section on human resources as independent professionals for a discussion of accreditation processes for these professions, all of which require a law degree.) Candidates pursuing this route must also pass a written exam that is intended to be equivalent to the exam that NIM candidates must take for graduation. (Until 2012 the written exam was reportedly easier than that NIM exam; in 2012 it was made identical to the NIM exam.) In the past, candidates could also qualify if they had a law degree, 10 years' experience in a legal profession, and merely passed an interview. This route is said to be the source of some of the less competent judges now on the bench. In 2008, the interview-based recruitment procedure was abolished.

253. After appointment as a judge or prosecutor, candidates pursuing this route must also undergo six months' training at the NIM (Law 303/2004, article 33), but those interviewed expressed some disagreement whether this is enough. One source said "a law degree, five years' experience as an intern in a law office, and a few weeks of training do not prepare a person to be a prosecutor." At present, there is discussion of reinstating a six-month apprenticeship⁸⁰ and toughening (yet again) the qualifying exam. Rather than using the exam required to graduate from the NIM, candidates pursuing this route would be required to pass the *capacitate*.

254. Similarly, those wishing to join the ranks of the *grefieri* have two routes: one is through the National School of Clerks (NSC), the other through direct recruitment from the private sector. Both entail examinations. According to the court of appeal in Cluj, the exam for direct hires is almost the same as the graduation exam for the NSC. Like the NIM, the NSC is said to produce high-quality graduates.

255. Both the NIM and the NSC can produce only a limited number of graduates each year. The NIM yields 100 judges and 100 prosecutors, the NSC 100 *grefieri* (of whom 70 percent are sent to work for judges, the rest for prosecutors). This capacity would be inadequate to supply

⁸⁰ Before 2000, candidates were required to undergo six months' of training followed by six months' of apprenticeship, during which they were not permitted to sign.

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the temporary bulge (if any) in the number of new judges and *grefieri* required to fill existing vacancies and to meet the requirements of the new civil and criminal codes.

256. The SCM is reluctant, however, to rely too heavily on the alternative route. We were informed that it is opening only 50 positions to non-NIM recruits in 2012—but we were also told that the SCM may be unable to fill even these 50 positions, as too few candidates pass the exam. This may be because it is too difficult, or at least harder than it needs to be. But it may also be because the non-NIM route fails to attract good candidates. Members of legal professions who are already well established might find the prospect of restarting their careers at the foot of the judicial ladder unattractive, especially because, as was also reported, the external candidates get the last choice as to where they want to be placed. To address this problem, at least in the case of the courts, the MOJ proposes to phase the increase in court personnel over three years (2013–15). Even that will require at least 150 judges to be recruited through the alternative route (Romania, MOJ, 2012).

257. The system for allocating new recruits to positions is strictly mechanical. On passing the NIM graduation exam, the top-scoring graduate is allowed to pick from among a list of all vacant positions, as assembled and approved by the plenum of the SCM. The second highest is then allowed to pick from among all the remaining positions, and so forth until all NIM graduates have chosen their positions. Candidates from the alternative route are then allowed to choose from among the remaining positions, according to their ranking on their exam. Thus the least desirable positions are ultimately filled by the lowest scoring non-NIM candidates. SCM does not necessarily make available all vacant funded positions. It can propose that existing funded vacancies remain vacant (thus permitting temporary downsizing).

258. Judges are evaluated every three years by a committee consisting of the president of the court in which the judge serves and two to five other judges appointed by the SCM.⁸¹ According to the SCM, they are evaluated on the basis of “quality (of judicial decisions, of court session conduct) and efficiency, plus integrity and training obligation.” Performance evaluations for promotions include a test of legal theory. Recent (2011) amendments to Law 303/2004 on the status of judges and prosecutors have increased the weight given to the quality of judicial decisions. Because judges are evaluated by their immediate peers, ratings are generally high, and it is reported that 99 percent of all judges are rated “very good.”

259. At the same time, penalties for poor performance are mild. Judges whose performance is less than satisfactory are merely prohibited from applying for positions in higher courts and may be required to undergo training. Judges are also subject to the Judicial Inspectorate, which investigates cases on its own initiative or on the basis of complaints from the public. But investigations by the Inspectorate rarely lead to sanctions: in 2011, 3,886 notifications were registered, but only 12 resulted in sanctions.

260. To be promoted to a higher court, judges must be ranked at least “very good” on their most recent performance evaluation. They must then take a special exam, which evaluates legal knowledge and judicial reasoning. The promotion is given to the top scorer on the exam.

⁸¹ There is a separate test to become the president (that is, manager) of a court. This includes an interview and a psychological exam. According to our interviewees, it still produces what they referred to as “strange” results.

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261. Romania's reliance on test results to determine who enters the judiciary and who rises within it raises a concern: the country may have been creating a judiciary composed of good test-takers who lack the judgment and temperament to prosecute and judge cases effectively. We were told that this practice was a response to the abuse of more subjective methods in the past. The NAD, interestingly, which is said to employ the cream of the prosecutorial staff, supplements the exam with an interview, as does the HCCJ. The recent changes to the NIM's entrance and graduation exams and the laws governing the evaluation of judges are aimed at addressing this problem.

262. A proposal is afoot to change both the venue and periodicity of performance evaluations. The venue would be changed to the courts of appeal, thus judges in courts of first instance and tribunals would be evaluated not by their peers but by their superiors. The evaluations would also be conducted at five-year, rather than three-year, intervals. Candidates for promotion, however, would be evaluated at the time their promotion was under consideration. Whether this would improve the quality of the evaluations (and reduce the proportion of judges ranked "very good") remains to be seen. So far it is just a technical proposal.

263. According to the PM, the procedure for evaluating prosecutors is much the same as for judges. Prosecutors are evaluated every three years, with provisional evaluations in the interim.

Salaries

264. The salaries of judges, prosecutors, and auxiliary staff are all set by common legislation that applies to all public employees (or more precisely, all staff paid from the government budget). Individual salaries are determined by multiplying a common reference value by a coefficient specific to each position, and adding any applicable bonuses.⁸² The current system of coefficients was put in place in 2006. Although the reference value has changed, the coefficients have not, thus salaries have changed in absolute, but not relative, terms since 2006.

265. Bonuses include an automatic increase for length of service, awarded in five-year intervals. Until recently, employees in the judiciary received a 25 percent bonus for stress and a 15 percent bonus for occupying positions requiring confidentiality. This has been abolished. Each level of the court system also has bonuses. *Grefieri*, for example, receive a 3 percent bonus in courts of first instance, 5 percent in tribunals, 7 percent in courts of appeal, and 10 percent in the HCCJ.

266. In the 1990s, low salaries prompted staff (particularly judges) to resign and take more lucrative positions in the private sector. Salaries have since been increased. Although the austerity measures that took effect in July 2010 included a 25 percent decrease in wages for all public employees, they lasted only six months. Effective January 1, 2011, all public sector wages were increased 15 percent. Wages were raised another 8 percent in May 2012 and 7.4 percent on January 1, 2013. This increase has taken salaries above their pre-austerity levels, at least in nominal terms. Wages for judges are now among the highest in the public sector.

267. Preliminary data suggest that wages in the judiciary are competitive with those in the private sector: a judge with 20 years of experience earned RON7,600 a month in 2012

⁸² The reference value in 2010 was RON705.

(table 5.4). This is roughly 2.5 times the average wage of persons employed in “professional, scientific, and technical activities” in January 2012, according to the most recent labor force survey. Even grade 1 *grefieri* with only five years’ work experience earn more than such employees.

Table 5.4: Average Monthly Salaries, Selected Positions in the Judiciary, 2012 (RON)

Service (years)	Judge	MOJ <i>grefier</i> ^a	Prosecutor	PM <i>grefier</i> ^a
> 20	7,600	3,678	8,235	3,628
15-20	7,250	3,599	7,765	3,402
10-15	6,800	3,441	7,322	3,366
5-10	6,300	3,204	6,040	3,154
3-5	4,931	3,047	5,433	2,740
< 3	3,173	3,047	4,830	2,740
Intern (<i>stagiar</i>)	2,468		3,393	

Source: Team elaboration based on statistics provided by SCM, MOJ, and PM.

a. *Grefier*, *grefier*-statistician, or *grefier*-documentalist, grade 1, with college degree.

268. Judges and prosecutors also benefit from generous pensions. As recipients of so-called service pensions, they can retire with full benefits after 25 years of service, regardless of age. Thus many are eligible to retire in their early fifties. Many judges nevertheless continue to work past their retirement date, reportedly because they fear that their pensions might be reduced by future laws (a risk referred to as legislative instability). Before 2010, *grefieri* were also permitted to retire with full pension benefits after 25 years’ service, but from that year, they had to meet the additional criteria applied to most other pensioners: a minimum age of 60 (for women) or 65 (for men).

269. Given relatively generous compensation, the judiciary as a whole is said to have little difficulty attracting and retaining qualified staff. As noted, vacancy rates are fairly low in the court system, although they are far higher in prosecutors’ offices. The NAD is reported to have particular difficulty attracting staff. Like the rest of the judiciary above courts of first instance, the NAD relies entirely on internal promotion to fill positions. Salaries for prosecutors in the NAD are equivalent to those for prosecutors attached to the HCCJ. Prosecutors from the higher judiciary are reportedly reluctant to transfer to the NAD, however, as the positions are highly stressful and generate unwanted media attention. The ranks of the NAD are therefore filled by more junior staff, for whom a transfer to the NAD represents a steep pay increase. After several years, these people can transfer back to the normal prosecutors’ offices. Until recently, such staff could retain their NAD-level salaries (but no more).

270. A plan is under consideration to restructure the entire pay and grading system of the public sector. This has been a long time in preparation (prodded by a series of World Bank Development Policy Operations) and is yet to be implemented. Law 330 of November 2009 sets out the principles of the new simplified and uniform pay and grading system. Positions would be classified into grades based on complexity, importance, and required educational background and competencies. Each grade would be assigned a corresponding salary coefficient. Most bonuses would be incorporated in the base wage.

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271. Legislation authorizing the reform was enacted in January 2010, providing for the reform to be phased in over 2010–15 and establishing elaborate provisions for the transition. Among other things, people in positions subject to wage reductions would be “grandfathered”—that is, they would be protected against any absolute reduction in their salaries (from the December 2009 level). But the government so far has declined to implement the new system, perhaps because it cannot afford to—grandfathering, for example, can be expensive—and it is under macroeconomic constraints. Under the 2010 Fiscal Responsibility Law 69/2010, the government is required to reduce the aggregate wage bill as a share of GDP.⁸³ In theory, this could be accomplished by reducing salaries, reducing staff numbers, or increasing GDP. But if GDP growth remains low and staff numbers prove hard to trim, it could be a long time before the government is in a fiscal position to implement the new pay structure. The impact it will have on the wages of staff in the judiciary and therefore on the judiciary’s ability to attract and retain qualified staff remains to be seen.

Conclusion

272. Numbers of magistrates, their salaries, and entry-level training for their professional activities seem at least sufficient and possibly more than adequate. There are some reservations on training in, for instance, ECRIS and general courtroom management, and preparation for handling more specialized legal matters. Numbers of *grefieri*, however, are low, and while those trained in the NSC seem sufficiently qualified, perhaps even somewhat overqualified, questions have been raised about those hired outside this system to fill positions in individual courts and prosecutors’ offices. For new entries and continuing legal education, the limited capacity of both training institutes is a bottleneck. If, because of financial constraints, their capacity cannot be increased, better systems for external recruitment might be devised. The present system probably discourages good entrants for magistrate positions, while for *grefieri* quality control is an issue that might be addressed more systematically and strategically.

273. Non-judicial professionals, too, appear to have significant gaps, and the practice of seconding magistrates and clerks to these positions not only leaves more vacancies in their original work units but is also unlikely to guarantee best results. SCM’s personnel management focuses largely on recruitment and career management, and has no visible human resources planning either to identify how new practices and changes in demand will affect the types of skills and staff required or to find ways to use current staff more efficiently. This approach is particularly evident over the introduction of the four new codes, where demand for staff is based largely on the assumption that more people will do more of the same work, despite some evident changes in work processes.

274. Because human resources “management” is not coordinated with other inputs (such as ICT) or with an eye to the longer-term budgetary impacts, the fiscal funding for other types of investment continues to narrow. This is partly because the wage bill represents a large and relatively permanent proportion of the overall budget, and partly because new personnel automatically require space and equipment. In the days of rapid economic growth and expanding budgets there was no apparent problem—unlike now.

⁸³ The Fiscal Responsibility Law itself does not set out these targets. It merely requires the government to reduce personnel expenditures to a target percentage of GDP in 2011 and 2012, set out in the government’s fiscal strategy.

5.2 Human Resources as Independent Professionals

275. This section covers independent professionals in some detail,⁸⁴ as their actions are vital to overall system functioning. They are the interface between many private actors and the state system, do work that might otherwise be assigned to state actors, and have their own perspectives on system problems and their causes. They are also registered with, and to a greater or lesser extent overseen by, the MOJ.

276. The most important categories are private attorneys, notaries, bailiffs and, most recently, insolvency practitioners. Per common European practice (CEPEJ, 2012), all must have law degrees and further accreditation, usually by their own professional association. Only the first three were reviewed for this report.

277. Paralleling the situation of magistrates, entry into any of these professions requires (with a few exceptions, as noted) that applicants with law degrees take an entry exam, perform an internship with an experienced professional, and pass a final exam before full accreditation.⁸⁵ The national organizations and local chambers that manage this process also are responsible for overseeing performance, receiving and investigating complaints, and disciplining malfeasants. Where behavior involves criminal activity, it theoretically should be reported to the PM,⁸⁶ although interviewees expressed some doubts on whether this happens, and on the efficacy of internal disciplinary proceedings.⁸⁷

278. Under the shadow of economic difficulties in recent years, all three associations seem inclined to control entry still further. Notaries have always done this, but it is new for lawyers and bailiffs. Entry examinations have become harder, there is less inclination to let magistrates qualify for entry long before they leave their current positions, and alternative routes to entry are being reduced. The lawyers have taken the hardest stance here, insisting that a magistrate resign her or his position within two and a half months of qualifying for private practice. The bailiffs apparently still allow magistrates to “reserve a place” by passing an examination, even if they have no immediate plans to retire or resign.⁸⁸

Private Attorneys

279. The roughly 28,000 lawyers practicing privately gives a ratio of slightly less than 150 per 100,000 inhabitants, around the average for Europe (EU members and non-members) (CEPEJ, 2010). More than half are women (as are law students). Members of a private law firm only half-jokingly suggested that they needed an affirmative action program for men as they had difficulty

⁸⁴ They are not emphasized in the further analysis.

⁸⁵ Entrance to any of the series of legal professions (in addition to those listed here, in-house counsel for public or private institutions) does not require admittance to the national bar. This explains why, as in many other European countries, national organizations (including the magistracy) have traditionally offered easier entrance requirements for those coming from accredited exercise in another legal profession.

⁸⁶ This is ordinary prosecution or the specialized DIICOT, which handles terrorism, drug trafficking and organized crime, or NAD, which investigates and prosecutes corruption.

⁸⁷ This reported issue is not about the adequacy of the legal framework (although it may have some weaknesses), but rather about what happens in practice.

⁸⁸ The apparent reason for doing this is the anticipation that entry examinations will only become more difficult as organizations make further efforts to limit membership.

recruiting qualified candidates. As with the other independent professionals covered, however, leaders of the national and local associations visited tended to be men.

280. In theory and by law (Law 51/1995) attorneys in private practice are all accredited by a single National Union of Romanian Bars and its local chambers, although a certain number (estimated in interviews at about 3,000) are affiliated with a second, parallel association (box 5.3) or simply practice without official accreditation—illegal but apparently not adequately controlled (see just below).⁸⁹ Many interviewed lawyers and members of local chambers claimed that there is not enough work to go around, in part because of illegal competition (the parallel bar) and in part because of an inclination of private parties to access the courts without legal representation and of the judges to deal with these *pro se* plaintiffs and defendants in that status.⁹⁰

Box 5.3: A Parallel Association

Private practitioners reported the issue of a parallel bar association (the “constitutional bar”),¹ of not entirely clear legal status.²

Initially composed of former magistrates who entered private practice after retiring, it is now said to include recent graduates of private universities (some of them little more than what are sometimes called diploma mills) with no ability or inclination to go through a rigorous accreditation process. Some of them are said to operate in the gray economy (with illegal or simply unregistered enterprises); however, others provide assistance to ordinary clients, and—as claimed by the National Union of Bar Associations and its chambers (in interviews)—succeed in representing clients in court because judges do not ensure that they are registered with the “legal bar.”³

1. This was the name used by interviewees and recognized by others who did not mention it spontaneously. It is not clear, however, whether all “independent practitioners” belong to such an organization or whether this is a term used for any attorney practicing without accreditation by the National Union.

2. In interviews we were varyingly told that it was legal, illegal, or “did not matter.”

3. Again comments from the MOJ insist that judges by law must check that a lawyer is registered with the bar, and bar members insist that they do know. The extent of implementation of this law is, however, unclear, and some further research would be useful.

281. Romania’s public defense and legal assistance program provides work for some private attorneys by paying them to work for defendants in criminal cases or for other parties who qualify for assistance through a means test. Amounts for this service are included in judicial budgets, although judges assigning the work seem to have little insight into whether they are within or beyond the budgetary allocation. Where more funding is needed, it is usually requested in supplementary budgets. We found no centralized records on how many people received this service or what it cost, although some courts of appeal and local chambers of the national bar association could provide figures.

⁸⁹ The relevant law stipulates fairly serious penalties for those operating outside the formal legal conditions—imprisonment between six months and three years as well as a fine. However, lawyers interviewed, all duly affiliated with the National Association, claimed that these illegal practices continued.

⁹⁰ Judges estimated that 50–60 percent of those going to court arrived without legal representation. Unfortunately, the judiciary’s database is incomplete on this area. Also, some who arrive unrepresented later acquire a lawyer (state subsidized or with their own funds), but it was reported that the appropriate changes were often not made to the database.

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282. The usual fees of RON100–300 for representing a defendant through a first instance trial (additional fees are paid for appeals) are clearly not large. Yet this finding is incompatible with the claim voiced in one court (and reportedly based on a study by a court of appeal judge) that public defenders earned more than judges. Private attorneys are also hired by state entities to represent them in litigation. The fees here are far higher, and observers claimed the process was far from transparent. The bench and the bar seem divided on the quality of service provided, and in some cases, both judges and prosecutors have recommended a reduction of fees.

283. Private attorneys are the only independent legal professionals (except for those working as in-house counsel) not to have their fee scales set through an agreement with the MOJ. In an effort to assure the livelihoods of its members, the Cluj chamber reported an attempt to set minimum fees, but said this did not succeed as there were always lawyers willing to work for less. That so many retired judges have joined the bar suggests that people who are competent (or have contacts) can make a living at this work, but current demand will probably not support the ever increasing number of lawyers graduating from the expanding number of private law schools.⁹¹

Notaries

284. As elsewhere in countries following the continental system, notaries are seen as a relatively privileged group. They were the only justice sector actors interviewed who did not complain about excessive workloads, lack of work, or low remuneration. According to the National Union of Romanian Notaries, there are 2,364 notaries in operation and two-thirds are women. Law school graduates may become notaries just as they become lawyers or bailiffs—through an initial exam, an internship, and a final examination. For members of other specialized legal professions with at least five years' experience, only an exam may be required. Since the numbers and locations of notaries are controlled by law, entry to the profession is limited and a notary is expected to stay in the location she or he is assigned to. Where that location does not afford enough work if there are multiple notaries, one or more may move (assuming a vacancy exists), but the last person is expected to stay or retire in place.

285. Notaries perform functions that might be done by judges or administrative agencies, and in some cases are. Differences are far higher fees and, according to notaries, faster processing. Observers with a common law background may find the role of the civil law notary unclear sometimes, but they should simply remember that in their own countries many of the same services are provided, for a fee, by other private actors, such as brokers and real estate agents in property transactions.

286. Notaries' primary function is to authenticate legal documents (for example, powers of attorney, contracts, transfers of property) but they also can handle some noncontroversial issues like uncontested divorces and the ensuing division of assets. They also may draft contracts and other legal documents for clients, check the contents of those prepared by others, and presumably make some effort to track the provenance of other legal papers. However, interviews revealed that in the case of property deeds or titles, this service does not extend to investigating rights to

⁹¹ Several interviewees suggested that many new law schools were little more than diploma mills. We were unable to investigate how they are accredited, but political connections of those financing the new schools were suspected to play a role.

ownership under the presumption that what is issued by a state registry is based on accurate information.

287. Notaries' fees are set by the MOJ, based on proposals presented by the National Union of Romanian Notaries. They include flat charges and, where transfer of property is involved, a percentage of the assessed value. On these transactions, notaries also collect taxes that are turned over to the state. Although the National Union recently reduced the flat fees through a revision to the MOJ protocol, the notaries have maintained the proportion charged on property transfers and this is an issue that current and potential users mention consistently. Critics also report redundant requirements for authentication of documents—for example for multiple powers of attorney linked to separate stages in a single judicial proceeding. Nonetheless, notaries provide a rapid alternative for those who can afford them to the often far slower courts and administrative offices that offer some of the same services, and in doing so decrease the congestion plaguing the other entities.

288. The ability of the National Union and its chambers to police the actions of their members has been questioned by some observers, as has the quality of assurances provided by a notary's authentication. There are cases where notaries have, intentionally or not, authenticated fraudulent documents. The issue is whether enough fraudulent cases are detected and their authors disciplined. The MOJ reports that this issue has been remedied by Law 77/2012 amending Law 36/1995, but as this is a recent change we cannot say whether the reformed concept of disciplinary liability of practitioners has curbed malpractice yet.

Bailiffs

289. Romania has around 880 licensed bailiffs operating, with roughly 200 of them in Bucharest. Unlike the other two categories, more men than women are bailiffs. The functions they carry out—coercive⁹² enforcement of judgments and what are called executive or enforceable titles⁹³—are vital to the administration of justice, as without effective enforcement, a judgment or a legal title is worth no more than the paper it is written on.

290. As several observers have noted (CEPEJ, 2012; Kennett, 2000), even within the EU, how this function is performed varies enormously. Romanian bailiffs now resemble French *huissiers* (independent, bonded professionals), but before 1995 they were salaried workers within the MOJ. In other European countries, enforcement may be conducted by judicial employees or involve some mix of modalities. There is no agreement on any single best system, and where courts do not handle execution directly, disagreement is widespread over their role in supervising execution, before or after the fact. In Romania, as nearly everywhere, a debtor (or creditor) may protest how execution is carried out, but the issue is the extent and timing of further oversight by the judiciary or executive.

⁹² Coercive should not be taken too literally. It simply means that the debtor has refused to pay or the tenant refuses to leave the rented premises. In debt cases, bailiffs do what is described as direct enforcement (for example, repossession of movable or immovable property given as collateral or the object of the debt) and indirect enforcement (for example, seizure of accounts, garnishment of wages, or seizure and sale of assets); they also conduct evictions and repossession of property for which full payment has not been made (direct enforcement).

⁹³ As elsewhere in Europe, enforceable titles are defined under the respective civil codes, and usually include contracts, checks, and IOUs, which constitute proof of a liquid debt without need for judicial verification.

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291. Like lawyers and notaries, Romanian bailiffs have their own national organization, the National Union of Judicial Bailiffs, which along with its local chambers serves, among other tasks, to accredit entrants, monitor performance, and represent members' interests before the MOJ, which performs a sort of arms-length supervision of the profession.

292. Fees for bailiffs' services are established through a protocol signed between the National Union of Judicial Bailiffs and the MOJ. Bailiffs defend their fees as reasonable given the amount of work they have to do, although some service users interviewed pointed to the share of value they capture on recuperating large monetary sums as an issue:⁹⁴ although the proportion drops for higher amounts, creditors still perceive it as too large.⁹⁵ There have also been recent disputes with banks over whether bailiffs' expenses should be reimbursed separately. This was the usual practice until the economic crisis put the banks in difficulties. Finally, there are several hundred cases under review by the ECHR having to do with ineffective enforcement, many of them arising in the bailiffs' alleged lack of interest in smaller claims.

293. Apart from some 40 officials formerly attached to the courts (passed to the bailiffs in 2000 and all nearing retirement age), bailiffs must have a law degree, and beyond that have two usual ways of entering the profession: an exam, two-year apprenticeship, and final exam or, for law graduates already accredited in another legal profession, an exam (which used to be only on the law governing bailiffs but has recently become more complex).

294. There is a further, one-time exception to this rule—the more than 300 bank bailiffs who were incorporated in 2009. These all have law degrees but became bank bailiffs through what is reported a much easier process, often based only on an interview with the bank that hired them. Whether these additional bailiffs pose problems with, possibly, poor quality work or their alleged usurpation of already scarce jobs remains unclear. The bailiffs who entered through the examination and internship program pointed to their inclusion as an issue, but could cite no other specific problems beyond the “injustice” of their not having to prepare in the same onerous fashion.

295. Insolvency practitioners, a fourth category of independent professionals, are covered in more depth by a separate World Bank study on insolvency. Two aspects of their work, however, affect the bailiffs and therefore deserve mention. First, interviewees who had been involved in parties to insolvency proceedings had the impression that entry into the profession was very easy. Although it has a national organization (the Functional Review team did not meet with it), outside observers seemed to believe that “accreditation” was fairly informal and that appointment to a specific case (by the presiding judge) was insufficiently transparent, often involving conflicts of interest (where the debtor in particular suggested the expert).

296. Second, the new bankruptcy law, because it freezes collection of any debts, has been objected to by both groups inasmuch as it stops the bailiffs' actions and, according to the creditors (banks and private firms), leaves them very little at the end as, during the long

⁹⁴ The same mechanism applies to notaries.

⁹⁵ The formula is 10 percent of the amount recuperated up to RON50,000 and 3 percent of any amount beyond that.

liquidation process or during a protracted declaration of insolvency, assets tend to “disappear” while the liquidators continue to collect a fee for their services.⁹⁶

297. Bailiffs mentioned other issues—a lack of access to various kinds of records needed to identify assets, delays and fees charged for use of many registries and databases, some issues about territorial competence (as they may be collecting against a debtor with holdings in many jurisdictions), and finally, the late 2009 Constitutional Court decision that all enforcement proceedings have to be first reviewed by a judge (a priori control). We note here only that this is not a universal practice or standard in the EU, where debates continue over its necessity and possible negative effects (largely delays).⁹⁷

A Possible New Category—Judicial Clerks (Grefierii Judiciari)

298. During 2012, a bill was under consideration by Parliament to turn judicial clerks (the *grefierii judiciari* working in both the courts and the PM) into another set of independent professionals. The team remains unclear on the rationale behind this initiative, which appears to be backed largely by the clerks’ union (which does not include all clerks but only, according to sources, about one third of them), by the MOJ (which would also oversee and negotiate directly with this group and take over responsibility for the NSC), and potentially by others.

299. The SCM, however, has opposed the law as the clerks work for and within the courts and prosecutors’ offices, arguing that giving them independent status would make them accountable to no one, except possibly the MOJ. In the team’s opinion the proposal is positive in recognizing different types of clerks with different types of responsibilities, but in that some of these duties are quasi-judicial, this is still more reason for them to be under the control of the courts, PM, and the SCM. Moreover, given reportedly inadequate supervision of other independent professionals by their own national organizations, it is not clear in the team’s opinion how well this kind of supervision would work for the clerks.

Conclusion

300. Romania has the complement of independent legal professionals typically found in civil law systems. Their organization and operating rules are in line with EU practices (although some of these practices vary considerably). The issues posed by and for these professions are also not atypical—a limited amount of work for an ever growing numbers of private practitioners, users reporting high fees and (for notaries) requirements for their services that are sometimes seen as redundant, and questions voiced by some as to how much work they are really saving state institutions—because they are seen as too expensive or because magistrates are perceived to be too willing to fill in.

301. Some recent legal changes have complicated matters. The Constitutional Court decision in 2009 on a priori control is the most prominent. The final issue is how well the respective national associations and local chambers are overseeing members’ performance, and the consistency of issues raised in interviews suggests that there is some room for improvement.

⁹⁶ A similar issue is reported in the United States (*New York Times*, June 6, 2012: 10-SR) where bankruptcy lawyers’ high and not very transparent fees are coming under attack, especially as they are the first paid even as employees lose jobs and creditors find themselves receiving only “pennies on the dollar.”

⁹⁷ The consequences of the decision were reviewed in chapter 3.

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Overall, however, these independent professions seem to be the least of the problems explaining reported dissatisfaction with the sector's performance.

6. FINANCIAL RESOURCES AND BUDGETING

302. The financial management component of the Functional Review is intended to assess the effectiveness of financial resource management in the judicial system (box 6.1). It focuses on four issues: institutional arrangements and the budgeting process; trends in budgetary allocations, income generation, and sector expenditures; management of the courts' budget; and financial planning and performance. The purpose of the analysis is to identify opportunities to strengthen the budgetary systems and procedures that govern resource allocation, in order to ensure that budgetary allocations are made in response to managerial needs and are executed effectively and efficiently.

Box 6.1: Importance of Financial Resources and Budgeting to Strategic Management

Financial resources and budgeting cut across all performance measurement areas. They are, however, a particularly important aspect of strategic management: in order for strategic management to be successful, financial resource allocation needs to be tied to sector performance objectives.

It would be a fundamental misunderstanding to think that this means that the primary focus should be to reward better-performing entities with more resources and punish less-performing ones by giving them less. It is about setting performance targets for efficiency, quality, and access, and allocating financial resources in a way that these targets will be achieved.

6.1 Institutional Arrangements and the Budgeting Process

303. The budgeting process follows the procedures detailed in the Public Finance Law 500/2002 (box 6.2) and the provisions of the Fiscal Responsibility Law 69/2010, which together establish the rules for budget formulation; in-year financial planning and release of funds; payment processing; accounting and reporting; internal financial control; and internal audit. Under these laws, the Ministry of Public Finance (MOPF) establishes the expenditure ceiling for each primary spending authority in the judicial sector—the MOJ, PM, HCCJ, and SCM. The ceilings are derived from the previous year's expenditure and are updated to reflect the macroeconomic situation.

Box 6.2: Annual Timetable for Budget Preparation

By March 31—Macroeconomic indicators for both the next budget year and the subsequent three years are developed by the relevant bodies.

By May 15—The MOPF submits the objectives of the fiscal and budget policies for the budget year and subsequent three years, with the expenditure ceilings by primary spending authority to government for approval. The government presents its main macroeconomic and public finance policy lines to the parliamentary budget, finance, and banking committees.

By June 1—A guidelines letter that states the macroeconomic circumstances in which the budget will be drafted, the methodologies for its formulation, and the expenditure ceilings approved by government is sent by the MOPF to the line ministries. If changes in the macroeconomic circumstances require adjustment to the expenditure ceilings, they are to be made by government at the proposal of the MOPF.

By June 15—The MOPF notifies the primary spending authorities of the adjusted expenditure ceilings to allow finalization of budget proposals.

By June 15—Primary spending authorities must file with the MOPF their budget proposals and annexes to the budget for the next budget year. The proposals must observe the expenditure ceilings and provide estimates for the subsequent three years, with detailed background information and documentation.

By August 1—The MOPF examines the budget proposals and discusses them with primary spending authorities. In the event of disagreement, MOPF decides on the final budget proposals.

By September 30—The MOPF, with the budget proposals of primary spending authorities, prepares the draft budget law and draft budgets for presenting to government for endorsement.

By October 15—Parliament approves budgets as a whole, by section, chapter, subchapter, title, article, and paragraph (as applicable), and by primary spending authority, for the budget year, and the commitment credit for multiyear programs.

Source: Government of Romania, Public Finance Law 500 (2002).

304. The two largest spending authorities in the judicial sector, the MOJ and the PM, use a “bottom-up” budgeting process to develop their budget proposals and initially draft a budget based on “needs” identified by lower-level units. The tertiary spending authorities (tribunals for the MOJ and prosecutors’ offices attached to the tribunals for the PM) prepare their own budgets and the budgets of the district courts under their jurisdiction. These proposals, however, often greatly exceed past spending patterns and are derived without any performance measures. They are then sent to the secondary spending authorities (courts of appeal for the MOJ and the prosecutors’ offices attached to the courts of appeal for the PM), which prepare their own budgets (which often again exceed realistic limits) and aggregate all the budgets from the tribunals under their jurisdiction. This consolidated budget proposal is then sent to the national offices of the MOJ and the PM.

305. The MOJ and the PM then aggregate the budgets from all the secondary spending authorities and add in their own budget for administration and national programs. The total budgets are then sent to the SCM, a legal requirement, and then the MOJ submits the full budget request to the MOPF, similar to other line ministries.

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306. At this stage, the MOPF rejects these budget proposals as they grossly exceed the respective ceilings and forces the sector agencies to reduce their budgets. These cuts are made by the financial management departments in the MOJ and the PM, which use the following criteria: historical spending trends; preliminary spending for the current year; and the monthly expenditure average of each secondary chief of account. Because wage levels are established by law, cuts are made to goods and services and to capital expenditure.

307. A budget that respects the initial established ceiling is then resubmitted to the MOPF for approval. If the MOPF approves the agency's budget, it is sent to the parliamentary committees, which must approve it before Parliament can vote on it. During these last two stages, the head of each sector agency can argue before the parliamentary committees for additional resources, which may be granted.⁹⁸

308. Although the budget structure applied in the public sector in Romania is organized by function, the budget proposals by line ministries are submitted in programmatic form (for now, the MOJ's budget includes estimates for nine programs). This programmatic approach is, however, primarily theoretical, and has limited use in practice as each spending authority manages and monitors budget execution primarily based on chapters, titles, and line items, rather than on programs. Thus, even though the budget is submitted with estimates for programs to be implemented in the coming budget year, there is no incentive to analyze the performance of such programs.

309. Within 15 days of the annual budget law's approval and publication in the Official Gazette, the primary spending authorities submit quarterly budget implementation plans to the MOPF for approval. Once the quarterly targets are approved, the budgetary credits are distributed among the levels of the pyramidal hierarchy of the spending units: the main spending entities distribute the approved budgetary credits between their own budget and the budget of the subordinated secondary authorities; similarly, the secondary spending agencies split the budgetary credits between their own budget and the constituent tertiary spending authorities.

310. Cash is released through monthly "credit openings" submitted by the spending authorities to the MOPF. The monthly credit openings are aligned to quarterly spending ceilings and are accompanied by an annex detailing the activities to be financed. Once the requests are approved, the cash is released to the main spending authorities and the credit openings are recorded in the treasury payment system.⁹⁹

311. Resources cannot be reallocated between line items during the first six months of the budget year without the explicit approval of the MOPF.¹⁰⁰ Ministries can, however, reallocate resources among subordinated agencies as long as they remain within the same budget line. Around July 1 and October 1, there is a rectification process in which the budget of each

⁹⁸ The parliamentary committees usually grant additional resources where the need for urgent and unexpected expenses occurred after elaboration of the draft budget.

⁹⁹ Payments are processed through the Treasury information system, generally within one day, and are based on payment orders brought by the spending authorities to the Treasury branch office. This procedure is required by Public Finance Law 500/2002 and involves much paperwork, due to absence of legal authorization for electronic signatures.

¹⁰⁰ This provision was established by the Fiscal Responsibility Law 69/2010.

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spending agency may be increased or decreased.¹⁰¹ Typically, the MOPF reallocates resources based on in-year budget execution rates, though in recent years most agencies have had their budget reduced owing to the macroeconomic environment.

312. Budget execution is monitored on a monthly basis by the MOJ and the PM through spending reports compiled by both the courts and prosecutors' offices throughout the country.¹⁰² The financial management departments of these agencies also analyze current spending patterns against past spending and the current budget, and prepare quarterly and annual financial statements.¹⁰³

313. The internal control environment follows the Public Internal Financial Control framework, in compliance with EU requirements.¹⁰⁴ But the internal audit function in the judicial system faces several challenges, such as too few staff (as advised to the team by each judicial agency), reduced training budgets, and the short time to implement the audit findings. For example, the MOJ does not have the necessary staff to audit the budget execution of every court each year, and instead must rely on audits produced by the courts themselves. The PM faces similar constraints. There is also a need for all judicial authorities to clearly define their objectives and annual work plans, which would assist internal auditors to monitor progress and performance. A first step in this direction would be to develop multiyear strategic plans that would be discussed and endorsed jointly by all the primary spending entities in the judicial system.

314. The Court of Accounts—the supreme audit institution—also audits each main spending authority annually.¹⁰⁵ Its last three annual reports (2008, 2009, and 2010) have not noted any significant problems in the judicial sector, but its last report covering 2010 noted in its audit of the MOJ that there were certain deficiencies on completeness and reliability of financial information, particularly on valuation of fixed assets.

¹⁰¹ The 2010 Fiscal Responsibility Law specifies that a maximum of two rectifications can incur during a budgetary exercise and only in the second half of the year.

¹⁰² The ongoing World Bank-supported Judicial Reform Project will finance the implementation of an integrated IT resource management system in the judiciary sector. The software will manage human, material, and financial resources and will be rolled out in the entire judicial system (MOJ, PM, SCM, HCCJ, courts, and prosecutors' offices). It is envisaged that the software would improve the reliability and timeliness of financial data, and thus the management and monitoring of the allocation of resources.

¹⁰³ The financial reports include a balance sheet, patrimonial results account, cash-flow statements, and budget execution accounts reflecting all transactions made in the current period. The MOPF also makes publicly available reports on the status of the quarterly budget execution and budget implementation plans by the end of April, July, and October, and a preliminary semi-annual report before the end of July. The reports on budget execution and measures proposed for correcting any deviations are subject to the review of the Fiscal Council, an independent consultative body established with the adoption of the 2010 Fiscal Responsibility Law.

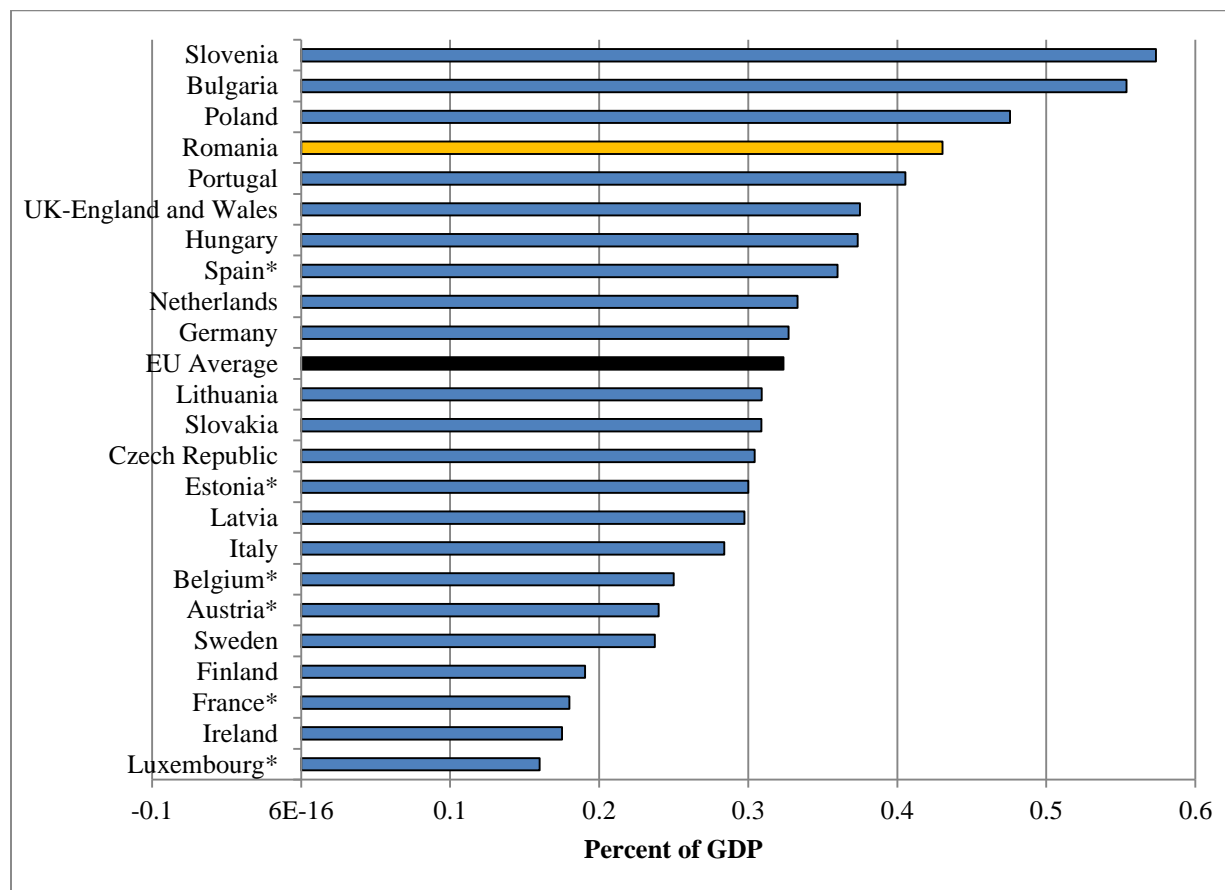
¹⁰⁴ Law 672/2002 on Public Internal Audit, republished on December 5, 2011, established mandatory audits for all the main spending authorities. The internal audit units are monitored by the MOPF Central Harmonization Unit for Internal Audit, which reviews the internal audit work plan and methodologies, delivers regular training activities, and participates in sectoral audits involving several ministries. All activities, including foreign-financed projects, are audited at least once every three years.

¹⁰⁵ The audit of a primary spending agency also includes that of subordinated secondary and tertiary units. For example, the financial audit of the MOJ in 2010 included the audit of nine courts of appeal (Alba, Pitești, Oradea, Brașov, Bacău, Timișoara, Ploiești, Bucharest, and Suceava) and 27 tribunals. The audit also assesses the internal audit function of the entity.

6.2 Trends in Budgetary Allocations, Income Generation, and Sector Expenditures

315. Romania’s overall justice sector budget falls within the upper range of EU countries. In the 2012 CEPEJ report on judicial systems in Europe, Romania allocated 0.43 percent of its GDP to the courts, public prosecution services and legal aid in 2010, significantly above the EU average of 0.32 percent of GDP (CEPEJ, 2012). This finding suggests that the justice sector is not under-resourced (figure 6.1).

Figure 6.1: Courts, Public Prosecution, and Legal Aid in Europe, 2010



Source: CEPEJ 2010 and 2012.

Note: * indicates 2008 data.

316. According to data from the MOPF, Romania’s justice sector budget—defined as the total expenditures of the four principal agencies (MOJ, PM, SCM, and HCCJ) minus the costs of prison administration (also part of the MOJ budget)—fluctuated at 0.38–0.47 percent of GDP in 2008–11 (table 6.1). In 2008, resources increased substantially during the budget year, but in 2009–11 the executed budget was less than the initial budget. The executed judicial budget as a share of the total executed state budget declined from 2.76 percent in 2008 to 1.95 percent in 2011, partly in response to the government’s fiscal stimulus plan, which increased the overall budget.

Table 6.1: Justice Sector Spending in Romania, Share of GDP and State Budget, 2008–12

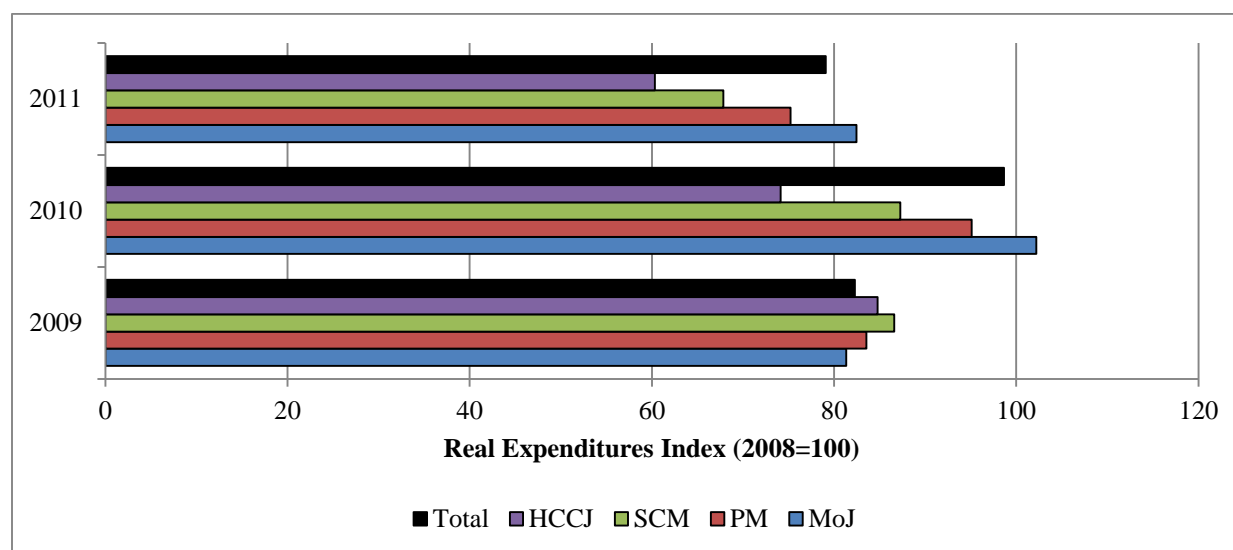
Budget	Share of GDP (%)					Share of state budget (%)				
	2008	2009	2010	2011	2012	2008	2009	2010	2011	2012
Initial Budget	0.33	0.41	0.52	0.40	0.35	2.13	2.15	2.69	2.03	1.85
Final Budget	0.45	0.42	0.49	0.39	—	2.75	2.14	2.38	1.90	—
Executed Budget	0.44	0.39	0.47	0.38	—	2.76	2.16	2.40	1.95	—

Source: Ministry of Public Finance.

— = not available.

317. Sector expenditures recorded a significant decrease after 2008 in real terms, reflecting the pressures of the financial and economic crisis, and again has affected all public sector budgets, not only justice. Total justice sector expenditures declined by almost 20 percent in real terms after 2008 (figure 6.2), a year in which GDP growth reached 9.43 percent. The HCCJ and the SCM have been the agencies most affected. In 2009, GDP contracted by 8.50 percent, grew by 0.95 percent in 2010, and contracted again in 2011 by 0.37 percent. Given the new economic reality, it is more appropriate to consider 2009, the first year of the crisis, as the baseline. In this case, expenditures increased for all justice agencies (except the HCCJ) in real terms in 2010, before falling back across the board in 2011, reflecting the small contraction in GDP.

Figure 6.2: Executed Justice Sector Budget, 2009–11 (RON)

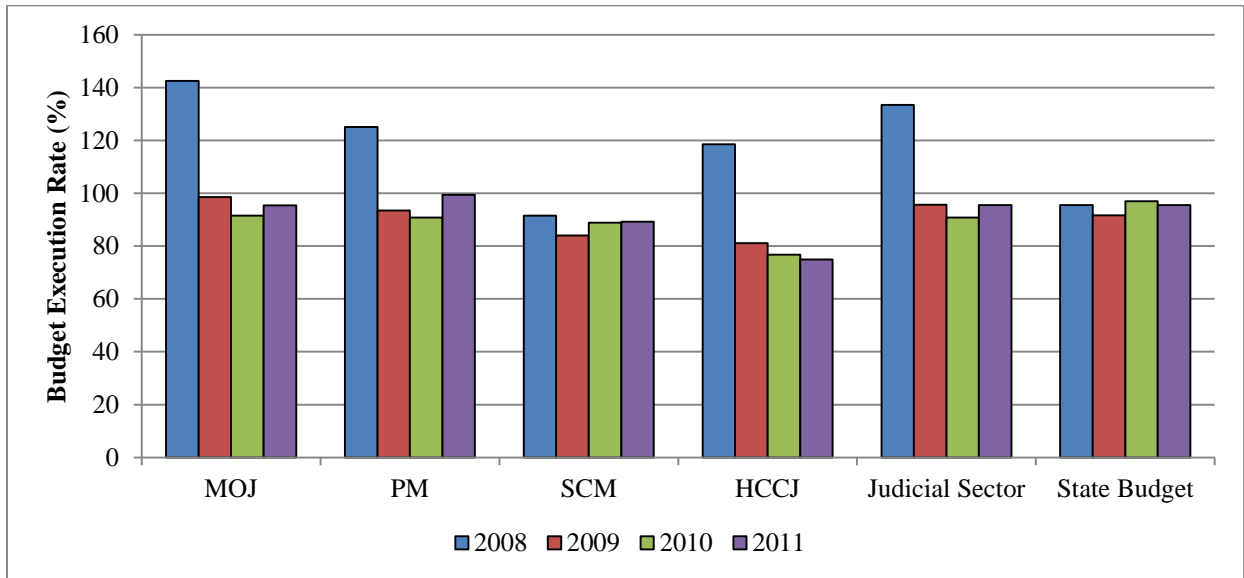


Source: Ministry of Public Finance.

318. For the justice sector as a whole, there has been significant variation in the budget execution rate (defined as the deviation between the initial budget and the executed budget). In 2008, the rectification process provided additional resources and the judicial sector spent 134 percent of its initial budget (figure 6.3). As the economic crisis took hold in 2009, however, the sector budget returned to normal levels, and the execution rate varied at 91–96 percent, similar to the overall state budget. Individual judicial agencies also displayed comparable

variations. This strong performance indicates that budget authorities can execute their allocated budgets.

Figure 6.3: Justice Sector Budget Execution Rate by Entity, 2008–11



Source: Ministry of Public Finance.

319. The majority of the justice sector budget—around 65 percent—is executed by the MOJ, which administers the budgets of the courts. The PM is the second largest entity averaging around 30 percent, and the HCCJ and SCM each about 3 percent. These ratios have been relatively consistent since 2008. Staff costs constitute about 80 percent of total expenditures, goods and services about 10 percent, and domestically financed capital expenditure only 3 percent (table 6.2). External grants and court-generated income (recovered fines, stamp fees, etc.) account for only 1–3 percent.

320. Justice sector institutions are completely dependent on the MOPF for financing. All court-generated income—less than 1 percent of the budget—goes straight to the state budget in accord with the Public Finance Law 500/2002. Because the weights of the expenditure categories are kept relatively constant, increases in the justice sector budget are driven almost entirely by changes in staff costs (either personnel or wage policies).

Table 6.2: Composition of Justice Sector Spending (%)

Expenditure type	2008	2009	2010	2011	2012^a
State budget	98.54	97.12	97.81	99.10	98.66
Staff costs	84.65	77.85	80.52	78.14	82.10
Goods and services	9.01	11.98	10.12	11.64	10.31
Interest on loans	0.37	0.02	0.00	0.00	0.00
PHARE ^b	0.17	0.15	0.26	0.17	0.47
National projects co-financed with external grants	0.00	0.93	1.91	1.18	0.77
Other expenses (scholarships, joint programs to promote the principles of law, democracy, and the rule of law)	1.19	0.47	0.41	0.41	0.51
Social allowances	0.05	1.51	0.17	0.01	0.14
World Bank–supported Judicial Reform Project	0.00	1.01	1.81	4.46	1.24
Capital investment	3.10	3.21	2.62	3.08	3.12
External grant funds	1.42	2.77	2.14	0.78	0.80
Court-generated income	0.04	0.10	0.05	0.12	0.54
Total	100.00	100.00	100.00	100.00	100.00

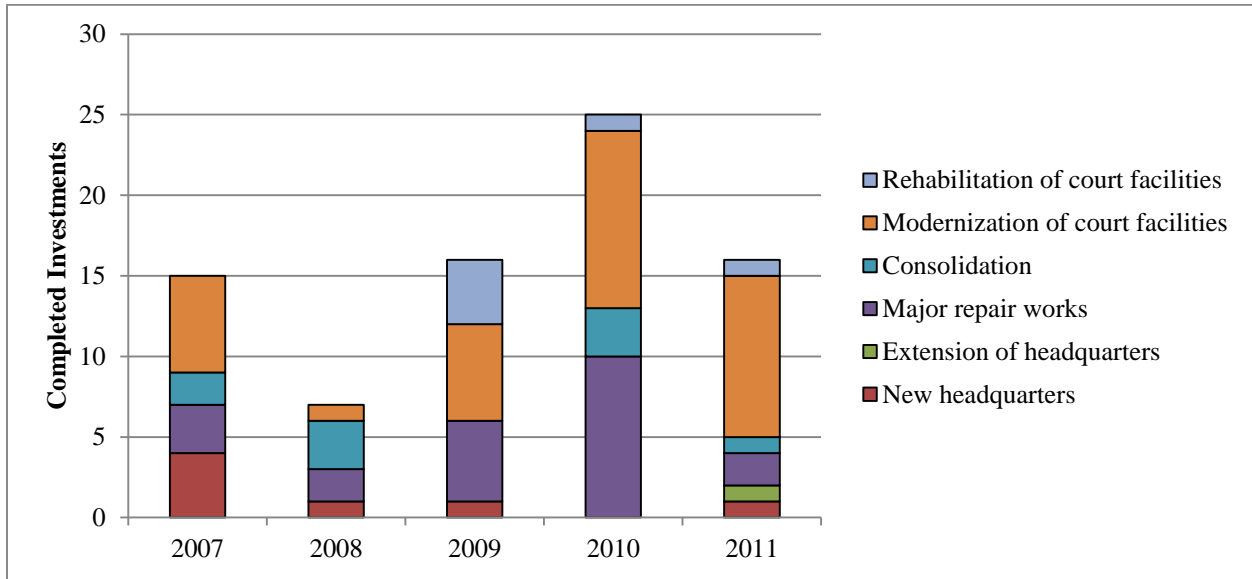
Source: Ministry of Public Finance.

a. Approved. b. A pre-accession instrument financed by the European Union.

321. Despite the constrained macroeconomic environment, capital projects increased after 2008 as the government used a World Bank loan to co-finance court investments,¹⁰⁶ mainly for modernizing court facilities and making major repairs (figure 6.4). The EU has also announced that additional funds will be able to support such modernization over 2014–20.

¹⁰⁶ Under the first component of the Judicial Reform Project, 19 court premises are to be rehabilitated, built, or equipped across the country.

Figure 6.4: Capital Investments in the Justice Sector, 2007–11



Source: Ministry of Justice.

322. The legal aid budget falls among the bottom tier of EU countries and represented only 0.006 percent of Romania’s GDP in 2010, much less than the 0.029 percent EU average and vastly lower than the top performers in the region (figure 6.5). Encouragingly, however, the budget grew after 2008, more than doubling in nominal terms by 2011 (figure 6.6).

323. Bucharest is the largest recipient of legal aid, accounting for 25 percent of total funding in 2011, followed by Cluj, Craiova, and Timisoara. Growth in legal aid has been uneven across Romania: Cluj has seen the largest increase, with its legal aid budget almost tripling in real terms, followed by Ploiesti, Galati, Bucharest, Tirgu Mures, and Timisoara, whose legal aid budget nearly doubled from 2008 to 2011.

Figure 6.5: Legal Aid Budget in Europe, 2010

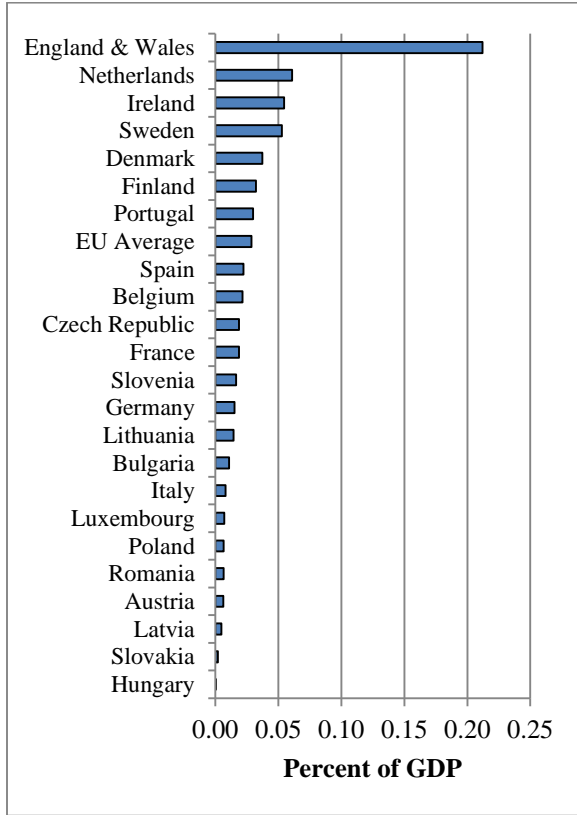
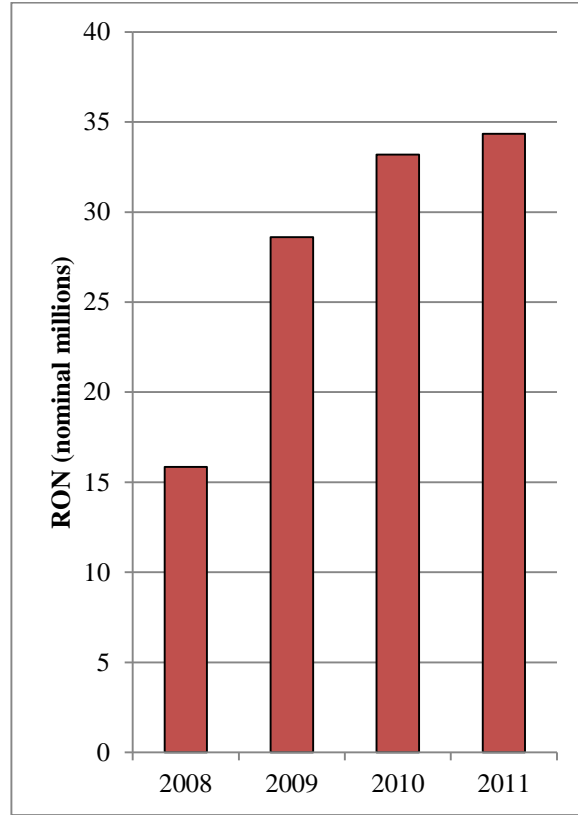


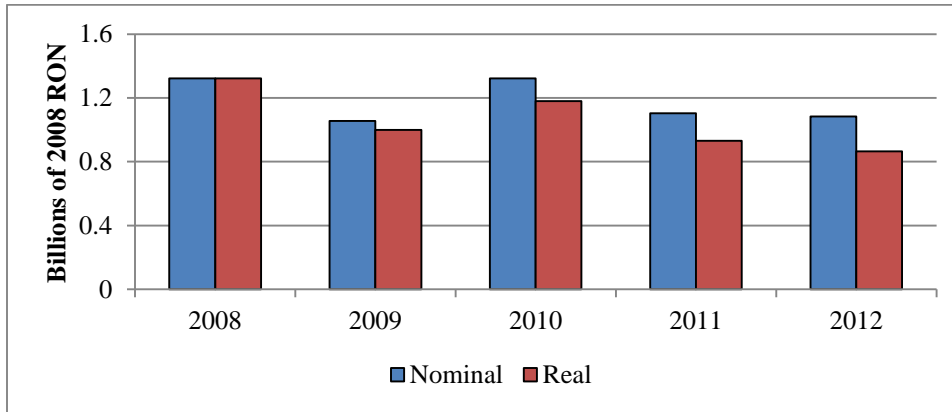
Figure 6.6: Romania Legal Aid, 2008–11



Source: CEPEJ 2012.

324. The budget for the functioning of the courts has declined since 2008, in nominal and real terms, again reflecting the effects of the 2008–09 financial crisis (figure 6.7). In real terms, the courts’ budget fell from RON1.32 billion in 2008 to RON0.93 billion in 2011, a decline of almost 30 percent. Since 2009, however, the budget has been less volatile and the 2012 approved budget mirrors the 2011 executed budget. Staff costs make up about 90 percent of the courts’ budget, followed by goods and services at around 8 percent. The distribution of the courts’ budget has not greatly deviated since the 2008 budget.

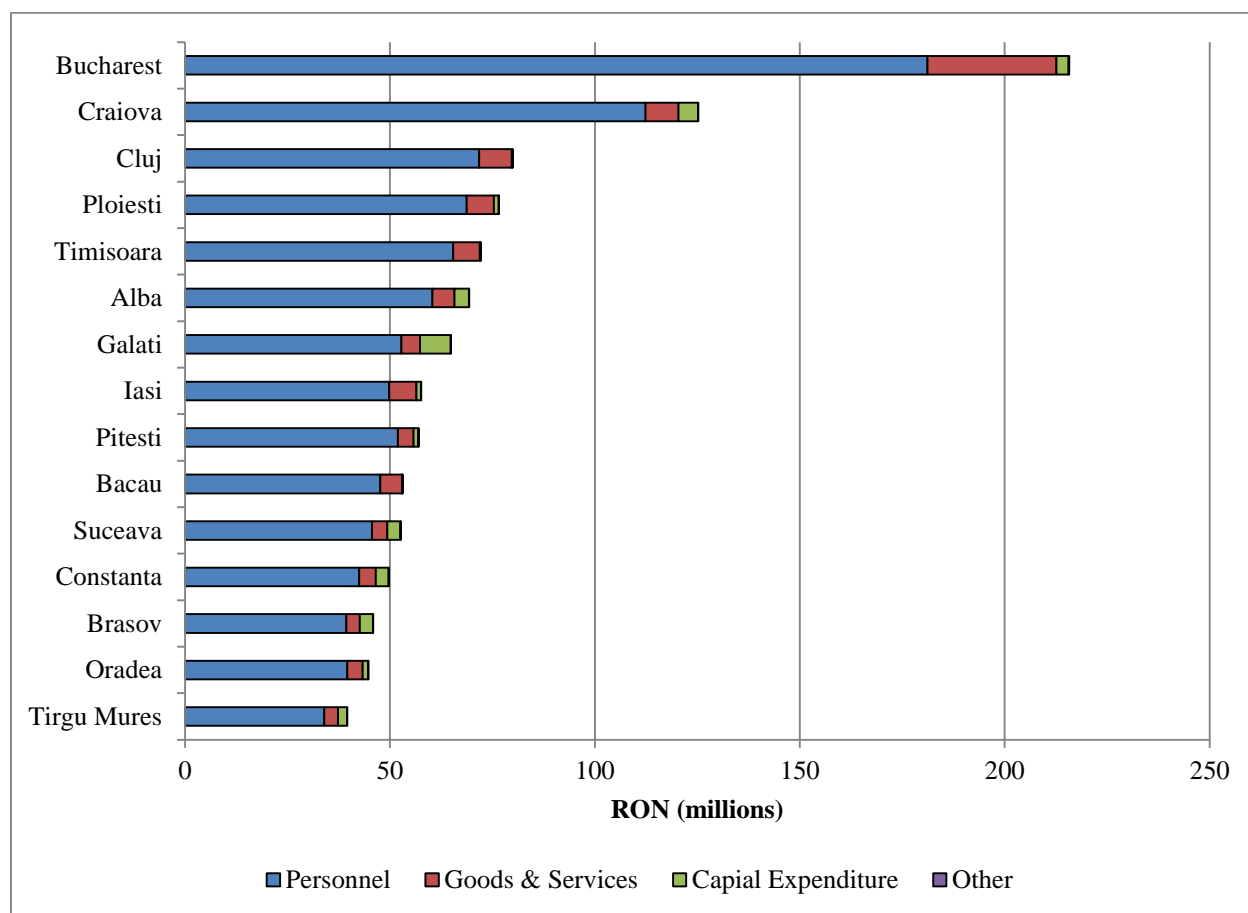
Figure 6.7: Budget of the Courts, 2008–12



Source: Ministry of Justice.

325. Bucharest receives the largest share of the court of appeal budget, followed by Craiova, Cluj, and Ploiesti (figure 6.8). This allocation roughly corresponds to caseload, but it tends to give disproportionately higher amounts to less congested courts—one of the arguments for closing smaller courts. The proportional share of the budget across courts of appeal has not changed much since 2008.

Figure 6.8: Expenditure by Court of Appeal, 2011



Source: Ministry of Justice.

6.3 Managing the Courts' Budget

326. Under Law 304/2004, the courts' budget management was to move from the MOJ to the HCCJ in 2008 to ensure financial independence of the judiciary. The transfer has not yet occurred, however, because it would entail the movement of at least four departments within the MOJ to the HCCJ, which does not have the capacity for the task.

327. The team believes that the courts' budget management should not be decoupled from management of human resources (setting staffing levels, patterns, and distribution, but not necessarily the recruitment and career management functions handled by the SCM) or from that of other resources (mainly ICT and infrastructure investments). It is much harder to ensure proper strategic management of the sector when decisions on the various resources are divided, especially in this time of tight fiscal space. The same logic also applies to the PM which, despite managing its own budget, depends on other agencies to plan human resources.

328. There is no single best practice for the institutional allocation of the budgeting function, and countries have adopted different institutional arrangements (box 6.3).

Box 6.3: A Sound Balance between Judicial Independence and Financial Accountability

A distinction can be made in Europe between the Southern European model (France, Italy, Portugal, and Spain) and the Northern European model (Denmark, Ireland, and Sweden).

In the Southern model, judicial councils fulfill only primary obligations in safeguarding independence, whereas in the Northern model they also have an important role in managing the courts' budget (setting the budget, allocating resources, and supervising and controlling expenditure). The models are also different in their approaches to the PM and the judiciary. The MOJ may manage operations of courts and prosecutors, but where a separate entity (a high court or judicial council) has control of or a greater role in judicial management, the PM either manages its own budget or the MOJ does this.

Nearly all countries have moved from the traditional practice of the MOJ managing both budgets. Yet regardless of where the budgeting function is located, experience shows that effective coordination among entities, clear accountability mechanisms, and indicators are essential to manage the judicial budget well.

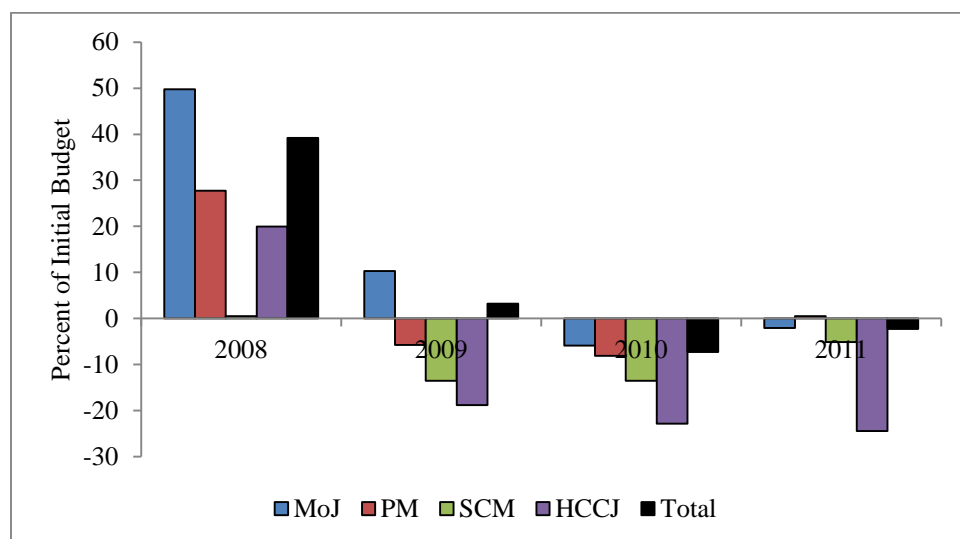
329. If the courts' budget is to be transferred from the MOJ to the HCCJ in Romania, certain issues must be resolved, such as how the government will allocate resources to the justice sector and how the judiciary will be held accountable for the use of public funds. In other countries, such as the United Kingdom, France, and the Netherlands, improved program budgeting methods that are more conducive to increase managerial autonomy have been used as a type of service agreement to ensure more efficient service delivery and better value for money. These agreements have proved extremely effective in managing the tension between the executive's need for accountability of public funds and the judicial sector's view of judicial independence infringed (Webber, 2007). A necessary requirement for this process is effective collection and application of measurable outcomes, and Romania's four judicial agencies have wide scope to improve the program-budgeting process by adding performance indicators and a clearly defined service accountability framework to their annual budgets, which would also shift the budgeting process more toward a strategic management orientation.¹⁰⁷

6.4 Financial Planning and Performance

330. The lack of predictable funding from the MOPF—at the start of the year and during the two budget rectification periods—disrupts strategic management of individual institutions and the sector as a whole. In 2008 the sector budget received an in-year increase of 40 percent of the initial budget during rectification, while in recent years the overall adjustment has been downward, with different agencies faring quite differently (figure 6.9). After 2009, the HCCJ and the SCM (to a lesser degree) had their budgets reduced. The in-year amendments were a combination of the shifting macroeconomic environment, poor forecasts, and the excessive authority of the MOPF to reallocate resources. Ultimately, greater budget predictability will be needed to provide managers with the necessary certainty to make budgetary decisions, which will require efforts by justice sector agencies and the MOPF.

¹⁰⁷ Also see Webber (2007) for a fuller discussion of results-based budgeting in the judiciary in other countries.

Figure 6.9: In-Year Amendments to the Justice Sector Budget, 2008–11



Source: Ministry of Public Finance.

331. There is also scope for improving the budgeting forecasts for legal aid, which has grown sharply in recent years (see figure 6.6). Because the MOJ in its initial budget proposal does not adequately forecast the number of legal aid users it rarely has enough resources, and is compelled to depend heavily on in-year amendments. Thus payments to legal aid lawyers have been typically made with a significant lag, which reportedly causes wide frustration and ultimately affects the quality of their services. We therefore suggest that the MOJ refine its forecasting methods to more accurately assess the annual legal aid requirements.

332. Linking measurable performance measures to budget requests could greatly improve strategic management of the justice sector (Webber, 2007). The budget is still drawn up mainly on the basis of historical patterns and infrequently reflects enough the changes in workload or distribution. Secondary and tertiary credit authorities continue to submit budgets based on “needs,” which undermines strategic management and forces central financial management units to make cuts, often based on extrapolations from amounts allotted in previous years.

333. One problem is the data management system. It does not allow planners to determine the composition of expenditure among tribunals and district courts; whether the allocation of resources matches demand from users; or whether the resources are being used efficiently. Since no performance targets are set (for example, improvement in the normal indicators like clearance rates and time to disposition, or in some of the variables tracked in the standard ECRIS reports) it is also impossible to determine whether incremental additions are producing any positive changes. Likewise, needs-based budgeting is not linked to explanations of why additional resources are needed—except to fill in gaps in historically set staffing levels.

334. Monitoring indicators such as how efficiently cases are adjudicated (costs per case), how quickly cases are adjudicated (time to disposition), and how effectively cases are adjudicated (number of successful appeals, user surveys, and so on) would greatly assist planning processes, help to determine whether resources are being effectively targeted at major policy goals and used

efficiently, and provide much stronger justification for additional resources from the MOPF. In addition, efforts should be made to ensure that the data are accurate, collected on time, and that managers are willing to use performance information in making decisions.

6.5 Conclusion

335. The current financial management system is in transition—very fragmented, in where budgets are drawn up and administered and in their links to the management of other resources. Transfer of the judicial budget to the HCCJ would reduce this effect, although it has already been postponed for several years and would still leave the responsibilities for human resources planning, ICT development, and management of other resources elsewhere. Budgets—whether presented to the MOPF and Parliament, or created from work units’ lists of “needs”—generally remain based on historical patterns and are not linked to results. Monitoring, too, is relatively weak.

336. Justice sector budgets, like those of the rest of the public administration, have been hit by the economic downturn, and adapting to this situation is made more difficult by the sector’s high proportion of fixed costs, largely for staff. Nonetheless, compared with European averages, the courts and prosecution still do relatively well with the amount of resources they receive (as a share of GDP). Yet legal aid, despite recent increases, remains at the low end of the European range (creating more work for magistrates to deal with unrepresented or inadequately represented parties). Finally, financial management does not seem guided by a multiyear framework or sector development plan. Although the budget is submitted along these lines, its day-to-day management does not operate according to the principles of a medium-term performance framework. In a time of budgetary constraints, this framework is recommended.

7. INFORMATION AND COMMUNICATIONS TECHNOLOGY

337. The ICT section of the Functional Review aimed to assess the ICT environment and architecture supporting the Romanian justice sector in light of their contribution to critical business functions (box 7.1). Using an Enterprise Architecture Methodology,¹⁰⁸ the Functional Review team examined the sector not only from the technology viewpoint, but also its key components: strategy, people, information, and business process. These viewpoints collectively influence the maturity of an organization's ICT environment.

Box 7.1: ICT as a Base to Boost Performance

ICT has the potential to enhance performance as measured by efficiency, quality, and access.

Efficiency

- Automation and standardization of justice processes (such as automation of workflows) can lead to process efficiencies;
- Standard documents can be quickly generated and forwarded to the right stakeholders);
- With electronic filing, near real-time feedback is provided, thus reducing delays in procedural processes; and
- Internal stakeholders can have easy access to the information they need to support their work through ECRIS.

Quality

- ICT allows random assignment of cases to judges to minimize the possibility of influencing judgments; and
- Access to information on previous decisions can contribute to more uniform application of the law.

Access

- Through justice portals, citizens and businesses can access procedural rules and the latest information on when cases are scheduled.
- With electronic filing, citizens and lawyers can easily submit the right documentation rather than physically going to the courts and filling out forms manually.

338. The Enterprise Architecture team made several field visits to Romanian courts, consulted with numerous stakeholders, conducted workshops, and performed desk analysis to draw its findings and conclusions. More than 230 requirements,¹⁰⁹ summarized in 21 functional gaps, were voiced by stakeholders and served as the foundation for this analysis. The functional gaps and technology frameworks supporting the ICT review are elaborated in an accompanying ICT

¹⁰⁸ Enterprise architecture is a management practice for aligning resources to improve business performance and help government agencies better execute their core missions (U.S. Federal Enterprise Architecture Program Management Office, 2007).

¹⁰⁹ By far the biggest requirements and gaps were found in the Information area (49 percent), followed by Process (21 percent), Technology (14 percent), Strategy (11 percent), and People (10 percent).

technical report to provide structure and transparency toward developing the recommendations, that is, a target state architecture and a migration plan.¹¹⁰

339. The Romanian judicial institutions have made great strides toward leveraging ICT to improve the performance of the judicial system. Investments in the past few years have led to productivity improvements, process efficiencies, and greater transparency in judicial functions. The dedicated and motivated ICT staff and management at the MOJ, PM, NAD, SCM, and HCCJ are commended for adopting good practices in developing and supporting ICT. Despite limited resources, these bodies' ICT teams have taken the necessary steps to opportunistically modernize the ICT systems to meet specific business requirements. Romania's justice sector is in the midst of a transition to improve its citizen services and government efficiency, as justice systems in other countries have moved toward automating their judicial processes.

340. But simply automating existing processes will not eliminate problems or bring about notable productivity gains. Changes in regulatory framework, policies, and directives, business process design, stakeholder buy-in and adoption, human resource capacity, and the correct skills mix are essential for further process efficiencies—and thus such gains. The functional gaps listed below highlight the key areas requiring improvement.

7.1 Strategy

341. *Need for a more coordinated and integrated ICT strategy.* The lack of a comprehensive, well-defined, and clearly communicated ICT strategy and robust governance structure has led to suboptimal IT investments with several fragmented and duplicate solutions supporting the same business functions.

342. The ICT Strategy for the Judicial System 2010–15 articulates the business and technology drivers and lists all the in-train and planned ICT investments. Twenty-six projects worth around €60 million are listed as either ongoing or proposed, but given the lack of an overall strategy, it is unclear that they are addressing the sector's most critical needs.

343. The ICT Strategy therefore needs to be anchored on a comprehensive definition of the scope, major goals, and business objectives and areas of focus of the Romanian judiciary system. It has to be endorsed and supported at the highest level of management. It needs to include the following components as well: definition and communication of the strategic priorities, a comprehensive plan of action across all ICT efforts and investments with clearly defined trade-offs; and supporting arrangements (such as organizational, policies and regulations, human and financial resources) for executing the strategy.

344. In September 2012, the MOJ launched an initiative to rationalize and consolidate the ICT portfolio across all judicial institutions. Several workshops were conducted with various stakeholders. The ICT Strategy for the Judicial System 2013–17 reflects the consensus achieved through this initiative; it has been approved and endorsed by the senior management of all Romanian judicial institutions.

¹¹⁰ See accompanying full report: "Romania Judicial System: Information Technology Architecture Review."

345. *Need for ICT governance mechanisms.* ICT investment management are reactive, tactical, and do not sufficiently leverage economies of scale. A fair amount of ICT fragmentation and duplication has been found, including multiple instances of the same application, multiple e-mail platforms, and various local solutions executing the same business functions (for example, human resources and finance systems). ICT spending and implementation are managed separately by the institutions, which have no central pool of funds for ICT investments that remain dispersed across the MOJ for courts, PM for prosecutors, SCM, and HCCJ. At the same time, enterprise applications supporting critical line functions are collaboratively managed by ICT teams.

346. Given the existing organizational framework and funding models (where each institution is a standalone budget holder), strong ICT governance mechanisms will position Romania's judicial sector to direct ICT spending toward agreed-on, high-priority areas with maximum impact on improved services, increased accountability, reduced duplication of efforts, and greater collaboration and transparency. A move toward a multi-tiered enterprise-wide governance structure will enable the sector to realize economies of scale and eliminate siloed, one-off solutions.

347. Recognizing this issue, in September 2012 the MOJ, through the institutions of the justice system, formalized the role of the ICT Governance Committee, a high-level steering committee of senior management (both business and ICT) across the judicial institutions. The committee endorses the ICT Strategy and ensures its alignment with the overall business strategy; it prioritizes the ICT investments to ensure that ICT spending is directed toward agreed-on, high priority areas with maximum impact of improving the functions of the judicial sector.

348. This new governance arrangement should have an IT shared services model for provisioning of enterprise common services (for example, infrastructure services and centrally supported application services). The service delivery model needs to address the process and functional relationships across the different operational units within the judicial system, as well as the funding strategy. The ICT Governance Committee attributions need to include decisions on business process standardization, establishment of shared services supporting common functions and addressing institutional constructs to optimize the business value of technology investments.

7.2 People

349. *Need for strengthening ICT capability.* There are more than 700 ICT staff in the justice sector, including the National Trade Registry Office (NTRO) and the penitentiary system. The ICT teams primarily focus on managing and administering IT. Applications development is conducted by external firms.

350. Although some progress has been made, ICT has not yet been established as a professional career. ICT staff, in general, is challenged with meeting the increasing demands for their time and support, lack adequate professional training in a field that is constantly evolving, and struggle with outdated technologies. They are reliant on external vendors to fix software issues, resulting in long delays for “quick fixes,” higher costs, and an accepted user culture to wait for rather basic changes and upgrades. The limited in-house capacity and knowledge (not to

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be confused with talent) is further exacerbated by paucity of technical documentation (such as software architecture, database design, and configuration specifications). The lack of sufficient in-house ICT staff (with varying professional skills levels) and of adequate resources raises costs and vendor reliance, and lower capacity to improve ICT systems' performance.

351. Given the size of investments and their critical contribution to the performance of the justice system, a strong cadre of ICT professionals is needed to oversee the development and operations of sector projects, enterprise integration, and alignment with overall business strategy. ICT career streams in critical areas such as project management and enterprise architecture¹¹¹ are recommended to ensure that the interests of the justice sector are well managed in partnership with private actors and other partners. Further, funding for ICT staff training is essential to stay abreast with changes in technology and acquire new skills in the critical areas supporting a modern-day IT enabled organization.

352. *Need to improve ICT user training.* Due to the lack of stable funding for ICT investments/projects, it is difficult for the judicial institutions to define and pursue an integrated and continuous training strategy and plan. ICT training is embedded as part of project funding. It is our understanding that there are no provisions for ICT training in operational budgets.

353. It was reported consistently that training was not provided adequately during implementation of ECRIS. It is our understanding that the contract with the implementation partner was closed before training was completed. Instead of professional trainers doing the job, ICT staff ended up training users for ECRIS on a continual basis. However, not all ICT staff from the courts has the necessary skills to provide training to users both from the technical perspective (how to use the system) and the business perspective (the implications and impact of the system on the judicial function). On-site training may be partially effective; materials used in the training (such as textbooks and videos from other training) are not exhaustive.

354. There is not enough capacity to fulfill the training requirements, especially those of clerks. The NSC now includes ECRIS training in its curriculum. However, refresher courses are needed to ensure that the new features provided by ECRIS are optimally used. The interviews revealed that the ECRIS functions were sometimes underused because staff might not be aware of the features; others were just resistant to change, we were told. ECRIS training especially tailored for judges would be beneficial to ensure that they encourage clerks' accurate entry of data and to show them how to use ECRIS as a management tool.

355. Continual training on technologies and systems is essential to ensure that the changes in automation are adopted and the systems are optimally used. Customized and comprehensive training to judicial staff are needed to ensure that the available functions are properly used. The Ministry of Justice is pursuing an e-learning platform that will provide customized courses to the courts on ECRIS, Microsoft Office, and IT Security.

¹¹¹ Including project management, enterprise architecture, system integration, application management, infrastructure and operations management, information security, business process analysis, information management, technical writing, and ICT procurement.

7.3 Information

356. *Need to improve access to complete case file information by judicial staff.* Accurate, timely, and accessible information is the foundation for decision making and process improvements. Judicial staff claimed to be satisfied with their access to comprehensive legislation and relevant case law. However, proper access to full case information—data, statistics, documents, audio files—was a major issue. For example, judges and clerks could not easily access and retrieve case rulings and historical data within and across courts to see how relevant laws had been interpreted.

357. Case-related information (data, documents, audio) is maintained in paper files, enterprise systems such as ECRIS and its local instances, the Enterprise Archiving System (EAS), ISARCP,¹¹² or locally in ICT users' computers and shared drives. There is no central place where all the case history is stored and easily accessible. Moreover, automatic data-replication mechanisms for consolidating case data nationally applies only to limited case fields (for example, unique Case ID, matter and object of the case file, parties). Only limited data (such as court decisions) are available online nationally and there is no single point of search/access across all court data.

358. To quote one interviewee from the courts: “The ECRIS system has brought much improvement, but the inability to search makes it an even more frustrating experience because the data is there.” Within the ECRIS system and across different repositories of case information, there is a need to improve its search function in terms of (search) options and performance. Although filtering of search results is in place, further calibration of the search capability is needed to improve the relevance of the results sets, but it should be done in concert with improved-access policies. Even magistrates and clerks should not have access to most information related to ongoing cases handled by another magistrate.¹¹³ Limitations will also have to be set on access to documents on closed cases (possibly, and except for appeals, restricted only to rulings and the data in ECRIS). Privacy concerns arise for protection of the parties. The ability to search for case information therefore needs to be grounded in user-based permission models that provide the facility to create multiple groups of users with varying permissions and views of case information.¹¹⁴

359. In the HCCJ, the audio recording system for court hearings is functional and has been used in criminal matters since the enactment of Law no. 304/2004 on Judicial Organization. However, for some courts where audio recordings of proceedings are in place, the CDs are kept in the archives. It seems that there is no automated way to get access to these recordings. The ISARCP currently under development will address this need. In ISARCP, the audio recordings will be stored in a file management system based on the case file number and the hearing session. ISARCP will also be connected to ECRIS.

360. Centralizing case information access and management (data, documents, and audio) through Enterprise Information Integration Infrastructure can help judicial staff to efficiently identify, access, manage, and link relevant case data and court documents throughout the court

¹¹² The Information System for Audio Recording of Court Proceedings, which is being installed.

¹¹³ This is a solved problem in ECRIS Prosecutors following the user requirements.

¹¹⁴ This feature has been developed in ECRIS Prosecutors following the user requirements.

process. Also, it is a necessary requirement to allow users to perform a single search on all relevant information from both internal and external sources. Nonetheless, case information should be centralized alongside improved access rights and appropriate controls, including privacy and separation of functions.¹¹⁵

361. *Need to improve electronic document management capabilities.* Given that case-related documents are dispersed among the paper case files and electronic repositories (such as ECRIS for case management and EAS for archives), court staff and judicial personnel cannot easily retrieve these documents. For example, if a case is ongoing and someone wishes to obtain an official document, they need to go to the paper case file given that the electronic version may not be the most up to date.

362. While EAS is installed in each court, this digital solution is used only after the case is closed and it is not integrated with ECRIS. Parallel paper archives are also kept and are considered the official system of record. Some courts, prosecutors' offices, HCCJ, and NAD scan core documents like final decisions and save it in the electronic archives. Other courts do not.

363. The Document Creation and Tracking functions in ECRIS were designed mainly to provide electronic forms/templates for core business documents that allow users to fill in data and print copies for review and signature. The subpoena template in ECRIS, for example, is often used by clerks (but not all forms). Several clerks use their own templates, cut and paste data from ECRIS into these templates, and store these documents in their local computers, or cut and paste data from the Word document into ECRIS templates and store the information in ECRIS, making these documents inaccessible online to other stakeholders. Additional templates (such as Order to Pay) have been requested to standardize the forms, facilitate access to these forms, and speed up the process. It seems that neither clerks nor prosecutors in prosecutors' offices use the electronic forms in ECRIS.

364. The MOJ is developing an Integrated Information System for Electronic Access to Justice (IISEAJ) to allow litigants to electronically submit documents in cases pending at the courts, as well as to fulfill certain procedural acts. This system will also provide the opportunity for electronically filed case documents to be consulted, based on access rights granted to judges, court clerks, lawyers, parties, or other interested persons. Electronic documents will be stored via a centralized data storage module, with metadata of all cases.

365. *Need to enhance data quality.* For the ECRIS system to be reliable and effective, case data entered into the system must be accurate and complete. Good practices are in place to manage data well. All cases in ECRIS are uniquely identified, and ECRIS generates and assigns a case number that is unique across its intended scope of use, based on a defined format (local

¹¹⁵ It is our understanding that an SCM decision exists stipulating that each court is the owner of the data existing in the local databases, thus limiting interference in the judicial process. Efforts in centralizing information to improve access must therefore be balanced with the need to ensure the integrity of the judicial process.

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case ID/court ID/Year). Reference and Master Data¹¹⁶ management practices exist, maintained centrally by the MOJ ICT Directorate and governed through an ECRIS Working Group.

366. Still, a couple of issues were highlighted that directly affect data entry and quality:

- Limited use or misclassification of core reference lists in ICT user interfaces (for example, Main Object, Causes for Delay).
- Ineffective drop-down menus/taxonomies illustrating the need for better user retrieval and selection options (such as grouping information into categories and subcategories, including the possibility to make multiple selections).
- Missing data fields (for example, first registration date of trial, suspension date of case, reason for suspension, and age of case file).
- Lack of standard data definitions (that is, a data dictionary) for the attributes collected in ECRIS. For example, the number of cases closed is one of the key performance indicators in a judicial system. These data are not easy to derive as the definition of “Closed” varies among judicial employees. Consultants reported that various criteria or their combination constitute whether a case is closed, such as a date in the solution field, the presence of closing documents, or an indication within the closing documents.

367. Moreover, when a case is being transferred from one court to another, the receiving court is only given electronically the agreed-on primary case data, statistical information and documents on file. The primary dataset may be re-entered into the system only if the electronic file transfer failed. Each time the same data is re-entered, there is an opportunity for introducing errors, omissions and inconsistencies into the court data, not to mention loss of productivity and duplication of efforts.

368. The quality and completeness of the data in ECRIS improved with the adoption of ECRIS version 4.0 in January 2011. Only that version made core case attributes mandatory. There are no plans, however, to include and enter information on older case files into the system.

369. There is no evidence of formalized activities relating to primary data quality reviews and remediation. One exception is at the HCCJ and PM. The HCCJ ICT team conducted a comprehensive ECRIS data audit in 2011 across all sections and attempted to remediate the primary data issues identified. The PM has developed scripts/procedures to monitor the accuracy and completeness of data in ECRIS. They are now currently working to integrate this application into ECRIS Prosecutors.

370. It is vital to have an integrated data quality program. This should be an item for discussion at the strategic level by the newly formed ICT Governance Committee. Clear responsibilities, funding and resources need to be put in place to allow ICT Departments to conduct data quality audits on a regular basis, including audits of business processes that may contribute to data quality problems.

¹¹⁶ Reference data maintained include main object and legal matter, institutional code identifiers (first instance court, court of appeal, Supreme Court), court geographic location identifiers (such as county number, city number) for the court in which the case is being filed, and causes of delay.

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371. *Need to improve access to case information by the public:* The MOJ Portal provides online descriptive information about all the courts and a searchable database of court cases with basic data and decisions. ECRIS InfoKiosk¹¹⁷ also provides core information on a case and hearing schedules with limited search capabilities. One advantage of ECRIS is the ability to publish near real-time core case data and hearing details for public access from the MOJ portal, HCCJ portal, and ECRIS InfoKiosk. These facilities, however, only enable information search within each court portal and not across. Further, the information in these kiosks is limited and not tailored to the various audiences (public or parties involved in the case) where more detailed or different data may be required and where an access policy will be needed.¹¹⁸

372. Progress has been made in this area. A project is under way to automate procedures that will facilitate access to information on cases pending before the courts of Romania, both for Romanian citizens and for citizens of other EU Member States. This project will provide EU citizens with an improved version of the court portal with additional capabilities (such as electronic summons serving to persons whose residence is unknown) and improved features (such as a general search engine).

373. *Need to strengthen data exchange with justice institutions and partners.* There is a need to automate the exchange or access to information from internal and external sources to support the work of the judges, prosecutors, and clerks. The Court-to-Court automated data exchange, for example, has to be improved to reduce manual data entry in upper courts (that is, new case data fields transmitted when a case is transferred). In the same manner, prosecutors' and the NAD's systems need automated interfaces to Courts Case Data (such as case decisions). Progress has been made in facilitating data exchange between prosecutors' offices and courts.

374. Data from three national databases are accessible online: Persons Records (Population Evidence), NTRO, and the Driver's License database. The prosecutors' offices have access to 20 external databases/registries. Information from other databases must be requested through formal paper inquiries.

7.4 Business Process

375. *Dependency on manual and paper-based processes:* Parallel manual and automated processes throughout the sector increase workloads and delay processing. Most courts have moved from manual registries, although some courts and all prosecutors' offices still maintain manual registries in tandem with the ECRIS system. More important, even documents created in ECRIS through online forms need to be printed and signed to become the official court record. These dual processes increase case-processing times and employee workloads.

376. Several legal and procedural dimensions of the use of electronic documents and signatures were formalized through the adoption of the legislation on electronic archives (Law 135/2007 of May 15, 2007 on archiving electronic documents) and electronic signature (Law 455/2001 of July 18, 2001 on digital signature). However, it is unclear whether legislation has

¹¹⁷ Each court has one to six InfoKiosk terminals.

¹¹⁸ Courts without access policies have had unfortunate experiences, especially where internet access is introduced, with robotic downloads of names of parties to prepare blacklists of debtors or employees in labor disputes. Even in an InfoKiosk, letting anyone search cases by name of party would not be a good idea.

been enacted to enforce the use of electronic documents, signatures, and so forth as official records and as admissible in a court of law. We were told that the new Civil Procedures Code—for example, article 148 (2) and article 199 paragraph (1)—supports electronic submissions of claims. Until the electronic case file will be enforced as the official court record, it will be very difficult to move toward paperless processes (e-filing).

377. *Labor- and time-intensive processes for management and statistical reporting.* Most internal management reporting at local courts is basic and not necessarily used for strategic planning. It is our understanding, however, that the SCM uses statistical reports as a planning tool for determining the staff positions across courts based on caseload and other indicators.

378. Demands for reports from the center (MOJ, SCM) are reported to be high and time-intensive on the part of clerks in local courts. It requires manual work and extra time to address these demands, for example, data need to be verified/validated given data-quality issues, and data have to be manually requested from different sources within the organizations and from external partners. Most users still appear to use Excel for data manipulation and reconciliation.

379. Reporting and analytic data are gathered through a combination of manual reports, reports from the Attribute Based Access Control (ABAC) legacy system, Excel spreadsheets, Structured Query Language queries, and the statistics module in ECRIS (which will gradually replace ABAC). The ECRIS Reporting module has 60 predefined reports that ECRIS version 4.2 introduced. It is now used at courts of appeal as well as the HCCJ (starting in 2013), with broader deployment across other courts scheduled over the next two years. The ECRIS Courts Module has its own predefined statistical reports, but it does not seem to be widely used. To ensure broad adoption of these reports, their relevance and ease of use will have to be reviewed.

380. The content and format of both sets of reports were standardized by selected expert users (at, for example, SCM); clerks and judges were not heavily involved. Statistics clerks or head clerks generate and provide the statistical reports, but most of them are not statisticians by training or profession. It is not clear to users what the business rules are behind the predefined reports in both the ECRIS Reporting Module and ECRIS Courts Module. It seems that the data collected at local courts are not congruent with the reporting needs of the center (SCM, MOJ), given the cumbersome manual procedures required to complete these reports.

381. There is a need for a better training program for judges, clerks, prosecutors, etc. to promote the understanding of how statistical reporting will enhance their work. There is also a need to standardize the statistics report across multiple sources (for example, the ECRIS module for National Statistics and the ECRIS Courts statistical module).

382. *Inconsistent ECRIS usability and incomplete functionality.* ECRIS is designed to support the core judicial functions across all institutions.¹¹⁹ Now in its fourth version, ECRIS is widely used by clerks for case data entry and a very motivated court president makes a difference in deriving high value when using this system. The move from a paper-based to an electronic-based

¹¹⁹ The application covers the entire flow of a case file in the court, and covers electronic case registry, scheduling and resource assignment, document creation, information exchange, and management reporting. It is supported by a network of ICT professionals who manage support, maintenance, and enhancements and who work across organizational boundaries and engage with users (such as judges, clerks, and prosecutors) on a daily basis.

registry of cases as the primary entry point has been a major improvement highlighted by judges and clerks.

383. The case-assignment function in ECRIS is of great value to most courts. Cases are assigned to judges or panels randomly through an algorithm relating to the case complexity¹²⁰ and/or maximum number of cases. It seems that several courts maintain the random assignment but prefer not to use the complexity score. Further, several courts have expressed a desire to have more control over scheduling hearings. Based on discussions with users, it seems a manual override is needed on the automatic scheduling (such as hearings per day based on an estimated maximum) to allow clerks to make changes on the fly if needed. This feature will need to be further discussed and validated with users in the courts.

384. The activities associated with the entry of the court decision are captured in ECRIS and disseminated to the public through the court portals. However, it seems that there is no formalized mechanism in place to notify the appropriate persons of court decisions.

7.5 Better Institutionalizing Change Management

385. Automating business processes require substantial change-management efforts given that it affects the ways judges, clerks, prosecutors, and other key players conduct their day-to-day operations. It often means moving from doing business the old way.

386. We suggest further taking this forward and developing a formal process in collaboration with the business to institutionalize change management practices across all ICT implementations in the judicial sector. To help prepare for potential change, it is imperative to reach out early to ICT users in courts and stakeholders and involve them where possible in the change effort. Constant communication is essential to convey the changes, its rationale, and expected benefits.

387. The new codes are likely to add to workload and increase complexity as both the old and new codes will be in effect during a transition.

7.6 Technology

388. The technical landscape of the justice sector is complex given its existing organizational and funding structures. Technology standards are non-existent; system services and ICT operations are limited; enterprise solutions such as case management, archiving, etc. do not fully support the business functions of the judicial subsystems; and integration across the multitude of systems is suboptimal at best. Some of this would clearly be aided by a strong ICT ministry, but without one the sector will need to work to enforce coordinated standards, at the least.

389. *Continue implementation of enterprise solutions and integration mechanisms supporting sector functioning.* ECRIS (case management), EAS (archiving), the upcoming Enterprise Resource Management System,¹²¹ and ISARCP, web portals, and local productivity tools (email,

¹²⁰ Complexity scores of a dossier based on the main juridical object, number of parties, etc.

¹²¹ Many software solutions support human resources and financial management functions and require substantial manual data consolidation for reporting and analytics. It is therefore hard to access the full case documents as one

word processing, spreadsheets, etc.) are the key enterprise solutions adopted or under adoption in the justice sector. Although these systems have improved operations of judicial functions, major improvements are still needed. For example, ECRIS and EAS are not linked, nor are there plans to integrate court audio files in ISARCP with other case file information in ECRIS and EAS. A full electronic documents and records management policy and solution are missing. As a result, it is hard to access the full case data, documents, and audio information as one has to search each system separately.

390. *Multiple email solutions across institutions.* Instant messaging tools, for instance, are available in some organizations or courts but not others. Such multiple solutions lead to increased maintenance and licensing costs. In addition, although the judicial system uses several integration methods, including web services and file transfers, it needs a comprehensive solution for logging and monitoring integration and transaction events, and exposing these logs in a consistent manner. This capability will enable ICT staff to manage workloads and to resolve batch file integration processes.

391. *Organization of specific data warehouses (such as the National Repository for statistics and Global Person Search for prosecuted persons in the PM).* However, the lack of a judicial system-wide data warehouse to store current and historical data from all applications system limits the ability to monitor, report, and analyze information across business processes. There is a need to establish a comprehensive metadata management process to identify information and develop a data dictionary to define the data collected, stored, and used for reporting and analytics.

392. *Need to improve capabilities for system services and ICT operations.* Application solutions are deployed across many locations. Change-management processes exist, but require a more comprehensive approach to ensure changes made to the environments do not hurt services. The application infrastructure landscape does not have separate environments to support software development, test, and production. Disaster recovery environments are non-existent and pose risks of loss of data and access to information in a timely manner.

393. *Need to strengthen security policy definition and reference implementation.* Though an information security policy exists, it is not comprehensive and enforced widely across the judicial institutions. ICT end users are unaware of these policies and their responsibilities in securing information (for example, passwords to access systems are reported to be written down or shared among colleagues) and there are no procedures in place to enforce information security practices.

394. *Information categorization—confidential, highly confidential, and so on—is weak.* It a key aspect of any court-related security policy process and should be uniformly enforced. The authorization processes across the applications should consider standardized methods to access documents based on a standard information categorization method.

has to search each system separately. The judicial system is currently in the process of implementing an enterprise resource planning solution (that is, the Resource Management System) to support these functions. It will replace the currently fragmented systems.

395. *Lack of business rules management and intra- and inter-system workflow.* Standardized workflow processes and business rules are not embedded in the applications nor shared across like processes. For instance, the workflows implemented in the ECRIS system do not share a common set of business rules. Automated workflows across applications do not exist. The complete life cycle of a case requires multiple applications to implement.

7.7 Conclusion

396. There are three main areas that require attention. First, Romania's justice sector needs to evaluate its ICT strategic direction and how it can better align it to the business drivers and goals, as well as to the requirements originating from external stakeholders, including the EU, and the public. Exploring a stronger governance and operating model for ICT services should be a key priority for the entire judicial system and for each institution. The current practice of implementing unique ICT solutions within each business domain (MOJ, NAD, prosecutors, etc.) creates data and functional anomalies, increases maintenance and operational costs, and adds complexity. Second, the way projects are created needs to be improved. Several of the 26 projects mentioned above are potentially redundant. To proceed with them may result in redundant functions and data in, as well as across, business domains. Third, the realization of the target state technology architecture will require the following actions:

1. Evaluating ICT as a professional discipline and add architecture and other related skills to the team,
2. Improving its information delivery mechanisms, both inside and outside the organization,
3. Establishing business process frameworks and align solutions to them,
4. Providing a fully integrated and centralized case, data and document management solution,
5. Upgrading the technology infrastructure and system and ICT management processes.

397. Changes have to be agreed upon, prioritized, and sequenced accordingly as not everything can be done all at once. The target state architecture and migration plan, as detailed in the supporting documentation, should be reviewed, matured and put into practice in the enterprise. ICT reform can only truly begin if there is a national willingness (groundswell) accompanied with an order (top down) to change the way technology is viewed within the Justice Sector.

8. CONCLUSIONS

398. The members of the Functional Review team focused on resources, not only because they were asked to do so, but because there is a general impression in Romania that scarce resources explain many performance deficiencies. This view is not unusual among judges and prosecutors (albeit with some dissenters), and is shared by many external observers, including those shaping the latest round of reforms. As the above should make clear, “scarce resources” may not be an accurate description of the situation, but their deployment and organization might be improved to enhance efficiency, quality, and access.

399. This interpretation is hardly novel among external observers. It was made in an earlier report on judicial rationalization (Lord and Wittrup, 2005) and a review by ABA/CEELI (2007)¹²² of family and other civil cases. However, these views are not widely shared, and as one sector member, who dissented from the majority opinion on the insufficiency of magistrates, told us: “I have been saying this for three years [the time in the person’s current position] and no one listens.”

400. Romania’s justice sector has a relatively generous budget, but a high degree of fixed costs and thus very little room for innovative experiments, making it especially important to program resource use in a coordinated fashion and to aim it at improving overall performance (delivery of services to citizens) in accord with objectives set by the highest levels of sector management. These objectives apply both to each type of resources (human, financial, ICT, and—not covered here but as important—infrastructure and materials) and to their combined use. Coordination across resource groups is imperative not only to derive the maximum benefit from new investments (whether in staff, information systems, or buildings) but also because changes in any type of resource imply changes in others. More staff means more equipment, places to put them, and training. Changes to ICT imply the need for more training and possibly for more staff to manage more sophisticated software.

401. Ideally, even current budgeting and planning should be guided by a longer-term sector development strategy, one that may over the years reduce some of the budget devoted to fixed costs or at least distribute it differently. Given, first, that most of the fixed costs are in personnel and second, that unless the economic situation improves rapidly there will not be more for the sector, it will be important to be especially careful about placing more staff (that is, magistrates) who cannot be removed and who, furthermore, automatically require spending on training, hardware, and infrastructure.

402. Investments in all resources should be carefully evaluated to ensure they contribute, individually and collectively, to real performance improvements and do not, as in the case of some ICT projects, replicate functions or further complicate an already somewhat disorderly situation. As judiciaries and the rest of the public sector are discovering in many countries, the fat years are seemingly at an end—one hopes temporarily—and thus over the immediate future the challenge will be how to use existing resources to produce more valuable services.

¹²² American Bar Association/Central and Eastern European Law Initiative.

PART 3: RISKS

9. A PLAN FOR IDENTIFYING AND MITIGATING RISKS

9.1 Introduction

403. The Romanian authorities requested the Functional Review to include a strategy or plan for identifying and mitigating risks to justice sector performance. It was developed in two parts:

- A schematic approach to identifying, measuring, and explaining performance problems (section 9.2).
- An accompanying methodology for identifying and mitigating risks (section 9.3).

404. Performance problems usually have causes not risks, but performance-improvement programs (or even performance-maintenance programs) often face (usually exogenous) risks that undermine their goals. Thus to improve (or maintain) performance one must first identify the issues to be addressed and their underlying causes; develop measures to address them; and then guard against the risks that may prevent a plan being carried out successfully.

405. The notion that courts and other justice sector institutions should take responsibility for improving their own performance is a relatively novel one and has advanced farthest in more developed nations in common and civil law worlds. Traditionally, judiciaries have tended to operate as collections of individuals and at most took joint responsibility for the quality—less frequently the timeliness—of their members’ decisions. The relatively few efforts to improve these characteristics relied on training, disciplinary systems, and if possible, addition of more human, financial, and material resources. Judiciaries’ approach to other factors shaping their performance tended to be passive. Thus they may indeed have identified these as risks, or forces beyond their control and often occurring unpredictably.

406. In the past couple of decades, this outlook has begun to change. Those in justice sector institutions have started to realize that they can be more active in evaluating the quality of their services, modifying those services, and taking some steps to mitigate adverse impacts from the broader range of elements affecting them. (They frequently reviewed, for example, internal organization and processes, procedural and substantive law, the size and content of their workloads, coordination within the sector and with extra-sector institutions, and the rules shaping and filtering access to their services.) This greater role has meant challenging some of the rules set by other branches of government, learning to communicate with users of the justice system to understand their needs, and adopting a self-critical look at some cherished traditions and practices that tended to restrict citizens’ access to justice or otherwise to impede their own ability to respond to changing circumstances.

407. A structure is needed to manage these changes. It may lie in a judicial council (the Netherlands), a supreme court (Sweden), or in mid-level or sub-national courts (Germany), but wherever, it requires a range of outlooks and skills. Ministries of justice can also graduate to this role, although governments seem to be showing a tendency (most developed in the common law world) to transfer both administrative and managerial powers and responsibilities away from the

executive to justice sector institutions.¹²³ The underlying aim—whether conceived as adding accountability to institutional independence or simply redefining that independence—is that independence should encompass responsibility for the quality of output, and that if current rules, practices, and traditions undermine that performance, the institution must change what it can on its own, and lobby other agencies and branches of government to bring in the changes requiring their acquiescence.

408. This emphasis on improving performance has also entailed an increasing emphasis on service to the user. The International Framework for Court Excellence,¹²⁴ for example, lists six core values—fairness, competence, impartiality, accessibility, integrity, and timeliness—and seven areas in which performance toward these goals can be tracked: court management and leadership; court policies; human, material, and financial resources; court proceedings; client needs and satisfaction; affordable and accessible court services; and public trust and confidence.

409. The Framework does not provide a measurement or scoring system, but suggests a means for a court to determine how well it is doing in each area. It also stresses the need for a variety of key performance indicators apart from the above, ranging from the usual (numbers of incoming and pending cases) to less commonly practiced ones like appeal rates, number and type of judicial decisions, and waiting or queuing time (the period when nothing happens to a case).

410. These indicators provide some sense of the information on which improvements in the seven areas can be based. If long queuing times lead to unnecessary delay, the courts (or prosecutors) can often find ways to shorten them on their own. If appeals rates seem unusually high, court management can investigate and either act on its own to reduce them, or work with other agencies and branches of government to change laws, rules, and practices. If client satisfaction is low (as shown by surveys and similar measures) courts, prosecutors, or defenders can investigate why and develop means for improving their image.

411. As the Framework notes: “Excellent courts formulate, implement and assess clear policies for achieving performance objectives for efficiency and quality they have set at an earlier stage ... [they] systematically evaluate the wishes and needs of clients as well as their level of satisfaction.” The Framework in short is not a performance measurement scheme, but rather a reminder to courts that performance has many dimensions and that an “excellent court” attends to all of them.

412. Significantly, the principal contributors to the Framework are common law countries, but CEPEJ has also been involved, and is working on its own programs for measuring and improving court excellence, accompanied by the biennial statistics it compiles for 45 European countries. Its own more detailed checklist incorporates more than 300 queries referring to recommended activities to achieve “quality in justice” (CEPEJ, 2008a). This goes into extreme detail, and most

¹²³ This occurred in the United States in 1939 owing to political conflicts with the executive, and gave rise to the Administrative Office of the Federal Courts, which is directly responsible to the Supreme Court. Australia and New Zealand are making a similar transfer, without the political conflict.

¹²⁴ Available at www.courtexcellence.com.

courts will not have all of them, but the list is a reminder of what can be done.¹²⁵ Moreover, many European countries, especially in Northern Europe, are advancing their own programs. Many of these programs may require some additional resources to implement, but they are always presented in terms of the benefits for citizens, not system members.

413. What applies to courts can also apply to other sector institutions (prosecution, defense, youth services, and correctional and rehabilitation programs). The bottom line is that monitoring and improving all these institutions' performance for the benefit of users is now a sector concern, and the most advanced institutions no longer wait for the executive or legislature to fix things, but do their own analysis, develop their own initiatives and, as much as possible, carry them out. When they cannot do this alone, they work with other government agencies, their own constituencies, and the public at large to obtain the necessary cooperation.

9.2 A Performance Measurement Tool for Romania

414. For present purposes we have restricted our attention to the four performance areas covered in the Functional Review¹²⁶ and to a scheme for identifying potential shortcomings and their likely causes (table 9.1). Presumably the causes could also be understood as risks, but we attach a second table looking specifically at what are normally considered risks—exogenous or otherwise unanticipated factors likely to interfere with reform efforts (see table 9.2 below).

415. The four performance areas have been subdivided to facilitate this discussion: efficiency has been subdivided into productivity and timeliness, and each of these two areas has been in turn divided into a simple and complex definition. This is because we believe Romania is now ready to enter into a more sophisticated approach to this area—not just counting cases and dispositions, but value added, too. Likewise, corruption has been subdivided into within-system issues and the ability of the system to combat corruption outside the sector.

416. Not all measures in the second column of table 9.1 are strictly quantitative, and in fact for the first performance area—strategic management and planning—we have included a series of questions arranged from most basic to most complex. A good system would have a positive answer to most or all queries; a more rudimentary one might score “yes” on only the first few. Except for efficiency, the other areas also have less direct and more qualitative measures as no one has yet come up with a single definition or means of tracking it. In the third column, we have built on evidence collected from several decades of experience in systems in industrial and developing countries around the world. The list is hardly exhaustive but features factors often found to undercut performance.

¹²⁵ For example, among the queries are the following: “Does the court have an information desk for court visitors?” “Are court judgments available on court internet sites?” “Are ‘standard’ decisions and rules used for ‘bulk cases?’” and “Are mediators easily accessible to resolve certain disputes?”

¹²⁶ Strategic management, efficiency (productivity and timeliness), quality (corruption and uniform interpretation of the law), and access.

Table 9.1: Performance Measurement and Potential Causes of Low Performance in the Justice Sector

Performance Area	Measurement Techniques and Sources of Data	Potential Causes of Low Performance
<p>1 Strategic management and planning</p>	<p><i>No direct statistical measure, but series of qualitative queries listed progressively (from most basic to most advanced)</i></p> <ol style="list-style-type: none"> 1. Does a development plan exist? 2. Do all institutions have one? 3. Do they have a short-, medium-, and long-term horizon? 4. Are the plans coordinated? 5. Is each plan sequenced—ordered steps over time? 6. Do plans match inputs with results? 7. Do plans have scenarios for different input levels? 8. Are plans tracked? 9. Are they modified when results do not occur as planned? 	<ol style="list-style-type: none"> 1. Limited planning capability 2. Confusion of wish list (everything we would like to do and achieve) with plan (how we will do it) 3. Inability to conceptualize performance and failure to compare with international statistics 4. Lack of adequate data to measure performance 5. Fragmented control of relevant inputs (ICT, human resources, financing, etc.) within and among institutions 6. No clear responsibility for who draws up plan and how others will be involved
<p>2a Efficiency—Productivity (ratio of inputs to results, usually average caseload per judge or prosecutor, or costs per case, and so on). Divided here by basic productivity (simple ratio) and complex productivity (results are given different weights depending on intrinsic value—that is, disposal of a case for lack of merit is of less value than an adjudicated or mediated solution; simple, routine case has lower weight than a complex one)</p>	<p><i>Statistical measures for basic productivity (from court records, case management system [CMS])</i></p> <ol style="list-style-type: none"> 1. Clearance rates 2. Caseload per judge/prosecutor 3. Cases disposed per judge/prosecutor <hr/> <p><i>Statistical measures for complex productivity (from CMS)</i></p> <ol style="list-style-type: none"> 1. Clearance rates, average judicial workload, and number of dispositions by major type of case 2. Per judge average number of dispositions by type of disposition and type of case 3. For prosecutors, share of complaints leading to an indictment; can be disaggregated by type of alleged crime 4. For prosecutors, share of complaints and indictments leading to a conviction <hr/> <p><i>Supplementary measures</i></p> <ol style="list-style-type: none"> 1. Case file analysis to identify where bottlenecks, delays, and downtime occur 2. Direct observation of time spent and by whom on various types of cases 	<ol style="list-style-type: none"> 1. Judges and other system actors not monitored for productivity 2. If monitored, productivity goals not set systematically to avoid manipulation of results (for example, focus on simple cases to raise scores) 3. No use of differential case management—efforts spent on different types of cases do not vary according to complexity 4. Overly complex procedures and legal prohibitions on skipping unnecessary steps 5. Dilatory practices by lawyers and judges’ inability/unwillingness to curb them 6. Poor distribution of caseload and staff 7. Insufficient or ineffectual delegation of functions to court staff or insufficient numbers of staff 8. Inadequate mechanism for filtering admissions (increases simple productivity but decreases complex definition)

Part 3: Risks

Performance Area	Measurement Techniques and Sources of Data	Potential Causes of Low Performance
<p>2b Efficiency—Timeliness, again divided into basic and complex variations</p>	<p><i>Basic timeliness—statistical measures</i></p> <ol style="list-style-type: none"> 1. Average time to disposition at single instance 2. Average time to final disposition (including all appeals) 3. Aging lists (age of still active cases) <hr/> <p><i>Complex timeliness—statistical measures</i></p> <ol style="list-style-type: none"> 1. Use of CMS to disaggregate disposition times by type of cases 2. Disposition times disaggregated by type (judgment on merits, dismissed, withdrawn, expiration of statute of limitations) 3. Times to final disposition disaggregated by type of case, type of disposition, and times within each instance 4. For prosecutors, times for dismissal for lack of merit and full adjudication, and for investigation 5. Aging lists (for court cases and for investigation) disaggregated by type of case (to ensure more complex ones are not left behind) <hr/> <p><i>Supplementary measures</i></p> <ol style="list-style-type: none"> 1. Case file analysis to determine which cases get through most rapidly and which ones take more time (or remain unresolved) and why 2. Review of stock (undisposed cases or those still under investigation) 3. Review of appeals records to identify cases with multiple appeals and length of resulting delays 	<ol style="list-style-type: none"> 1. No monitoring of times to disposition 2. If times are monitored, system favors focus on simple cases (or non-cases) to get better scores 3. Monitoring only for decisions at single instance; does not register additional times for appeals process 4. Inadequate filtering system for appeals 5. Management of cases simply by first in first out rather than use of tracking system (cases divided by level of effort required) or differential case management
<p>3a Quality—Corruption (i) within system</p>	<p><i>No direct statistical measures but various quantitative and qualitative means to estimate presence</i></p> <ol style="list-style-type: none"> 1. Number of complaints registered 2. Public opinion polls on sense of corruption 3. Public surveys on experience with corruption 	<ol style="list-style-type: none"> 1. Inadequate preventive measures 2. Inadequate monitoring and supervision 3. Inadequate complaints system—difficult to use or ineffectual 4. External pressures and expectations 5. Extremely low salaries or failure to pay them 6. Staff perceptions that internal rewards are distributed unfairly 7. Staff perceptions that few crimes will be detected and/or that sanctions will be light

Part 3: Risks

Performance Area	Measurement Techniques and Sources of Data	Potential Causes of Low Performance
<p>3a Quality—Corruption (ii) system’s ability to investigate and adjudicate external corruption</p>	<p><i>No direct statistical measures but various quantitative and qualitative means to estimate efficacy</i></p> <ol style="list-style-type: none"> 1. Number of corruption cases reported 2. Share of cases leading to indictment 3. Share of indictments leading to convictions 4. Length of time to process cases 5. Share of cases dismissed because of expiration of statute of limitations 6. Apparent disparity in sentencing 	<ol style="list-style-type: none"> 1. Inadequate human, technical, and financial resources 2. Inadequate investigative techniques 3. Legal framework imposes obstacles—short time frames, limits on investigators, liberal use of appeals policy 4. Political intervention or threats from other parties 5. Within-system corruption
<p>3b Quality—Uniform interpretation</p>	<p><i>No direct statistical measures but series of qualitative and quantitative indicators of presence and dimensions of any problem</i></p> <ol style="list-style-type: none"> 1. Public surveys indicate concerns about problem 2. Interviews with “concerned parties” reveal a list of common issues 3. Comparisons of decisions reaching courts of appeal demonstrate different decisions at lower instances and among courts of appeal 4. Similar questions continue reaching High Court 	<ol style="list-style-type: none"> 1. Unstable, rapidly changing legal framework 2. Rapid rotation of judges, or overly long stays in same position 3. Training does not emphasize importance of predictable decisions 4. Excessive emphasis on judicial independence and individualization of cases 5. Lack of mechanisms for judges to discuss problem and reach some tentative solutions 6. Inadequate communication with court users on presence of problems

Part 3: Risks

Performance Area	Measurement Techniques and Sources of Data	Potential Causes of Low Performance
<p>4 Access</p>	<p><i>Statistical measures (based on a fairly detailed CMS) or other mechanisms</i></p> <ol style="list-style-type: none"> 1. Certain groups (defined by gender, ethnicity, or social class) are significantly underrepresented as complainants in cases 2. When these groups access courts or prosecution, their cases are less likely to prosper (receive any resolution, whether positive or negative; receive a judgment in their favor) 3. When these groups appear as defendants in civil or criminal cases, they are more likely to lose <p><i>Alternative qualitative and quantitative measures</i></p> <ol style="list-style-type: none"> 1. In public opinion surveys, approval ratings of sector institutions from these groups are more negative than from others 2. In public opinion surveys, knowledge of the system, how to access it, and for what reasons appears limited, especially among more vulnerable groups 3. In surveys of such groups, satisfaction with experience with the system is low 	<ol style="list-style-type: none"> 1. Legal assistance program is too limited in its coverage 2. Knowledge of workings of sector institutions and of how to access them is limited, especially for vulnerable groups 3. Legal processes are overly complex, such that <i>pro se</i> representation is unusually difficult 4. Access is not a priority for government or sector institutions 5. Legal assistance is of poor quality, even when available and service providers are inadequately monitored 6. There is no means, or only an ineffectual one, for those dissatisfied with quality of service to register complaints

417. Although we have limited the performance issues to those addressed in the review (thus not extending them to the additional values tapped in the International Framework), this performance table is generic in its coverage of potential causes (for example, extremely low salaries or their nonpayment do not appear relevant in Romania, as seen in previous chapters).

418. This approach also suggests the utility of a comparative review both in assessing performance and evaluating potential causes of shortfalls. Performance can of course be assessed only against local standards, but there is an increasing tendency to look to international datasets to get a better idea of what is reasonable. The data collected by CEPEJ in its biennial reports are one example. Obviously, as argued by Romanian readers, local circumstances must also be considered, but where measures for one nation deviate widely from the majority, this may also be a sign that those circumstances themselves constitute a negative influence on performance and thus should be addressed. For example, judges' inability in many countries, for legal or other reasons, to exercise disciplinary actions against abusive dilatory practices by parties to a dispute may be a major cause of delay. This is a "special circumstance" and in the past would have been regarded as a simple given—nothing the courts could do anything about. However, modern

judiciaries increasingly see this as a problem to resolve, either through new policies or if needed by legal change for which they will lobby.

419. Similarly in Romania, the sudden addition of enforcement review cases to the first instance workload could be regarded as a special circumstance, but again it is also a factor that the judiciary could address, either contesting the measure on the basis of its questionable value added (as contrasted with the substantial costs to efficiency) or finding other ways to deal with it (as suggested in the main text). Passive judicial “management” might let the issue be—a more active management body would approach it as a problem to be resolved.

420. Special circumstances must also be taken into consideration in interpreting the types of measurements proposed here. As in the two examples of courts that dramatically reduced their caseload (Costa Rica and Sweden) by eliminating nuisance cases, the subsequently lower average caseload per judge would have to be interpreted in this light. At least for those two countries, cutting the average workload in half but focusing it on more important issues was defined as improved performance—as it undoubtedly was—despite the seeming quantitative decline.

421. Because everything is not about efficiency, as the International Framework suggests in its six core values, some special circumstances may result from other values that a society chooses to prioritize. In many countries for example, population distribution patterns argue for putting courts and prosecutors’ offices or assigning a public defender in areas where they will be underused. The value here is access, and depending on local attitudes may override sheer efficiency. The only caution is that the trade-off should be recognized rather than assumed.

422. That said, table 9.1 is offered as a means to identify and understand performance issues and to begin to develop strategies for addressing them as part of a reform program. There are no standard scores or correct answers. The exercise is intended to help countries evaluate where they are and where they might want to do better through tracking their own trends over time and comparing them with statistics from other nations. When a trend or comparison suggests issues, the third column may help in understanding what is happening and how such issues might be addressed.

423. Table 9.1 is thus intended to help justice sector institutions (particularly courts and prosecution) evaluate their performance, determine where they may have shortfalls, and identify potential causes. On the basis of this analysis they can develop their own performance improvement programs (or reforms). As the International Framework states, “excellent courts [and other sector institutions] use a set of key-performance indicators to measure the quality, efficiency and effectiveness of their services ... and aim at shifting their data focus from simple inputs and outputs to court customer satisfaction, quality of service, and quality of justice.”

424. In short, the process is permanent and consumer focused—not a one-time change to bring the system to perfection, and it is notable that the courts (and other sector organizations) that are most concerned with this undertaking are those generally regarded as most developed. We believe Romania is ready to take this leap, but we also admit that it is not an easy one.

9.3 Risk Assessment and Mitigation in Conducting Performance Improvement Programs

425. One reason for the difficulty in taking this leap is the multitude of unanticipated and often unpredictable obstacles that may get in the way of the “best laid plans.” Many of these originate outside the sector and can be mitigated but not controlled, and include political or community conflicts, economic crises, or even the passage of laws promoted by other actors. Some obstacles originate within the sector and are simply inadequately considered—predictable resistance to new policies or the inability of personnel to respond fast enough.

426. In typical development programs, designers are in fact asked to draw up a list of such “risks,” and this is what we have done. Table 9.2 lists some risks commonly found to impede efforts in improving performance (though it should not be taken to imply that all these risks exist in Romania today) and provides a useful analytical framework. As with table 9.1, table 9.2 is not exhaustive.

Table 9.2: Risk Identification and Mitigation Measures

Risk	Identification and Likely Causes	Mitigation Measures
Lack of political commitment to improving justice sector performance	<p><i>Identification</i></p> <ol style="list-style-type: none"> 1. Delays in approving new laws and programs 2. Extensive executive and legislation modifications to laws 3. Failure to provide financing for, or to implement, legislated changes <p><i>Likely causes</i></p> <ol style="list-style-type: none"> 1. Lower priority among political and institutional leaders 2. Opposition to change from vested interests 3. Doubts about returns on effort and monetary investment 4. Lack of citizen support or demand for change 	<ol style="list-style-type: none"> 1. Sector institutions develop a unified improvement program (“strategic development plan”) and match requests for funding and new laws with commitments to achieve specific results in terms of improved services 2. Institutions take the plan to the public to develop a broader constituency for change 3. Public forums are held to discuss performance issues and suggestions are invited for improvement 4. Sector tracks implementation and results publicly, noting where political support falls short 5. Sector develops alternative scenarios to allow for financial shortfalls

Part 3: Risks

Risk	Identification and Likely Causes	Mitigation Measures
<p>Ineffective or counterproductive reforms</p>	<p><i>Identification</i></p> <p>Reforms do not produce predicted improvements or generate further problems</p> <p><i>Likely causes</i></p> <ol style="list-style-type: none"> 1. Fragmented governance structure without unified strategic vision 2. Resistance to change “disguised as reform” 3. Limited planning capability 4. Inadequate analysis of problems and their causes 	<ol style="list-style-type: none"> 1. Start reforms with a problem to be resolved, not with a solution for a problem that is not understood enough 2. Do thorough analysis of targeted problems before designing reform 3. Be sure reforms are results oriented and evidence based (a “solution” that has produced the desired result in several comparable countries) 4. Consider full financial implications of proposals as well as needs for training, additional and possibly different staff, infrastructure, etc. 5. Consider alternative designs if it seems that financing will be unavailable or that staff cannot be moved or retrained to comply with new demands 6. Consider (if needed, with outside technical assistance) possible negative repercussions and means to fend them off, and weigh the trade-offs 7. Pilot reforms and monitor results as well as possible counterproductive impacts 8. Implement gradually, if possible by district or by a few case types, etc.
<p>Mismatch between donor (or EU) priorities and those of country</p>	<p><i>Identification</i></p> <p>Comparison of external projects/conditionality with country aims and citizen concerns</p> <p><i>Likely causes</i></p> <ol style="list-style-type: none"> 1. Donors’ limited understanding of context and challenges 2. Donors do not know or understand national priorities 3. Lack of clarity of country government and sector institutions on their own needs and plans 	<ol style="list-style-type: none"> 1. Develop sector wide performance improvement program to guide donor support 2. Meet with donors to discuss differences—may be easier for the country if this is done at one time (to let the donors air their differences with each other) 3. Do polls and surveys to tap into citizen demands—this can strengthen the sector’s case, but only if it plans to meet these demands 4. Do not accept donor projects just because they are funded—move donors to fund what is important to the country

Part 3: Risks

Risk	Identification and Likely Causes	Mitigation Measures
<p>Sudden changes in external political, economic, physical, or social environment produce unanticipated pressures on the justice system</p>	<p><i>Identification</i></p> <p>These are equivalent to exogenous shocks on the economy, which also affect the justice sector. They also include ethnic and political tensions, natural disasters, sudden shifts in national legislation, or legal interpretations of international courts. The changes are easily visible: their impact can be measured by tracking sudden changes in caseload and composition, nationally and within certain districts, and by other event-specific means (such as more complaints about performance, or increased criticism of case outcomes or of certain magistrates by government)</p> <p><i>Likely causes</i></p> <p>As varied as the type of change but for their impact on the system, a failure to consider their possible occurrence can make it hard to respond rapidly. Impacts can be positive when they reduce caseload or cause certain types of cases to disappear, but the new normal can also be challenging when it radically reduces the caseload for certain types of courts</p>	<p>Only the effects can be mitigated as the changes may be difficult to predict (which aggravates the challenges they present) and are usually beyond the sector's control.</p> <p>Still:</p> <ol style="list-style-type: none"> 1. For the most likely changes (economic crises and readjustments; escalating political conflict; shifts in crime rates and types) some preparation is possible in the form of contingency planning and detection of new trends before they escalate radically. This should be part of the strategic planning process. It should never be assumed that current patterns and trends will continue in the future 2. As proposals for new legislation are forwarded, with direct or only indirect impacts on the sector, planners should already be anticipating these effects and if possible lobbying for modifications that will lessen the negative impact on sector operations 3. Laws on sector operations should be drafted to allow some flexibility, thus easing responses. It is highly desirable that sector management be able to close or open courts and shift their personnel
<p>Absence of consistent sector management to achieve agreed-on and measurable goals</p>	<p><i>Identification</i></p> <p>Lack of goals, or failure to measure achievement; annual budget requests do not reference master plans or link inputs to results; additional funding used for purposes not closely linked to plan for performance enhancement</p> <p><i>Likely causes</i></p> <ol style="list-style-type: none"> 1. Inability to define goals in terms that can be monitored/measured 2. Lack of information to track results 3. Lack of ownership of performance questions and related reform efforts 4. Self-referential system busy with itself rather than a vision externally oriented to service delivery 5. Management systems not geared to performance monitoring or too fragmented to do this well 	<ol style="list-style-type: none"> 1. Add staff (who can carry out strategic management functions) to management units 2. Strategic plans should include measurable results, which should be tracked 3. If needed, information systems should be improved to allow tracking of performance and results of reforms 4. Use technical assistance to improve management systems and tracking capabilities—donor judiciaries (if not donors themselves) should have expertise

Part 3: Risks

Risk	Identification and Likely Causes	Mitigation Measures
<p>Additional financial resources not available to implement reforms or strategic plan</p>	<p><i>Identification</i></p> <p>Gap between requests and allocations; additional funds authorized or used for lower priority items</p> <p><i>Likely causes</i></p> <ol style="list-style-type: none"> 1. Overall public sector belt tightening 2. Disagreements among sector institutions as to priority areas and thus no single plan 3. Sector's inadequate justification of need for more 4. Sector's past performance—more funds have not produced better performance 5. Sector's own priorities do not match those indicated in its plan 	<ol style="list-style-type: none"> 1. Sector institutions reach agreement on a single list of priorities and plan, rather than individual variations 2. Improve case for adding resources by carefully linking to specific results 3. Develop contingency plans for doing more with the same budget 4. Prioritize changes and areas of need 5. Communicate past successes in performance improvement 6. Reach agreement with government (and public) on results framework
<p>Reform fatigue</p>	<p><i>Identification</i></p> <p>Cynical response to new measures; continual criticism from outside and inside sector; sector actors begin to ignore new instructions</p> <p><i>Likely causes</i></p> <ol style="list-style-type: none"> 1. Too frequent changes in goals and policies 2. Poor change management—policies introduced without adequate involvement at all institutional levels 3. Poor communication of goals and achievements to public and other government actors 4. Performance does not improve despite multiple reforms 	<ol style="list-style-type: none"> 1. Tie all policy and legal changes to specific, measurable service improvements 2. Give change time to settle; do not try too much at once 3. Pilot programs wherever possible to avoid a need for drastic corrections 4. Get feedback on results constantly and in many different forms (own statistics, public response, observation, etc.) 5. Involve all sector members and public in discussion of proposed changes
<p>Sector members (magistrates, staff and other personnel) resist new policies and programs or refuse to comply</p>	<p><i>Identification</i></p> <p>Strikes, public manifestations of other sorts, or (based on observation) visible tendency to stick to former methods or find ways to “game” the new approaches</p> <p><i>Likely causes</i></p> <ol style="list-style-type: none"> 1. Poor change management 2. Insufficient consultation on new programs and reasons for their adoption 3. Fear of implications for their own careers 4. Certain counterproductive attitudes, especially on judicial independence, accountability, public service orientation, and perceived entitlements 5. Insufficient training or material support to facilitate change 	<ol style="list-style-type: none"> 1. Ensure adequate discussion of proposed changes with all sector members and the public 2. Pilot new programs to ensure they will work 3. Once piloted, provide adequate training and resources during expansion to allow adoption 4. Ensure that monitoring and supervision harmonize with new practices and procedures

Part 3: Risks

Risk	Identification and Likely Causes	Mitigation Measures
<p>Incentive systems (evaluations, bonuses, inspection systems, policies on transfers, salaries) do not encourage behaviors needed to improve performance</p>	<p><i>Identification</i></p> <p>Public perceptions of sector performance do not improve despite positive signs from sector's own indicators</p> <p><i>Likely causes</i></p> <ol style="list-style-type: none"> 1. Failure to consider incentive system as part of reform design 2. Outdated policies on evaluations and performance tracking that encourage staff to do unnecessary or even counterproductive things 3. Staff resistance to measurement and evaluation 4. Corruption, nepotism, and favoritism in rewards and recognition 5. Public's lack of understanding of changes and its persistence in expecting traditional behaviors 	<ol style="list-style-type: none"> 1. Review entire incentive system to ensure it is measuring and rewarding the right things 2. Pay special attention to disciplinary matters (Judicial Inspectorate or equivalent) to ensure their focus is not counterproductive 3. Make incentive system more transparent and discuss this with staff members; involve them in discussions of what to measure 4. Check impact of incentive system on real behavior—any measurement system can soon be manipulated or “gamed” and when this happens will have to be adjusted 5. Communicate changes to the public so it does not follow traditional patterns 6. Carry out public surveys to check results

427. Somewhat surprisingly, few of the items that commonly impede reform implementation are usually considered by countries undertaking reforms—although they are well known, if not always well dealt with, by donors supporting their programs. The entirely exogenous factors—lack of political commitment; sudden political, economic, or social crises; and failure to provide sufficient financing (for reasons other than insufficient political support)—are largely unpredictable but anyone undertaking a reform should be attuned to their possible appearance, and may be able to see the signs long before the event occurs.

428. Many of the other factors—reform fatigue, poor management, and problems with internal resistance and an incompatible incentive system—lie more in the justice sector's court. These constitute frequent oversights in reform planning, and can indeed be mitigated before they create serious obstacles. For example, resistance to change is universal but is not always a consequence of vested interests, and it is important to make the distinction. People may fear change only because they believe they cannot cope and, in that instance, the solution is to provide them with coping skills—training, equipment, a chance to ask questions and suggest modifications. Those who oppose change because they know they will lose something are another issue, but it is an error for reformers to confuse the two groups as they may create active resisters out of the “only fearful.”

429. Incentive systems are a related but slightly different issue and one still often overlooked in reform programs. Where the reform promotes one type of behavior but the existing system of rewards and benefits promotes another, the reform is likely to suffer. In the justice sector, awareness of the impact of such systems is rarely very sophisticated. As the saying goes in

human resources, “what is counted is what counts,” and if one counts the wrong thing, the wrong behavior will be likely.

430. In Romania, aspects of the justice sector’s incentive system ought to be reviewed (as seen in earlier chapters). Certain shortcomings (such as cases remaining in investigation without resolution for years, if not forever) seem to go undetected, and other actions of less value may be rewarded. No reform can operate without a consistent incentive system, and thus more attention is merited here. Again, this was never a concern of traditional justice systems, but it is part of a more managerial approach to making performance improvements.

9.4 Conclusion

431. Reform planning is a complicated business and involves not only identifying goals and developing ways to achieve them, but also fending off the largely unpredictable obstacles—risks—that may get in the way. Modern justice sector institutions are beginning to see these tasks as part of their job—not just maintaining performance at current levels, but also identifying areas for improvement and avoiding the pitfalls in moving ahead. Information is key to all this—not only good case management systems but also alternative sources of data, including surveys, public discussions, comparative datasets, and independent research.

432. Once, judiciaries may have existed as a collection of somewhat independent actors each making his or her decisions as best they could do. Today, they are seen as an organization whose leaders take a good part of the responsibility for the actions and products of all its members. Romania, having built the foundations for such a system over the past two decades, is now positioned to move to this new status. The transition will be neither easy nor rapid, but is absolutely essential, and it is hoped that the donor community can assist by recognizing the country’s need to reach a new stage in the sector’s development.

APPENDIX 1: TERMS OF REFERENCE

1. *Objective.* The objective of the Advisory Services is: (i) to analyze the functioning of institutions of the judicial system in Romania and (ii) to provide analytical and advisory input to enable the Recipient to formulate an action program to improve the performance of the judicial system.

In meeting this objective, the Bank will undertake through the Advisory Services to examine: (i) the functioning and organization of the judicial system and efficiency of the management of the institutions within the system: the Ministry of Justice (the MOJ), the Public Ministry (the PM), the High Court of Cassation and Justice (the HCCJ), the Superior Council of Magistracy (the SCM), and its subordinated institutions—the National Institute of Magistracy (the NIM) and the National School of Clerks (the NSC), respectively, judicial inspection, courts, and prosecutor’s offices; (ii) the distribution and management of human and financial resources in the judicial system; and (iii) the contribution of ICT to the performance of the judicial system.

2. *Advisory Services.* Except as the Recipient and the Bank may otherwise agree, the Bank shall perform the following Advisory Services, subject to such modifications and refinements thereof as the Recipient and the Bank may agree upon from time to time to achieve the objective thereof:

Component 1: Assessment of the organization and functioning of the judicial system and recommendations to improve its performance.

Under this Component, the Bank will provide support to the Recipient for the following activities:

(i) Assess the performance of institutions of the judicial system.

Under this, the Bank will provide an analysis of the performance of institutions of the judicial system (Ministry of Justice, Public Ministry, High Court of Cassation and Justice, Superior Council of Magistracy, and its subordinated institutions—the National Institute of Magistracy and the National School of Clerks—the judicial inspection, the courts, and the prosecutors’ offices, in particular with respect to the inflow of cases, their management and their disposal will be examined). The assessment will analyze the relevant normative framework, the distribution of competencies among and within institutions of the judicial system, the capacity of these institutions and the effectiveness of their management. The performance measurement areas will cover the quality of judicial services, their efficiency, their accessibility, and their integrity. The accountability of above mentioned institutions in fulfilling their tasks will be also examined.

(ii) Assess the effectiveness of the cooperation between institutions of the judicial system in the delivery of services.

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The scope of this assessment is the effectiveness of the cooperation between different institutions of the judicial system in the delivery of services. The focus will be on the Ministry of Justice, Public Ministry, High Court of Cassation and Justice, Superior Council of Magistracy, and its subordinated institutions (the National Institute of Magistracy and the National School of Clerks), the judicial inspection, the courts, and the prosecutors' offices. The role of core legal professions (lawyers, public notaries, bailiffs) forensic and independent expertise in judicial proceedings and the legal aid system will be part of this analysis as well. Judicial system performance will be assessed in terms of service delivery to users of the system. The performance measurement areas will cover the quality of judicial services, their efficiency, their accessibility, and their integrity. The mechanisms through which performance accountability is managed will also be examined.

(iii) Formulate recommendations on how to improve the performance of institutions of the judicial system and the performance of the judicial system as a whole.

Component 2: Assessment of the use of human and financial resources allocated to the judicial system and recommendations for improvement.

Under this Component, the Bank will provide support to the Recipient for the following activities:

(i) Assess the effectiveness of human resource management in the judicial system. The assessment will focus on (1) institutional arrangements, (2) organizational capacities and staffing levels, and (3) the overall performance of the human resource management system. With respect to institutional arrangements particular emphasis will be placed on the analysis of the way human resource policies for the judicial system are drafted and implemented and to what extent they are effective. As to organizational capacities and staffing levels, the analysis will focus in particular on the distribution of judicial and non-judicial staff among and within judicial system institutions and across the country's court network in relation to the existing and anticipated workload. The review will analyze different options to ensure the flexibility of staff allocation throughout the territory required to adjust to the development of the workload. When it comes to the overall performance of the human resource management system, particular emphasis will be placed on the career management of magistrates and their evaluation and promotion system. This analysis will include the legal inspection and the impact of their work on the performance of the human resource management system. The analysis will also look closely at the rationing and management of the courts and prosecutors' offices.

(ii) Assess the effectiveness of financial management in the judicial system. This assessment of the financial management framework and resource allocation to and within the judicial system and its institutions will cover aspects such as (1) institutional arrangements and the budget process including procurement, (2) budgetary allocations and income generation of the judicial system, including funding levels, (3) judicial system expenditures, and (4) the overall performance of the financial resource management system. As to the budgetary allocations and income generation of justice system institutions, the analysis will comprise an assessment of the funding levels and their appropriateness compared with the overall public sector budget and service demand (for example, caseload). Special emphasis will be given to

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options for generating sources of income in addition to budgetary allocations, such as stamp duties, judicial fees and others and their relation to the actual costs of services. When it comes to judicial system expenditures, the analysis will include options to achieve efficiency gains by realigning resource allocation and outsourcing certain support activities. It will also cover the use of legal aid funds provided by the Ministry of Justice to the local Bars. With respect to the overall performance of the financial resource management system, a particular emphasis will be put on the way financial resources are allocated and to what extent they match the needs.

The analysis will be carried out in close cooperation with representatives of each institution to be assessed. It will require working with those in charge of management of funds in courts and prosecutors' offices, including at the local level. The analysis will review and utilize available data-sets and generate additional performance data to fill gaps.

(iii) Recommendations.

Based on these analyses specified at (i) and (ii), recommendations will be formulated to improve the allocation and management of human and financial resources in the judicial system.

Component 3: Assessment of the functionality of the information and communication technology (ICT) environment and architecture of the judicial system and its management.

Under this Component, the Bank will provide support to the Recipient for the following activities:

(i) Assess the functionality of the ICT system within the judicial system at central and local levels.

This activity will review the ICT environment and architecture supporting the Romanian judicial system. The analysis will cover five key areas: (i) Review the judicial system's operational objectives and processes and identify critical business capabilities and functions required to support the functioning of the judicial system. (ii) Review the institutional arrangements to support the technology requirements of the judicial system, including information and technology governance and management. (iii) Assess current ICT systems across the judicial system in light of their contribution to critical business capabilities and functions. (iv) Identify the ICT components required to support the future-state business capabilities and highlight component gaps in the IC landscape. (v) Provide an overall ICT architecture and integration approach and develop recommendations, a high-level transition strategy and a roadmap aimed at ensuring effective alignment of the judicial system's business capabilities and processes to ICT investments.

The analysis will be carried out in close cooperation with representatives of each institution involved. It will also require working with those in charge of control and management of ICT systems in the courts and prosecutors' offices at local and central level.

(ii) Recommendations.

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Based on this analysis, recommendations will be formulated to improve the performance of ICT systems in the judicial system and their contribution to future judicial service delivery.

Component 4: Provision of a systematic framework to identify and mitigate risks affecting the performance of the judicial system.

Under this Component, the Bank will provide support to the Recipient to develop a systematic framework to identify, prevent, mitigate and overcome risks affecting the performance of the judicial system within the current normative framework.

APPENDIX 2: RECENT HISTORY, CHALLENGES, AND STRUCTURE OF THE LEGAL SYSTEM

Only a brief summary is offered here as most readers will be familiar with the sector. Those wanting more information are referred to publications in the list of references.

Legal Tradition and post-1989 Developments

The Romanian justice system follows the continental tradition with France and Germany as principal models. Under communist regimes (1945–89) it was subject to the distortions typically found in Eastern Europe. These included what many considered the “disproportionate strength” of prosecutors, especially in influencing the outcome of legal actions (Goodale, 2002); limited independence and a rather restricted, bureaucratic role for judges; and little further evolution of the legal framework, especially as it applied to private law.

After the fall of the Ceausescu government in December 1989, the country introduced a number of changes to eradicate past ills. These began with the 1991 Constitution and a new Law on the Organization of the Judiciary (92/1992) both of which stipulated that judges would be independent and subject only to the law. Nonetheless, instances of political interference with the judiciary were reported throughout the 1990s as the legacies of the past were abandoned with great difficulty. A “confusion between the prosecutors and judges’ roles was maintained, not only in the legal framework but also in judicial culture” (Coman and Dallara, 2012: 837).

Some additional changes began in 1996 and were further consolidated with the pre-accession strategy in 2000. Modifications to the Law on Judicial Organization, enacted in 1997, were criticized locally as extending the role of the Ministry of Justice (MOJ) “well beyond the administration of justice” (to be understood as administrative management of the courts). Other important, but less central, changes during the 1990s included the promulgation of a new Civil Procedures Code (1993) and a new bankruptcy law (Law 64/1995, superseded by Law 85/2006) and the creation of a National Anti-corruption Prosecution Office (later the National Anti-Corruption Directorate [NAD]).

In 2003, the process of judicial reform, especially independence, was taken up with greater fervor, resulting in a Judicial Reform Strategy released in September that year and the passage of three laws in 2004: on the Superior Council of Magistracy (SCM), on the Organization of the Judiciary, and on the Statue of Magistrates.¹²⁷ These laws addressed issues reported locally and by the European Union (EU) about the MOJ’s continuing role in the selection, promotion, and evaluation of magistrates (a term used for both judges and prosecutors), as well as poor working conditions and “political pressures.”

It bears mentioning that there is an emerging consensus among reform experts that laws alone, while important, can rarely bring about the intended changes in behavior of within-system and external actors. Thus, while the passage of laws and even the creation of new organizations set a

¹²⁷ Owing to opposition from the Constitutional Court and the Superior Council of Magistracy, the laws were further modified and the new versions were promulgated in 2005.

basis for further change, additional measures are needed to ensure that their desired results are realized (Carothers, 2003; Gupta, Kleinfeld, and Salinas, 2002; Hammergren, 2007; Kleinfeld, 2012; Mendelski, 2011; Roos, 2011). Moreover, as seems to have happened in Romania, laws once enacted can also be modified to undercut their intended impact.

One of the principal forces motivating these reforms disappeared with Romania's accession to the EU in 2007, despite the EU's continued reporting about challenges with implementing the improved legal framework. Hence the Cooperation and Verification Mechanism (CVM) was created, aimed principally at monitoring continuing progress in the areas of judicial reform (and especially independence) and the fight against corruption. Among the steps taken by the government in the interest of resolving CVM concerns were the drafting and promulgation of four major codes (Civil Code, already in effect; Civil Procedures Code, entering in February 2013; and the Criminal Code and Criminal Procedures Code, both to enter into effect in 2014).¹²⁸ Further changes have been made to reduce the MOJ's influence on judicial appointments and make the latter more transparent, and to transfer, as scheduled, budgetary control to the High Court of Cassation and Justice (HCCJ). Yet this transfer has been continually postponed because of the impression that the HCCJ is still not ready to take on the new responsibilities.

While this Review was going on, the MOJ and other sector institutions continued preparing a series of bills, plans, and strategies to address other government concerns. Although it was too early to evaluate their adequacy and likely outcomes, the team took them as a positive sign of the government's continuing interest in addressing these issues.

Current Setting and Challenges

By the time this Review was carried out, Romania was in a challenging position for further improving justice sector performance, despite having met the criteria for EU accession and being monitored closely by the CVM. It also faced economic and political difficulties, all with an impact on the courts and other sector institutions, as well as on completing the institutional transition to an open economy and stable democratic polity.

Economically, after enjoying high growth rates through 2007, the country suffered economic contractions in 2008 and onward, and after a brief respite, again officially entered a recession in the second quarter of 2012. The population is also shrinking. Latest census figures had not been released as of writing, but it appears that the population may have fallen from 22 million to around 19 million, a more than 10 percent decline. Since joining the EU, out-migration has become easier,¹²⁹ and there is a concern that the "best and the brightest" are seeking employment and residence elsewhere.

Economic declines clearly affect resource allocations to all public institutions, and justice is no exception. They simultaneously create more demands for judicial services as people attempt to recuperate debts, rid themselves of nonpaying tenants, dismiss excessive workers, retain jobs, or otherwise seek out what may appear to be the only way of resolving their economic difficulties.

¹²⁸ Dates have been postponed several times and further delays are possible.

¹²⁹ The trend was visible even before, however. Goodale (2002: 1372) reports that as of 1992 Romania had a population of 23 million in the country and 9 million dispersed throughout the rest of Europe and North America.

Economic declines also may increase crime¹³⁰ or the likelihood of joining the gray economy. When, as in Romania, a decline spurs governmental austerity measures, these add to the pressures on the courts, because those affected are likely to protest the possible illegality of such steps.

Cultural factors also pressure the system, including a misguided understanding among some citizens of the legal system or the role of courts and other organizations. This may be more prevalent among older citizens who grew up under the pre-1989 regime and so carry ideas and attitudes formed during that era (or for that matter during much of the 1990s). While Romania has enough attorneys to cover demand in theory, many citizens do not seek legal advice before accessing the courts, most probably because they cannot afford it, but also because they may not understand why it would be needed. Consequently, many civil and criminal complaints are filed for frivolous, dilatory or similar purposes. Yet prosecutors and judges appear to understand their role as having to attend to all complaints equally without any option to give lower priority to cases, divert them, or simply discard them,¹³¹ doubtless increasing their workload.

Long-standing informal practices like clientelism and corruption are often put forward as other cultural factors (Guasti and Dobovsek, 2011). They were prevalent under the communist regime and are perceived as having hardly disappeared with the democratic transition. Although the series of sector reforms arguably reduced, if not eliminated, the direct influence on the justice system's institutions of these practices, they still affect external actors' behavior and perceptions,¹³² which can only be changed by still more proactive sector programs—attacking what problems still exist, introducing preventive measures, and informing the public of the intent to improve matters. An announcement of a “zero tolerance” policy (for either party to a corrupt transaction) might not be a bad idea.

The transition from a communist regime has been blamed for certain dysfunctional practices—many stemming from the euphoria of being able to use the courts to make complaints, whether justiciable or not. It is also possible that certain judicial attitudes carry over from the earlier period or from the transition itself.¹³³ Still, the transition began in 1989 and other countries (Chile for instance) emerged from a prior authoritarian regime later and less chaotically. In any

¹³⁰ See UNODC (2011). According to Eurostat as of November 2012, overall crime had increased in Romania, although data report rates only through 2009. Crime in Romania showed a sharp decrease in 2000–05, followed by a steady increase in 2006–09, but not reaching the levels of 2000.

¹³¹ In Western Europe, the United States, Canada, and other developed systems, complaints usually require an initial vetting by an intake office before they are entered and sent to a judge or prosecutor. When trained personnel staff this office, they are usually able to eliminate frivolous and non-justiciable complaints from the start, and sometimes to divert them to other agencies (including whatever type of legal assistance exists). Asking a judge or prosecutor to do the vetting (as happens in many Latin American countries) simply wastes their time. To help unrepresented clients meet the minimum requirements, courts in developed countries are increasingly providing standard forms to guide their presentation of the issues, and occasionally also have staff to help them.

¹³² The National Council for the Study of the *Securitate* Archives (CNSAS) through 2011 made public 42 cases of judges and prosecutors who had collaborated with the *Securitate*. Of these 42, 20 received final court decisions attesting their collaboration.

¹³³ Among magistrates these might include a tendency to excessive formalism (cleaving to every rule, writing lengthy motivations for even the most straightforward decisions, and allowing even the most blatantly frivolous claim or dilatory maneuver to avoid being charged with violating parties' rights), a fear of antagonizing those higher up within or outside their organizational hierarchies, and a lack of consensus as to what is meant by judicial independence and how it should affect their individual and collective actions.

event, Romania's transition has probably been less linear, more subject to radical and sudden changes, and certainly more affected by outside pressures (the EU accession criteria and the CVM) than those in the most logical non-European comparator region (Latin America)¹³⁴ or in fact in some other new EU members.

The broader governmental and political environment also complicates the sector's role. Government actions have affected the courts for some time owing to frequently changing laws and policies introduced since the fall of the Ceausescu regime. Some of the issues (for example, restitution of confiscated property) have their origins even earlier—as far back as 1945 in this case. Those involving wage reductions, fees, and taxes have emerged more recently; their impact is further complicated by sudden policy reversals and decisions by the Constitutional Court and ECHR on their legality. Moreover, while the faith of citizens in the justice sector generally and the courts in particular is not high according to survey data, their confidence in government or at least its commitment to meet political promises is apparently lower still.

In practical terms therefore citizens file an unusually large number of legal actions “just in case” the government does not come through. Recent causes of such anxieties include the government's purported inclusion of the traditional bonuses in its salary readjustments in 2009, its decision in August 2010 to deduct a 5.5 percent health care tax from all pensions, and a longer controversy over the car pollution tax.¹³⁵ In the first two cases the Constitutional Court found against the government, which has promised to repay those affected. The third case was ruled against the government by the European Court of Justice in July 2011. However, these decisions have not prevented judges, pensioners, and car owners from continuing to file cases, in some instances because they believe they must do so in order to get the money back, and in others because they believe this is extra insurance for their claims.

Institutional Map of the Justice Sector

The following is a brief summary. (More information on staffing, other resources, and operations is primarily in part 3.)

The Judiciary

As per both the 1992 and 2004 laws on the organization of the judiciary, the courts are organized into four instances: the HCCJ, 15 courts of appeal, 42 tribunals, and 176 district courts or *judecatorii*.¹³⁶ All have general jurisdiction (that is, hear both criminal and civil cases, and subtypes of the latter), despite some recent efforts to introduce specialized tribunals. The HCCJ

¹³⁴ Rather than Asia, Australia, and so on. While we will not push the comparison, Latin America is the logical comparator as its countries follow the continental legal tradition and have fully embraced, at least in theory, the full set of internationally recognized human rights; transitioned from authoritarian regimes during the 1980s; and are also affected by reportedly high levels of corruption throughout the public and private sectors.

¹³⁵ About 80,600 files were opened in 2011–12 on restituting of this tax, according to an article in *Ziarul Financiar*, October 19, 2012, available at <http://www.zf.ro/auto/guvernul-schimba-din-nou-taxa-auto-taxa-de-primamatriculare-auto-inlocuita-cu-una-de-mediu-10245774>.

¹³⁶ This number was set by Law 304/2004. The real number does not always coincide with it. Some courts have never been created and there is an effort to close some underused district courts (and accompanying prosecutors' offices). As a rule, setting the number of courts by law is not recommended practice, as it ties the judiciary's hands when adjustments are required.

and larger courts of appeal, tribunals, and *judicatorii* allow for internal specialization by judicial panels and chambers or by individual judge.

All the courts have original jurisdiction for some matters, but most cases are first lodged at the district or Tribunal level, with the division of labor between the two determined by the amount in question (former civil and commercial cases, now combined into a single civil category), severity of crime (criminal), and specificity of the legal matter. Thus “administrative complaints” involving small fines and lesser penalties (many levied by local authorities) enter at the *judicatorii* level while other administrative and all labor and family disputes are first seen by the tribunals. The original-jurisdiction cases heard by the courts of appeal and the HCCJ largely involve corruption and other criminal charges against public officials.

In addition to appeals and *recurs* (see next paragraph), the HCCJ is charged with the responsibility for encouraging uniform legal interpretations. This has occasionally put it into conflict with a body not covered here, the Constitutional Court, which has both *a priori* and *ex post* powers for determining the constitutionality of laws and their application (Chiriac, 2011). Cases, once they have exhausted all local remedies, may also be taken to the European Court of Human Rights (ECHR) in Strasbourg or the European Court of Justice in Luxembourg on the basis of their alleged violation of European law. Romania is the country with the fourth largest number of cases (about 12,300) pending before the ECHR (after Russia, Turkey and Italy).

Formerly all cases enjoyed three instances: original judgment; appeal (*apel*), in essence a retrial on issues of merit and law by the next higher court; and cassation (*recurs*), only addressing legal error, and seen by the third level (court of appeal or HCCJ, depending on where the case began). In recent years, however, the rules have been modified so that some cases (civil matters involving amounts under RON2,000, heard by *judicatorii*) have no appeal of either type and certain others (for example, civil cases for a value between RON2,000 and RON100,000, again heard by *judicatorii*, and all criminal cases heard by *judicatorii*) have only a *recurs*, which for them will involve both substantive and legal issues. These changes were made in the interest of reducing the tribunals’ workload and limiting appeals entered only to delay a final judgment. (We examined those effects in part 3.)

The Superior Council of Magistracy

Although officially part of the judiciary, the SCM manages its own budget and administrative offices. The number of internal staff and staffing patterns are, however, subject to budgetary restrictions (Ministry of Finance and Parliament) and to some extent to the MOJ’s recommendations to both these other agencies. This may account for some reported shortcomings. Another factor may be certain SCM practices such as reliance on magistrates rather than professionally formed experts to staff offices specializing in topics like human resources and statistics, and the tendency to rotate them out of these positions every two or three years so as to preclude them from acquiring expertise on the job.

The SCM was initially created in 1909, but its organization, role, and powers have been much modified since 1992. It has undergone several further changes since then. As now structured, it is headed by a 19-member board, elected for six-year concurrent terms.¹³⁷ Members are as follows:

- Nine judges and five prosecutors selected by the general assemblies of judges and prosecutors.
- Two representatives of civil society selected by Parliament.
- Three members *de jure* (by virtue of their positions)—the president of the HCCJ, the minister of justice and the general prosecutor before the HCCJ.

The presidency of the SCM changes every year and is determined by vote of the SCM members.¹³⁸ The SCM has a staff scheme of 215 as follows: 83 positions of legal advisors with status of magistrates (25 legal advisors, 39 seconded magistrates, and 19 vacancies), 44 public servants (36 filled in positions and 8 vacancies) and 88 contract agents (66 contracts, 14 seconded personnel, 8 vacancies). The structure is led by a secretary general assisted by a deputy. There are 30 department heads, out of which 10 are seconded judges and prosecutors. Its principal mandate is to guarantee the independence of the magistracy; its principal function is to control the career (selection, training, promotion, and discipline) of virtually all magistrates. The only exceptions are high-level prosecutors.

The SCM publishes an annual report on the activities of the courts and the Public Ministry (PM), and for this has a statistical office to collect and process performance data. It does not draw up or administer the budgets of these organizations, but on the courts (but not the PM) it collects information on needs from the courts of appeal (based in turn on submissions from tribunals and *judecatorii*), and discusses them with the MOJ. The SCM is also currently supervising the two principal training institutes, the National Institute of Magistrates (NIM) responsible for training magistrates and the National School of Clerks (NSC) responsible for training of clerks. Under consideration is a law that would transfer the NSC to the MOJ's control along with the supervision now exercised by the SCM over the careers of its graduates, the law-trained *grefieri* or clerks.

The Judicial Inspectorate

This body was created under the SCM, but recent legislation provides it with its own legal personality and arguably operational independence. It is staffed by judges and prosecutors recruited from ordinary positions. Previously, they were seconded, but they are now appointed for a six-year term. Its primary responsibility is reviewing complaints about magistrates' breaches of disciplinary rules defined in the Law on the Status of Judges and Prosecutors that are subject to disciplinary sanctions, and making recommendations to the SCM, which is responsible for the final decisions. It does not investigate corruption and, when its investigations turn up evidence of it, it is expected to refer the cases and any findings to the NAD or the ordinary prosecution. The Inspectorate also makes periodic visits to courts to monitor court operations and

¹³⁷ For reasons that have not been made explicit, CADI (2010) believes the terms should be only five years. A more important change, practiced by councils in other countries and regions, would be to stagger elections so that the entire board is not replaced at once. This would make interference by any particular political faction or tendency more difficult, and would also guarantee greater continuity in operations.

¹³⁸ The one-year term is suboptimal, and the judiciary and government might want to consider longer terms so as to allow programs begun one year to have a greater chance of continuing in operation.

conducts studies on various performance problems, as agreed with the SCM. It is too early to tell how this more independent legal status will translate into an improved practice.¹³⁹ It remains unclear how the Inspectorate's studies have informed SCM actions, and how they will do in the future.

The Public Ministry

This ministry is responsible for prosecuting criminal cases and supervising prior police investigations. It is headed by the General Prosecutor, appointed by the President, pursuant to recommendations from the MOJ and advisory opinions from the SCM. The same appointment process applies to the general prosecutor's deputies, the head (chief prosecutor) of the NAD and the head (chief prosecutor) of the Directorate for the Investigation of Organized Crime and Terrorism (DIICOT) as well as their deputies. The NAD and DIICOT also enjoy a semi-independent status vis-à-vis the PM, owing to the sensitivity of their investigations. Other prosecutors (including those seconded to the NAD and DIICOT) are recruited, selected, promoted, and disciplined by the SCM. The PM's organization parallels that of the courts, with different levels of prosecutors assigned to each of the latter's instances—wherever there is a court, there is a corresponding prosecutors' office. The PM manages its own budget and does not channel it through the MOJ, unlike the ordinary courts.

Ministry of Justice

Under the pre-1989 regime, the MOJ controlled the sector in the name of the executive and to advance that branch's interests. This control has diminished considerably. It still administers the courts' budgets (except for the SCM and HCCJ), is represented at the SCM, and oversees the sector's "independent professionals," to which court (and prosecutorial) clerks may soon be added along with the institute that trains them (NSC).¹⁴⁰ The Ministry also sets the budget for legal defense, which is administered through the courts, and regulates the fees to be paid to the private attorneys who provide it. The MOJ has a major role in advising the cabinet on staffing (location and numbers) and on other issues related to judicial organization that might require legislative change. It also has a right of legislative initiative in relation to the legal framework for court organization. Beyond that it has many other functions not reviewed here, for example prison administration, probation services, the National Trade Registry, the National Citizenship Authority, and the National Institute for Forensic Expertise.¹⁴¹

¹³⁹ Amendments have been made to Law 317 (on the SCM) restating the Inspectorate's functions, but what is meant here is to what extent de jure provisions translate into reality. Transition countries in the region have a tendency to rely on changes in legal provisions, assuming their implementation will somehow materialize. Ample evidence, especially from reforms in other Eastern European countries (see Gupta, Kleinfeld, and Salinas, 2002: 2) shows that this is not the case.

¹⁴⁰ The nature of this oversight varies considerably according to the type of professionals. It is also continually evolving.

¹⁴¹ The team conducted interviews at the Institute, but could only conclude that an ECHR determination had resulted in two forensic institutes being created, neither of which appears to be adequately staffed. Apparently the ECHR found that the location of the existing one, under the police, violated European standards and so required that Romania establish another. If securing more objective analyses was the aim, it remains unclear whether, in Romania, location under the MOJ serves that end, or whether a recent initiative to allow private laboratories to do some of this work will produce better results.

APPENDIX 3: A FEW WORDS ON THE NEW CODES

We were not asked to address this topic, but feel some comments are in order, especially because so many observers, in Romania and elsewhere, have suggested that the Romanian approach may not be sufficient. It is now generally accepted that writing a new code is the easy part (no matter how long it takes) and that the real challenge is in its implementation to ensure that whatever the new code aims at improving actually occurs. Here the European Union (EU) is sometimes seen as endorsing what one commentator has called a “formalistic approach” to reform (Roos, 2011). By formalism the author means a complete reliance on new laws and new structures with little or no attention to ensuring that what the laws dictate actually occurs and that the new structures are organized and their internal practices designed to allow these improved outcomes to take place.

Estimates of Human Resources Needs

The Functional Review team was struck by the constant equation among those designing “restructuring” and reorganization charts with adding more resources and personnel. This is an extremely limited interpretation of the term which ought to refer not to how more of the *same* people can do more of the *same* things, but rather to how the codes will require *different* types of staff performing *different* functions. It appears that no one has given a thought to this second, arguably more authentic interpretation of the terms, and that moreover the “more-of-the-same” approach has very little empirical basis for its conclusions. It is not clear to the team why roughly 400 more judges would be required for the implementation of the four new codes. Could the existing number of judges not be reassigned or rotated to perform the new functions?¹⁴²

The team is also uncertain why even the smallest and least busy court should require five judges—would three not be enough? The Impact Study on the new codes (Tuca Zbarcea and others, 2011) notes the absence of this type of pre-implementation evaluation, but the quality of data would not have allowed it to carry one out anyway. The team stresses that this kind of evaluation is a complex, time-consuming process, although an essential one and we recommend the use of pilot courts as one way of advancing it.

According to later comments by the Ministry of Justice (dated December 2012), the estimates of needs have been revised, based on the exclusion of the formation of two separate groups of judges and the decision that all stages of the trial will be heard by the same judge. From the economic standpoint this appears to be an improvement, although it would certainly be possible in the spirit of the initial law to simply require that the same judge not see all stages of the same criminal case. In any event, the Functional Review team remains concerned about the apparently *ad hoc* nature of these decisions and strongly suggests that whatever arrangements are decided, they be piloted first before being rolled out nationally.

¹⁴² The earlier and ongoing Latin American experience with the same type of criminal procedures codes offers a cautionary tale. The number of often already underworked judges was expanded to create new categories of criminal magistrates, resulting in extremely low caseloads—in the seven Mexican states that have adopted the codes, often resulting in fewer than 100 cases per magistrate annually. The only saving grace in Mexico is that pretrial “control” judges may now adjudicate the abbreviated process—where the defendant does not protest the charges.

Overlooked Information and Communications Technology and Other Resource Needs

Aside from human resources—reorganized, redefined, and possibly but not necessarily increased—new procedures should be incorporated in the case tracking systems (ECRIS). Equally, stipulated needs for new infrastructure or readjustments should be carefully tailored to reflect a good prognosis of real needs. So far as we know the first has not been done, and estimates as to the needs for hearing rooms seem to be fairly ad hoc and, most probably, excessive.

Underestimates of Time for Implementation and Failure to Set Benchmarks

A further issue is that, based on the last quarter century of experience, it is fairly clear that the new codes—and the procedural codes in particular—cannot be implemented overnight. Latin American and other international experience with new criminal procedures codes has amply demonstrated this, and the preferred method is now to implement codes incrementally, selecting groups of states or districts for early or later adoption. At the same time, problems arising in the early pilots should be resolved before the process extends to the rest—something only Chile has done well. Incremental implementation is convenient simply to allow time for adjustments but it is most effective if errors are detected and resolved before the process continues.

Finally, implementing a new code is never the final objective—which is instead to improve certain aspects of performance, for example, time to resolution, better outcomes, or greater user satisfaction. These results should be defined early, along with the means for measuring them, and they, along with the effective implementation of new practices, require constant monitoring.

This monitoring should be both statistical and observational. If the new Civil Procedures Code aims at fewer hearings, someone needs to determine whether fewer hearings are being held, and if not, why. This monitoring can be statistical, assuming a sufficiently robust case management system, but should also be observational. Those in charge of monitoring visit courts to see what is happening and to determine why, if the predicted is not occurring, things are going amiss. As one of our interviewees noted, one further issue with the new Civil Procedures Code at least is that while it sets new deadlines for various procedural steps, there are no sanctions (to either the judge or the parties) if they are not met. While we do not believe the “stick” is the only means to change behaviors, open ended admonitions to do something usually do not work without some kind of incentive behind them.

We would have recommended the codes be introduced in incremental fashion, county by county or region by region. We note that the Impact Study made much the same recommendations, suggesting the codes first be applied on a pilot basis to identify challenges and necessary modifications. Although staggered implementation has not been possible for the new Civil Procedures Code, which entered into force in February 2013 (but possibly still is for the new Criminal Procedures Code), an effective monitoring system should still be set up, with a full-time task force to conduct it.

Where new procedural codes have been introduced (and the best examples are elsewhere in Eastern Europe and in Latin America, as more developed nations generally prefer to amend existing codes, possibly because they fixed the basic ones decades ago), gradual implementation

Appendixes

(by district, by type of crime, or by date of entry of the complaint) have proved more effective than imposing the code on the entire country at a certain date. Code implementation, we repeat, is a long-term process, and it only begins with drafting and initial training in the new requirements. New procedural codes in particular require the design of new internal processes and protocols—what the actors do when they show up for work on Monday morning. These will not be elaborated in the codes, but must be designed separately, and will have to be continuously readjusted.

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