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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**(VENICE COMMISSION)**

**ROMANIA**

**OPINION**

**ON AMENDMENTS TO THE CRIMINAL CODE**

**AND THE CRIMINAL PROCEDURE CODE**

**adopted by the Venice Commission  
at its 116<sup>th</sup> Plenary Session  
(Venice, 19-20 October 2018)**

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## I. Introduction

1. On 28 June 2018, the Monitoring Committee of the Parliamentary Assembly of the Council of Europe requested the opinion of the Venice Commission to the recent amendments to the Criminal Code and Criminal Procedure Code of Romania (see CDL-REF(2018)042, CDL-REF(2018)043, CDL-REF(2018)044 and CDL-REF(2018)045).
2. Mr Richard Barrett, Mr Alexander Baramidze, Mr Martin Kuijer, Mr Jorgen Steen Sorensen, Mr Kaarlo Tuori and Mr Guido Neppi Modona acted as rapporteurs on behalf of the Venice Commission. Mr Marc Touillier was appointed as an expert.
3. On 5 July 2018, the Secretary General of the Council of Europe asked Romania to wait for the Venice Commission's opinion on the amendments to the criminal codes.
4. On 13 and 14 September 2018, a delegation of the Venice Commission, composed of Mr Alexander Baramidze, Mr Martin Kuijer, Mr Guido Neppi Modona, and Mr Marc Touillier, accompanied by Mr Thomas Markert, Secretary of the Venice Commission, and Ms Artemiza Chisca, Head of the Democratic Institutions and Fundamental Rights Division, visited Bucharest and had exchanges with the President of Romania, the Minister of Justice, the High Court of Cassation and Justice, representatives of the General Prosecutor's Office, the National Anticorruption Directorate (DNA), the Directorate for Investigating Organized Crime and Terrorism (DIICOT), the Superior Council of Magistracy (CSM), Parliament representatives including the Joint Special Parliamentary Committee<sup>1</sup> for amending the laws of justice, associations of judges and prosecutors, and civil society organisations. The Venice Commission is grateful to the Romanian authorities for the organisation of the visit.
5. The present opinion was prepared on the basis of contributions by the rapporteurs and on the basis of the information provided by the interlocutors during the visit. Inaccuracies may occur in this opinion as a result of incorrect translations of the draft laws.
6. This opinion was examined by a joint meeting of the sub-commissions on Fundamental Rights and on the Judiciary, and subsequently adopted by the Venice Commission at its 116<sup>th</sup> session on 19-20 October 2018.

## II. Preliminary remarks

7. It is not the purpose of this document to provide a detailed and exhaustive analysis of all amendments to the Criminal Code (hereinafter CC) and the Criminal Procedure Code (hereinafter CPC) (also affecting Law No. 78/2000 on preventing, discovering and sanctioning corruption offences and the Law no.304/2004 on judicial organization). Given the very large number of amendments,<sup>2</sup> most of which carry significant implications for legal practitioners when investigating, prosecuting, defending and adjudicating criminal offences, the opinion focuses on those amendments raising the most serious concerns. If this opinion remains silent on other issues, this is not to say that the Venice Commission agrees with the necessity or desirability to introduce the amendment or that the amendment is fully in line with existing standards and practice in the field.
8. The Commission is aware of the fact that the Romanian authorities have asserted that the amendments are largely due to the necessity to bring the Romanian legislation in line with a number of decisions of the Constitutional Court (hereinafter CCR), as well as with Directive 2016/343/EU of 9 March 2016 on the strengthening of certain aspects of the presumption of

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<sup>1</sup> Hereinafter "Special Parliamentary Committee"

<sup>2</sup> Some 300 amendments were voted on by the Romanian Parliament in June and July 2018; the amendments concern 266 amendments to the Criminal Proceedings Code and 63 amendments to the Criminal Code.

innocence and of the right to be present at the trial in criminal proceedings, and Directive 2014/42/EU of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union.

9. The Commission further acknowledges that, as it resulted also from the exchanges held during the visit to Romania, there is consensus, including among members of the Romanian judiciary, that there was a necessity to revise the existing provisions, although the two Criminal Codes are rather young and have also been subject of amendments in recent years. The difficulties faced in the application and interpretation of the two Codes in recent years have been presented as an important reason for revisiting the two legal instruments.

10. The present opinion does not deal in an exhaustive manner with the conformity of the amendments with European Union Law. Nor is it up to the Commission to express itself on how the Romanian Constitution should be interpreted; the Romanian Constitutional Court has the authority to interpret the Romanian Constitution in a binding manner.<sup>3</sup> At the same time, the review currently carried out by the CCR is limited of course to issues of constitutionality that have been raised before it. In view of its mandate, the CCR will not be able to give a comprehensive analysis of the amendments and the effects that the amendments might have on the effectiveness of the criminal justice system. It will determine whether a particular amendment is constitutional or not. From that perspective, the comments made by the Venice Commission may have a slightly broader scope.

11. The focus in public debate regarding the proposed amendments to the criminal codes has been the allegation that the current amendments have the potential of undermining the fight against corruption in Romania. However, the Commission would like to emphasise from the outset that the potential impact of the amendments under review is much wider: they could significantly impact the criminal justice system and its effective and efficient operation, namely the investigation into, the prosecution and adjudication of various other forms of crime, in particular serious and complex crimes. On the other hand, provisions which seem to raise no concern and even to strengthen legal security may turn out to be problematic in light of pending corruption cases or investigations and amount to *ad hominem* legislation.

12. Also, the consequences of the amendments have to be seen in a broader context, both in their inter-relations and in connection with the amendments to the laws of justice (already examined by the Venice Commission in the Preliminary Opinion issued by the Venice Commission on 13 July 2018) and with other, potentially relevant, legislative provisions or pending initiatives. The two opinions should thus be read together.

13. Since this large number of amendments was adopted very rapidly, there are ambiguities or aspects subject to interpretation, the effects of which will be observed only when the amendments will have entered into force and been applied to individual cases.

### **III. Background**

14. As it was the case for the amendments brought to the so-called "Justice laws", the legislative process which is the subject of this opinion took place in a context marked by a tense and divisive political climate, strongly impacted by the results of the country's efforts to fight corruption.<sup>4</sup>

15. The fight against corruption has *inter alia* been the subject of yearly assessment (and recommendations) under the EU Mechanism of Cooperation and Verification, established upon

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<sup>3</sup> See also para. 58 of CDL-PI(2018)007.

<sup>4</sup> See Preliminary Opinion on draft amendments to Law No. 303/2004 on the statute of judges and prosecutors, Law No. 304/2004 on judicial organization, and Law No. 317/2004 on the Superior Council for Magistracy, CDL-PI(2018)007.

Romania's accession to the EU.<sup>5</sup> While previous reports prepared in the context of this mechanism had noted that important progress in the fight against corruption had been made, the most recent report (in November 2017) expressed concern that this progress might be affected by the political situation<sup>6</sup> and developments such as the adoption, in January 2017, of a Government Emergency Ordinance to decriminalise certain corruption offences, such as abuse of office and the proposal for a pardon law.<sup>7</sup> Widespread protests throughout Romania contested these measures. Even though the Emergency Ordinance was abrogated by the Government and also repealed by the Parliament, the events left a legacy of public doubts.

16. The Anti-Corruption Directorate (DNA) carried out a high number of investigations against leading politicians for alleged corruption and related offenses and a considerable number of Ministers or members of parliament were convicted.<sup>8</sup> This thorough fight against corruption has been hailed as a positive evolution, both domestically and internationally

17. On the other hand, some politicians alleged that there had been cases of misuse of their powers by some prosecutors (and, in some cases, by judges). Some acquittals in high-profile cases of corruption led to the methods used by the prosecution services being questioned. Following the recent disclosure of co-operation protocols signed between the Romanian Intelligence Service and judicial institutions, questions are being raised on the way the anticorruption fight has been conducted.<sup>9</sup> Questions have been raised over alleged interference of the intelligence service within the activities of the Romanian judiciary, and the extent and modalities of such interference.

18. More generally, politicians in power claim that, under the existing rules, the justice system is abusing "people" and that changing the rules, in particular those in the Criminal Code and Criminal Procedure Code, is an urgent measure to take to protect fundamental rights. At the same time, there are reports of pressure on and intimidation of judges and prosecutors, including by some high-ranking politicians and through media campaigns.

19. While there is consensus in Romania, as also stated by many interlocutors in Romania, over the need to rethink and improve criminal and criminal procedure rules, this requires wide and thorough consultations, impact studies and time for debate. An adequate framework for rational and constructive discussions is a key pre-requirement for identifying the most suitable solutions, in line with existing standards and best practice, for existing deficiencies.

20. Amidst this controversy, the amendments to the Criminal Code and the Criminal Procedure Code laws (and Law no.78/2000 on preventing, detecting and sanctioning acts of

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<sup>5</sup> See the Conclusions of the Council of Ministers, 17 October 2006 (13339/06); Commission Decision establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, 13 December 2006 (C (2006) 6569 final).

<sup>6</sup> The last MCV Report, adopted in November 2017, noted in this respect: "*Within a nine months period since the January 2017 report, Romania has seen two governments, while growing tensions between State powers (Parliament, Government and Judiciary) made the cooperation between them increasingly difficult.*" See Report from the Commission to the European parliament and the Council On Progress in Romania under the Cooperation and Verification Mechanism, COM(2017) 751 final, Brussels, 15.11.2017.

<sup>7</sup> Emergency Ordinance 13/2017, amending the Criminal Code and Criminal Procedures

<sup>8</sup> According to information provided by the DNA, for the last 5 years DNA has indicted more than 68 high officials, charged with corruption offences (or assimilated to those of corruption): 14 ministers and former ministers, 39 deputies, 14 senators, 1 member of European Parliament. The courts have ruled final conviction decisions against 27 of these officials (5 ministers, 17 deputies, 4 senators, 1 member of the European parliament). During the same period, seizure measures over 2 billion euros have been ordered.

<sup>9</sup> According to information provided to the Venice Commission, there are some 65 of such co-operation protocols, including between the Romanian Intelligence Service and various branches of the judicial system. According to some representatives of the Romanian authorities, the use of the technical support provided by the Intelligence Service has become the standard *modus operandi* for the DNA and has been applied in thousands of instances. The Venice Commission has already held that "a thorough review of the legal rules on the control of the intelligence services seems necessary" (CDL-PI(2018)007, para. 97).

corruption, and the Law no.304/2004 on judicial organization), tabled by the majority coalition of PSD and ALDE, were adopted under urgent procedure by the Romanian parliament, offering very little time and transparency for a genuine public debate (see comments in Section V.A below). The amendments to the CC were adopted by Romanian Parliament on 18 June 2018, and those to the CPC on 4 July 2018.

21. Immediately after their adoption by Parliament, the two draft laws were challenged before the Constitutional Court by the opposition parties, the High Court of Cassation and Justice (hereinafter HCCJ) and the President of Romania. On 12 October 2018, the Constitutional Court established that over 60 articles of the draft law amending the Criminal Procedure Code were not in conformity with the Romanian Constitution.<sup>10</sup> The Court is expected to examine the constitutionality request concerning the draft amendments to the Criminal Code on 24 October 2018.

#### IV. Applicable standards

22. The amendments concern the area of criminal policy, an area where domestic authorities traditionally enjoy wide discretion. The European Court of Human Rights (ECtHR) for example demonstrates judicial self-restraint in particular with regard to the following: (a) the establishment of the facts of the case; (b) the interpretation and application of domestic law; (c) the admissibility and assessment of evidence at the trial; (d) the substantive fairness of the outcome of the proceedings before the domestic court (including the guilt or innocence of the accused in criminal proceedings).<sup>11</sup> Legislators aim to pursue a balance between, on the one hand, safeguarding the rights of the defence (often laid down in human rights treaties, e.g. the right to a fair trial as enshrined in Article 6 ECHR and the right to privacy as enshrined in Article 8 ECHR) and, on the other hand, the *effet utile* of the fight against acts which have been criminalised.

23. There is no uniform model how to strike that balance. To assess the amendments under review, the Commission took into account internationally recognised standards that can be applied to the issues covered by its analysis, as well as the obligations stemming from the European Convention on Human Rights (ECHR) and the ECtHR case-law. The Commission also referred, when examining issues covered by the above-mentioned EU Directives, to the requirements deriving from the two Directives.

#### ***Standards flowing from international instruments on anti-corruption***

24. The Criminal Law Convention on Corruption (1999),<sup>12</sup> ratified by Romania in 2002, calls *inter alia* for the introduction of legislative measures to criminalise a large number of corrupt practices:

- (1) active and passive bribery of domestic and foreign public officials;
- (2) active and passive bribery of national and foreign parliamentarians and of members of international parliamentary assemblies;
- (3) active and passive bribery in the private sector;
- (4) active and passive bribery of international civil servants;
- (5) active and passive bribery of domestic, foreign and international judges and officials of international courts;
- (6) active and passive trading in influence;
- (7) money-laundering of proceeds from corruption offences;

<sup>10</sup> See CCR Press release at <https://www.ccr.ro/noutati/COMUNICAT-DE-PRES-332>

<sup>11</sup> See more elaborately M. Kuijer, "Margin of Appreciation Doctrine and the Strengthening of the Principle of Subsidiarity in the Recent Reform Negotiations" in: *Human Rights Law Journal* Vol. 36 No. 7-12 [2016], pp. 339-347.

<sup>12</sup> ETS No. 173.

(8) accounting offences (invoices, accounting documents, etc.) connected with corruption offences.

25. In addition, the Convention calls for “*effective and dissuasive*” sanctions and measures, including confiscation of the proceeds of criminal offences (Article 19 of the Convention).

26. In a similar vein, Article 30 (3) of the United Nations Convention against Corruption (2003)<sup>13</sup> calls on State Parties to the Convention to “*maximize the effectiveness of law enforcement measures*”.

27. The Venice Commission has previously opined that international instruments “*clearly define an international obligation for states to ensure institutional specialisation in the sphere of corruption, i.e. to establish specialised bodies, departments or persons (within existing institutions) in charge of fighting corruption through law enforcement. Key requirements for a proper and effective exercise of such bodies’ functions, as they result from the above instruments, include: independence/autonomy (an adequate level of structural and operational autonomy, involving legal and institutional arrangements to prevent political or other influence); accountability and transparency; specialised and trained personnel; and adequate resources and powers.*”<sup>14</sup>

28. The implementation of the Criminal Law Convention on Corruption is monitored by the “Group of States against Corruption - GRECO”. In its ad hoc report of April 2018,<sup>15</sup> GRECO expressed concerns (see in particular paragraphs 60 and 63):

*“GRECO is equally concerned by the objectives pursued by certain draft amendments to the criminal law (substantive and procedural) and the legislative process initiated in December in this respect, as these could have a negative impact on the country's anti-corruption efforts. [...] These proposed amendments are raising serious concerns both domestically and among other countries for their potential negative impact on mutual legal assistance and the capacity of the criminal justice system to deal with serious forms of crime, including corruption-related offences. [...] Romania should refrain from passing criminal law amendments which would contradict its international commitments and undermine its domestic capacities in the area of the fight against corruption.”*

### **Standards stemming from positive (procedural) obligations under human rights treaties**

29. Human rights treaties, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms, do not only offer protection to suspects in criminal trials (e.g. the presumption of innocence, adequate facilities for the preparation of his/her defence, respect for privacy, et cetera) but equally offer protection to those who fall victim to the committal of criminal offences. The latter form of protection is usually offered by acknowledging that State authorities are under a positive obligation to offer *effective* protection to victims of criminal acts, and to provide for an *effective* deterrent, vis-à-vis potential perpetrators, from committing those criminal acts. Positive obligations under human rights treaties are by no means a new phenomenon, but have been increasingly acknowledged in more recent case-law of the European Court of Human Rights.<sup>16</sup> According to Ashworth<sup>17</sup> there are three distinct categories of positive obligations:

<sup>13</sup> General Assembly resolution 58/4 of 31 October 2003, ratified by Romania in 2004

<sup>14</sup> CDL-AD(2014)041, Interim Opinion on the Draft Law on Special State Prosecutor's Office of Montenegro, §§ 17, 18 and 23. See also CDL-PI(2018)007, para. 106

<sup>15</sup> Doc. Greco-AdHocRep(2018)2, adopted on 23 March 2018 and publicised on 11 April 2018

<sup>16</sup> See elaborately on this issue: P.H.P.H.M.C. van Kempen, *Repressie door mensenrechten. Over positieve verplichtingen tot aanwending van strafrecht ter bescherming van fundamentele rechten (oratie Nijmegen)*,

- the obligation to introduce criminal law provisions and the effective enforcement of those provisions.<sup>18</sup> This first obligation entails *inter alia*
  - the obligation for a legislator to act against certain societal phenomena using criminal law provisions since only criminal law provisions can provide effective deterrence.<sup>19</sup>
  - the obligation for a legislator to ensure that the investigation into certain forms of crime is not made dependant on whether a victim or a third party has lodged a formal complaint about the offence.<sup>20</sup>
  - the obligation that the public prosecutor has to prosecute certain forms of crime.<sup>21</sup>
  - the obligation to ensure that criminal behaviour is punished in such a manner that there is no *de facto* immunity and an effective deterrence.<sup>22</sup> The imposition of lenient sentences engenders a climate of impunity.<sup>23</sup>
- the obligation to take preventive measures to protect a person from imminent threats of the criminal acts of a third person. This obligation refers mainly to the so-called Osman doctrine<sup>24</sup> and is less relevant with regard to the amendments under review.
- the obligation to conduct an effective investigation in order that perpetrators may be identified and punished.<sup>25</sup> Such a prompt response by the authorities may avoid the “appearance of tolerance of unlawful acts”.<sup>26</sup> This entails an obligation to ensure that operational difficulties do not hamper an effective implementation of criminal law provisions.<sup>27</sup>

30. This part of the European case-law has been mainly developed when dealing with criminal offences constituting physical violence (sometimes resulting in the death of a victim), such as domestic violence, trafficking, murder and homicide, et cetera. The ECtHR accepted the above-mentioned positive obligations under the procedural limb of Articles 2 and 3 ECHR for example. This part of the case-law has so far not yet been applied specifically in the context of the fight against corruption. But then again, the Commission reiterates that the amendments

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Nijmegen: Wolf Legal Publishers 2008, p. 7. See also: Laurens Lavrysen, *Human rights in a positive state*, Intersentia 2016.

<sup>17</sup> A. Ashworth, *Positive Obligations in Criminal Law*, Oxford: Hart Publishing 2013

<sup>18</sup> See for example ECtHR 19 July 2018, *Sarishvili-Bolkvadze v. Georgia*, appl. no. 58240/08, para. 77, in which the Court found a violation of the positive obligation under the Convention to provide an effectively functioning regulatory framework that would ensure compliance with the applicable regulations. Or ECtHR 4 December 2003, *M.C. v. Bulgaria*, appl. no. 39272/98, para. 153: “[...] the Court considers that States have a positive obligation inherent in Articles 3 and 8 of the Convention to enact criminal law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution.”

<sup>19</sup> For example ECtHR 26 March 1985, *X. and Y. v. Netherlands*, Series A-91, para. 27: “This is a case where fundamental values and essential aspects of private life are at stake. Effective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions”.

<sup>20</sup> For example ECtHR 9 June 2009, *Opuz v. Turkey*, appl. no. 33401/02 in which the Court conducted – within the framework of a case concerning domestic violence – a comparative analysis and found that, although there was no general consensus, the practice showed that the more serious the offence or the greater the risk of further offences, the more likely it was that the prosecution would proceed in the public interest even when the victim had withdrawn a complaint.

<sup>21</sup> ECtHR 30 November 2004, *Öneryildiz v. Turkey*, appl. no. 48939/99, para. 93: “the fact that those responsible for endangering life have not been charged with a criminal offence or prosecuted may amount to a violation”.

<sup>22</sup> ECtHR 20 December 2007, *Nikolova and Velichkova v. Bulgaria*, appl. no. 7888/03, para. 62: “It follows that while the Court should grant substantial deference to the national courts in the choice of appropriate sanctions for ill-treatment and homicide by State agents, it must exercise a certain power of review and intervene in cases of manifest disproportion between the gravity of the act and the punishment imposed. Were it to be otherwise, the States' duty to carry out an effective investigation would lose much of its meaning, and the right enshrined by Article 2, despite its fundamental importance, would be ineffective in practice.”

<sup>23</sup> Judge Ksenija Turković, ‘International and national courts confronting large-scale violations of human rights’ at the Opening of the Judicial Year – Seminar – 29 January 2016.

<sup>24</sup> ECtHR 28 October 1998, *Osman v. United Kingdom*, appl. no. 23452/94. State responsibility can arise when “the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk”.

<sup>25</sup> See for example ECtHR [GC] 15 May 2007, *Ramsahai and others v. the Netherlands*, appl. no. 53291/99.

<sup>26</sup> ECtHR 9 June 2009, *Opuz v. Turkey*, appl. no. 33401/02

<sup>27</sup> ECtHR 28 January 2014, *O’Keeffe v. Ireland*, appl. no.35810/09



under review are *not* limited to those criminal offences that affect corruption. The amendments affect a broad range of provisions in the criminal code aimed at fighting serious forms of criminal behaviour.

31. It may be concluded from the above that a State is under a positive obligation to ensure that its criminal system is effective in the fight against serious forms of crime, that criminal law constitutes a strong deterrent to commit such offences, and that perpetrators of such offences do not enjoy impunity.

### ***Requirements of the Rule of law***

32. The Venice Commission also took into account, in the present opinion, key requirements of the rule of law, as described in its Rule of Law Checklist, adopted on 11-12 March 2016. The Commission stresses inter alia that “*a fundamental requirement of the Rule of Law is that the law must be respected. This means in particular that State bodies must effectively implement laws. The very essence of the Rule of Law would be called in question if law appeared only in the books but were not duly applied and enforced.[...] The duty to implement the law is threefold, since it implies obedience to the law by individuals, the duty reasonably to enforce the law by the State and the duty of public officials to act within the limits of their conferred powers*” Obstacles to the effective implementation of the law include the lack of quality of legislation or the absence of sufficient sanctions (*lex imperfecta*), as well as an insufficient or selective enforcement of the relevant sanctions.<sup>28</sup>

33. The same document points to corruption as a particular challenge to the rule of law. Corruption “leads to arbitrariness and abuse of powers” and it “undermines the very foundations of the Rule of Law”. “Preventing and sanctioning corruption-related acts are important elements of anti-corruption measures, which are addressed in a variety of international conventions and other instruments.”<sup>29</sup>

## **V. Analysis**

### **A. The legislative process**

34. The legislative process which led to the adoption of the amendments to the two Codes has drawn strong criticism, both from among the judiciary and within the Romanian society. The amending draft laws, passed through an urgent procedure, have mainly been discussed in the framework of a body established especially for that purpose (a special joint committee of the two chambers of Romanian parliament). The possibilities for a more in-depth examination of an important piece of legislation by two bodies, according to the regular procedure, offered by the Romanian bicameral system therefore were not used.

35. Debates took place in a very limited amount of time which did not allow real debate, despite the fact that the amendments were numerous and substantively far-reaching. The input provided by the different sectors of the Romanian judiciary, after extensive and thorough consultations among members of prosecutor’s offices and courts throughout the country, as well as the Superior Magistracy Council and the professional associations, was only to a limited extent taken into account. Legal practitioners, including even the High Court of Cassation and Justice, warned that the entry into force of the amendments could have drastic negative consequences for the functioning of the Romanian criminal justice system. A more comprehensive process of discussion, based on dialogue with legal practitioners and society at

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<sup>28</sup> Rule of Law Checklist (CDL-AD(2016)007), paragraphs 53 to 55

<sup>29</sup> Rule of Law Checklist (CDL-AD(2016)007), paragraph 115

large, and assessing in detail the impact of the numerous amendments, would have been not only advisable but even necessary.

36. Insufficient transparency as to the agenda and the content of the special committee's discussions made it very difficult for interested stakeholders to follow and to effectively contribute to those discussions.

37. Furthermore, the debate prior to the adoption of the amendments by the two Chambers in the plenary session seems excessively fast, taking into account that more than 300 amendments were made to two particularly important and sensitive codes.<sup>30</sup>

38. Finally, the Commission cannot ignore the fact that the Parliament has adopted these controversial amendments to the criminal codes while they will directly affect pending judicial proceedings in which some parliamentarians are involved. In that sense, a comparison can be drawn with the case of *Stran Greek Refineries and Stratis Andreadis v. Greece* in which the legislature's intervention was in reality aimed at pending judicial proceedings to which the State itself was a party:

*"[...] [T]he Court has had regard to both the timing and manner of the adoption of Article 12 of Law no. 1701/1987 [which] [...] was in reality aimed at the applicant company – although the latter was not mentioned by name. [...] It is nevertheless an inescapable fact that the legislature's intervention in the present case took place at a time when judicial proceedings in which the State was a party were pending. [...] The principle of the rule of law and the notion of a fair trial enshrined in Article 6 preclude any interference by the legislature with the administration of justice designed to influence the judicial determination of the dispute. [...] In conclusion, the State infringed the applicants' rights under Article 6 para. 1 by intervening in a manner which was decisive to ensure that the - imminent - outcome of proceedings in which it was a party was favourable to it."<sup>31</sup>*

39. The Commission is - as always<sup>32</sup> - highly critical of situations in which acts of Parliament regulating important aspects of the legal or political order were being adopted in an accelerated procedure. Such an approach to the legislative process cannot provide conditions for proper consultations with the opposition or the civil society. Especially when adopting decisions on issues of major importance for society, such as criminal justice and the fight against corruption, wide and substantive consultations are a key condition for adopting a legal framework which is practicable and acceptable for those working in the field.

## **B. Specific comments**

### **1. Amendments to the Criminal Code**

#### **a. Ancillary penalties (Article 65 CC)**

40. The new paragraph (3<sup>1</sup>) added to Article 65 proposes to suspend the enforcement of any ancillary penalties (which would include restrictions on convicted persons standing for

<sup>30</sup> According to the information provided to the Venice Commission, the adoption of the Amendments of the CPC in plenary session by the Chamber of Deputies took no more than a couple of hours.

<sup>31</sup> ECtHR 9 December 1994, *Stran Greek Refineries and Stratis Andreadis v. Greece*, Series A-301-B, paras. 47, 49 and 50. See also: ECtHR 7 November 2000, *Anagnostopoulos v. Greece*, application. no. 39374/98, para. 20

<sup>32</sup> CDL-AD(2011)001, Opinion on three legal questions arising in the process of drafting the New Constitution of Hungary, paras.16-19; see also CDL-AD(2012)026, Opinion on the compatibility with Constitutional principles and the Rule of Law of actions taken by the Government and the Parliament of Romania in respect of other State institutions and on the Government emergency ordinance on amendment to the Law N° 47/1992 regarding the organisation and functioning of the Constitutional Court and on the Government emergency ordinance on amending and completing the Law N° 3/2000 regarding the organisation of a referendum of Romania, para. 74.

election to public office or occupying positions involving the exercise of state authority) when the offender receives a suspended sentence.

41. In principle, a ban on holding public office is appropriate in many cases, provided the principle of proportionality is respected. The Venice Commission has stated: *“The exercise of political power by people who seriously infringed the law puts at risk the implementation of this principle [i.e. the principle of legality], which is on its turn a prerequisite of democracy, and may therefore endanger the democratic nature of the state: a person who is not eager to recognise the standards of conduct in democratic society, may be unwilling to obey the constitutional or international standards on democracy and the Rule of Law. The basis for the restriction on such a person’s right to be elected or to sit in Parliament is inter alia the occurred violation of democratically adopted criminal law, i.e. of generally recognised standards of conduct.”*<sup>33</sup>

42. While the severity of the punishment is one element of the proportionality test, the nature of the crime is as important. It is appropriate to restrict the right to hold public office for a considerable length of time in the case of severe crimes of corruption and electoral offences, given the impact such crimes have on the public trust in the state and the democratic nature of elections.<sup>34</sup> For such crimes even a suspended sentence is sufficient justification of a ban on the holding a public office.<sup>35</sup>

43. The courts should have some discretion in this respect, including on whether the nature of the crime requires a ban on the holding of public office even in less serious cases leading only to a suspended sentence and on what is the appropriate length of such a ban in such cases. The current provisions of the Romanian Criminal Code indeed provide that the courts decide on enforcing such complementary penalties, and this, in the light of the nature and seriousness of the offence, and the specific circumstances of the case and the person of the offender (article 67 (1). When the law itself stipulates such penalty for an offence (Article 67 (2), the judge *must* rule to ban the exercise of two specific rights: the right to stand for election to public office or to occupy positions involving the exercise of state authority (see Article 66 (2) and (3) CC).

44. In view of the above observations, it is recommended to reconsider new paragraph (3<sup>1</sup>).

#### **b. Extended confiscation measures (Article 1121 CC)**

45. One of the purposes of the legislative amendments is to implement EU Directive 2014/42 on extended confiscation. The Directive establishes minimum rules for extended confiscation to give to competent authorities the means to trace, freeze, manage and confiscate the proceeds from crime. Article 112<sup>1</sup> CC, as amended, indeed widens the scope of extended confiscation to include all criminal offences for which the sanction provided by the law is higher than four years imprisonment. At the same time, it introduces additional conditions making it significantly more difficult to enforce the measure. Extended confiscation will only be possible when the court is convinced, based on the circumstances of the case including available factual elements and evidence, that: 1/ the value of assets acquired by a convicted person within a time period of five years before and, if necessary, after the time of perpetrating the offence, until the issuance of the indictment, clearly exceeds the revenues obtained lawfully by the convict (new paragraph (2 a)); 2/the assets which are subject to confiscation originate from criminal conduct (new paragraph (2b)); and that 3/ there is evidence, “beyond any doubt”, for the involvement of the convicted person in the criminal activities generating assets and money

<sup>33</sup> See Venice Commission, Report on exclusion of offenders from parliament, CDL-AD(2015)036, para 139.

<sup>34</sup> See Venice Commission, Report on exclusion of offenders from parliament, CDL-AD(2015)036, para 155.

<sup>35</sup> The European Court of Human Rights also had to deal with cases in which a convicted person had been sentenced to a suspended prison sentence, in combination with the imposition of a measure declaring the person ineligible for ten years. See *Féret v. Belgium*, application. no. 15615/07, 16 July 2009.

proceeds (new paragraph (2<sup>1</sup>)). In addition, the assets transferred to a family member or a third party may only be confiscated if the respective family member/third party was aware that the purpose of such a transfer was to avoid confiscation (new paragraphs (3) and (9)).

46. Under the current provision, to order extended confiscation, two cumulative conditions are sufficient for the court: 1/ to be “convinced” that the relevant goods originate from criminal activities; 2/ that the value of goods acquired by the convicted person clearly exceeds the revenues obtained lawfully.

47. The Romanian authorities explained, with reference to the Preamble of the Directive 2014/42/EU, that the new conditions were “*absolutely necessary in order to ensure the right of property, the rules in force permitting the confiscation of goods on the basis of mere suppositions, no evidence being required*”, and that the court’s mere conviction is a notion involving “*arbitrariness and absolute subjectivity*.”<sup>36</sup>

48. However, the EU Directive sets much lighter requirements for the courts of the EU member states when they are called to order extended confiscation. Paragraph 1 of Article 5 of the Directive provides only that extended confiscation should be possible where a court *is satisfied* that the property in question is derived from criminal conduct. As explained in recital (21) of the Preamble, “[t]his does not mean that it must be established that the property in question is derived from criminal conduct. Member States may provide that it could, for example, be sufficient for the court to consider on the balance of probabilities, or to reasonably presume that it is substantially more probable, that the property in question has been obtained from criminal conduct than from other activities.”<sup>37</sup>

49. As indicated in the Preamble (recital 22), the “*Directive lays down minimum rules. It does not prevent Member States from providing more extensive powers in their national law, including, for example, in relation to their rules on evidence.*” This clearly indicates that the national legislator should not impose stricter requirements than provided for by the Directive.

50. Yet, the Romanian legislator has opted, to prescribe, for the extended confiscation, the highest standard of proof - ‘beyond any doubt’. By requiring the court to apply the “beyond any doubt” standard in relation to the measure of extended confiscation, the legislator made a fundamental error. In practice, what this amendment is likely to lead to is that the courts will rarely decide in favour of the extended confiscation as in most cases the prosecution will be unable to prove beyond a reasonable doubt that the value of assets clearly exceeds the revenues obtained lawfully by the convict and that the assets originate from criminal activities.

51. An additional practical obstacle, which raises concern in terms of predictability of the law, could be the lack of consistency between the standard of evidence in new 112<sup>1</sup> alin. (2<sup>1</sup>) CC (“beyond any doubt”), and that required by the provisions of Article 112<sup>1</sup> (1) and (2) lit. (b), which refer to the “conclusion reached” (in Romanian “convingere”) by the court, based on the circumstances of the case etc.

52. The Romanian Constitutional Court has already ruled, in relation to the standard proof required for extensive seizure, in the following way: “*it must not be assumed that the presumption of the lawful acquisition of property can be overturned only by evidence, namely*

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<sup>36</sup> See Point of View of the Special Committee of the Romanian Parliament

<sup>37</sup> The balance of probability standard is used in the UK and the US courts predominantly in civil cases at the stage when the case is to be adjudicated on merits. Lord Nicholls of the UK House of Lords has described it as follows: “*The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.*” ([In re H \(Minors\) \[1996\] AC 563 at 586](#)).

*by proving that the goods in question originate from committing offenses.” In the view of the Court, if this were the approach, special seizure of the goods may be applicable, in which case the extended seizure measure would become useless.”<sup>38</sup>*

53. The Romanian Constitutional Court has concluded that the modality by which, under existing criminal law provisions,<sup>39</sup> a court may order extended confiscation, was not in breach of the constitutional provisions protecting the right of private property, including the constitutional principle that legality of acquirement shall be presumed.<sup>40</sup> The Court has in particular stressed that it is through a public and contradictory judicial procedure that the judge will come to the conclusion (will be “convinced”) that the assets to be confiscated proceed from criminal activities.

54. As to the condition that the family member/third party should be aware that the assets have been transferred in order to avoid confiscation, it is noted that Article 6 of Directive 2014/42/EU, while pointing to “the rights of *bona fide* third parties”, nevertheless provides that states should enable such confiscation “*at least if those third parties knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation*”. Here again, the EU Directive appears as less demanding than the proposed new paragraphs (3) and (9) Article 112<sup>1</sup> CC.

55. In the absence of convincing justification for the need to introduce, in the Romanian context, such a high evidentiary threshold, it is difficult to conclude that the proposed amendments are in keeping with the obligation for the Romanian state, to ensure that “effective and dissuasive” sanctions and measures, including confiscation of the proceeds of criminal offences, are adopted in domestic legislation.<sup>41</sup> It is recommended to repeal the proposed provisions or to amend them in line with Romania’s international obligations related to extended confiscation.

### **c. Statute of limitations (Articles 154 and 155 CC)**

56. In its current shape, Article 154(1) provides the following structure of time limits for criminal liability:

“(1) The limitation term for criminal liability is as follows:

- a) 15 years, when the penalty provided by the law for the offense perpetrated is life imprisonment or a term of imprisonment exceeding 20 years;
- b) 10 years, when the penalty provided by the law for the offense perpetrated is a term of imprisonment exceeding 10 years, but no more than 20 years;
- c) 8 years, when the penalty provided by the law for the offense perpetrated is a term of imprisonment exceeding 5 years, but no more than 10 years;
- d) 5 years, when the penalty provided by the law for the offense perpetrated is a term of imprisonment exceeding one year, but no more than 5 years;
- e) 3 years, when the penalty provided by the law for the offense perpetrated is a term of imprisonment not exceeding one year or a fine.”

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<sup>38</sup> See CCR, Decision no 356/2014 of 25 June 2014, on the exception of constitutionality of the provisions of Article 118<sup>2</sup>, paragraph 2 (a) of the Criminal Code of 1969, § 39

<sup>39</sup> Law no nr.63/2012 on amending and completing the Criminal Code. See CCR, Decision no 356/2014, paragraphs 43 and 44.

<sup>40</sup> Article 44 (8) of the Constitution

<sup>41</sup> “*Each Party shall adopt such legislative and other measures as may be necessary to enable it to confiscate or otherwise deprive the instrumentalities and proceeds of criminal offences established in accordance with this Convention, or property the value of which corresponds to such proceeds*” Article 19, paragraph (3), Criminal Law Convention on Corruption; see also Article 31 of the United Nations Convention against Corruption (UNCAC)

57. It is proposed to amend subparagraphs (b) and (c) by reducing the time bar from 10 years to 8 years, when the term of imprisonment is 10 to 20 years, and from 8 years to 6 years, when the range is 5 to 10 years. At the same time, the maximum penalty has been reduced by the pending amendments for a number of offences.

58. The proposed changes raise several issues. First, the amendment of Article 154(1) looks inconsistent in view of subparagraph (d), since there the time bar of 5 years remains unchanged, leaving thereby a very narrow margin between (c) and (d).

59. More importantly, the amendment creates a high risk that, in complex cases, the crimes at issue be time-barred before the investigation and trial can be duly carried out. This concern should be also seen in the light of the new rule that criminal investigations need to be concluded within one year (see Comments under the Section B.2.b). Considered together, these changes will clearly affect the capacity of the Romanian judiciary to provide effective remedies against non-implementation of legislation and duly sanction crimes' perpetrators.

60. For the offence of torture, for example, the ensuing diminution of the limitation term for criminal liability to 6 years, under the proposed amendment, would go against the practice of ECtHR and of the Council of Europe's Committee of Ministers. The Court has in several judgments criticised short prescription periods, and even the very existence of such periods for the most serious human rights violations.<sup>42</sup>

61. It is the view of the High Court of Cassation and Justice of Romania, that the proposed changes are legislative solutions that "affect the balance between the state's right to hold criminally liable persons who commit offences, which responds to a general interest, and the rights of persons who benefit from prescriptibility of criminal liability, on the other".<sup>43</sup> The High Court further stresses that the diminution of the statute of limitation periods, in case of offences against persons, is not conducive to "a just balance between the rights of persons prosecuted for such offences and the rights of persons prejudiced", "and does not respond to the general interest of sanctioning offences against persons". Reference is made in particular to bodily injury offences, illegal deprivation of freedom or rape, which will be much harder to sanction when shorter limitations terms will be introduced.

62. The High Court in addition notes that these solutions also contravene the principles consecrated by the Constitutional Court in relation to the legislator's powers and discretion on criminal matters. As explained by the Constitutional Court, Article 1 (3) of the Romanian Constitution, stating that "Romania is a democratic and social state, governed by the rule of law", "imposes on the legislator the obligation to take measures for the defence of public order and safety by adopting the necessary legal instruments in order to prevent the state of danger and the criminal phenomenon, with the exclusion of any regulations likely to encourage this phenomenon."<sup>44</sup>

63. The Commission notes at the same time that the reduction of the statute of limitations periods will in particular affect corruption offences.<sup>45</sup> As a matter of fact, the range of penalties for most of those offences, namely taking a bribe (Article 289), giving bribes (Article 290),

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<sup>42</sup> See *Cestaro v. Italy*, 6884/11, Judgment (Merits and Just Satisfaction), Court (Fourth Section), | 07/04/2015, *Alikaj and others v. Italie* (no 47357/08, § 108, 29 March 2011 ; see also Committee of Ministers, Decision, *Khashiyev group v. Russia*, 18 September 2018; Committee of Ministers, Decision, *Gharabishvili group v. Georgia*, 19 September 2017.

<sup>43</sup> High Court of Cassation and Justice of Romania, Decision no 8, Session of 5 July 2018

<sup>44</sup> CCR, Decision no. 224/2017, paragraphs 34-35.

<sup>45</sup> In the present Opinion, the Venice Commission uses the term corruption offences to refer to all offences regulated in Title V - Crimes of corruption and in public position of the Romanian Criminal Code, and not only to refer to those in Chapter I (Offences of corruption) of Title V.

trading in influence (Article 291), buying of influence (Article 292), embezzlement (Article 295), abuse of office (Article 297), etc., are such that the reduced time limits under subparagraphs (b) and (c) of Article 154(1) apply.

64. Article 29 UNCAC provides that “[e]ach State Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence established in accordance with this Convention and establish a longer statute of limitations period or provide for the suspension of the statute of limitations where the alleged offender has evaded the administration of justice”. Further, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions provides that “any statute of limitations applicable to the offence of bribery of a foreign public official shall allow an adequate period of time for the investigation and prosecution of the Offence” (Article 6).<sup>46</sup> It is therefore not in line with the international instruments in the field of the fight against corruption to reduce time limits affecting in particular corruption offences in this manner.

65. The Commission notes that the proposed reduction of statute of limitation periods raises serious concerns both with respect to the rule of law in general and the country’s respect for its international obligations in particular. It therefore recommends re-considering the proposed diminution of the statute of limitation periods, in the light of the above-mentioned concerns.

#### **d. Definition of “public servant” (Article 175 CC)**

66. The amendment of Article 175 CC, by which the scope of the notion of “public servant” in criminal law is restricted, is of clear relevance for the application of corruption offences, and in particular for the abuse of office. Paragraph 2 of this Article, which includes persons delivering public interest services (notaries, judicial experts, persons working in public hospitals, etc.) among public servants, will be abrogated.

67. Persons delivering public interest services will thus in the future no longer fall under the scope of the provisions regulating those offences and will be exempted of criminal liability. This will lead to many acts of corruption in the sphere of public service not being investigated and sanctioned.

68. Under Article 2 (a) (ii) UNCAC, the notion of “public official” also includes “(ii) any other person who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party”. Paragraph 2 of current Article 175 CC, repealed by the proposed amendment, seems in line with the UNCAC provision: “(2) At the same time, for the purposes of the criminal law, the following shall be deemed a public servant: the person who supplies a public-interest service, which they have been vested with by the public authorities or who shall be subject to the latter’s control or supervision with respect to carrying out such public service.”

69. Also, for the purpose of EU Directive 2017/1371 of 5 July 2017<sup>47</sup> on the fight against fraud to the Union’s financial interests by means of criminal law, the notion of “public official” is defined widely, in such a way as to include any person holding an executive, administrative, judicial or legislative office at national, regional or local level, as well as any person exercising a public service function involving the management of or taking decisions concerning the Union’s financial interests.

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<sup>46</sup> Although Romania is not a member of the OECD, it is understood that it has set a strategic goal to join the organisation in the near future.

<sup>47</sup> Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union’s financial interests by means of criminal law, see Article 4.4.

70. The Romanian Constitutional Court<sup>48</sup> has rejected a previous attempt to restrict the scope of the notion of public servant in the Criminal Code as being in breach of Article 16 (1) (equality of citizens before the law) and Article 16 (2) of the Constitution ("no one is above the law"). For the Court, the decisive criteria for including or excluding persons from the scope of criminal law include "*the nature of the service provided, the legal basis on which the activity is performed or the legal relationship between the person concerned and public authorities, public institutions*". In its decision, the Court actually concluded, referring also to the UNCAC definition, that "*the Romanian legislation on fighting corruption and the abuse of powers committed by civil servants is in line with the requirements of the international regulations in the matter, which, according to the provisions of Art. 11 (2) of the Constitution, once ratified, became "part of national law"*".

71. It seems clear from the above that the proposed amendment to Article 175 CC is not consistent with the definition of the notion of "public servant" as provided in the relevant international instruments. Moreover, the amendment also raises issues of consistency with numerous other provisions of the Romanian Criminal Code, such as Articles 178, 259, 289, 308, 317, which continue to refer to this paragraph which will no longer exist. In view of the observations contained in the preceding paragraphs, the proposed amendment should be reconsidered.

#### **e. False testimony (Article 273 CC)**

72. Article 273 criminalizes false witness testimonies. It is proposed to add a new paragraph (4) which sets forth some situations in which a witness testimony may not be treated as "false". These include:

- "a) The refusal to give statements that self-incriminate the person in question;
- b) refusal to testify in the sense requested by judicial investigation bodies;
- c) changing and recanting a statement that had been given as a result of any type of pressures being exercised against the witness;
- d) a mere divergence of testimonies given during the trial, unless direct evidence exists that should prove their deceitful nature and ill faith."

73. According to the Explanatory Note to the draft amendments, these amendments are intended to transpose into the Romanian law articles 4 and 7 of EU Directive 2016/343<sup>49</sup> on the presumption of innocence and the right to be present at the trial in criminal proceedings. It is noted however that, as indicated in its Article 2 (Scope), the Directive "applies to natural persons who are suspects or accused persons in criminal proceedings".

74. In principle there is no objection against subparagraph (a), although it may appear redundant since the right not to incriminate oneself is already secured for a witness under Article 118 of the Criminal Procedure Code.

75. Each of the other three subparagraphs is considered problematic to various degrees. The language in subparagraph (b) is very vague. What does it mean to refuse to testify 'in the sense requested by judicial investigation bodies'? Article 114(2)(c) of the Criminal Procedure Code obliges a witness 'to tell the truth'. This means, inter alia, that a witness has to answer questions (Articles 122 and 381) unless the question is dismissed by the court as 'not relevant or useful' (paragraph (4) of Article 381)). If the Court decides to admit the question, it has to be

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<sup>48</sup> CCR, Decision no 2/2014, see sections 4.1, 6.2.4, Conclusions. See also CCR, Decision no 603/2015 (paragraph 28).

<sup>49</sup> Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings



answered truthfully and the 'sense requested by the judicial investigation bodies', whatever this may mean, is irrelevant. The amendment should be removed or at least its text clarified.

76. At the first glance, subparagraph (c) corresponds to and is justified in view of the US doctrine of "the fruit of the poisonous tree", whereby no evidence extracted from a witness under torture or any other violation of the Constitutional rights of an individual may be admitted in evidence (*Nix v. Williams*, 467 U.S. 431 (1984)). The same approach was upheld by the European Court of Human Rights (*Gäfgen v. Germany*, no. 22978/05, [GC], 1 June 2010).

77. However, it has to be established that the testimony was extracted from a witness by means of pressure or any unlawful method. A mere claim by the witness that he/she made some statement under pressure should not suffice. It is, therefore, advisable that a phrase like "it is established that" be added to that subparagraph (c).

78. Subparagraph (d) seems problematic because it justifies any 'mere divergence of testimonies' unless "*direct evidence* exists that should prove their deceitful nature and ill faith". The notion of 'mere divergence of testimonies' is extremely vague and can possibly include any false statement. At the same time the Commission notes that demanding 'direct evidence' of ill faith is too high a threshold.

79. The offence set forth in Article 273, like any other offence, is to be proven beyond a reasonable doubt (according to amendment to article 103 CPC, in the future these will need to be proven "beyond any doubt", see comments under Section B.2.c) and the criminal intention of that offence has to be proven beyond a reasonable doubt as well, which means that no person may be convicted for having committed the crime of 'false testimony' unless it is proven that he/she had an intent to lie. Therefore, no further "protections" or "exceptions" are necessary. In addition, the hearing of witnesses is already regulated in a detailed manner by Section IV (Articles 114 to 124) and a number of other provisions of the Criminal Procedure Code. In the light of the above comments the proposed amendment to Article 273 CC appears as superfluous and should be removed or at least redrafted in a clearer manner, taking into account the comments above.

#### **f. Compromising the interests of justice (Article 277 CC)**

80. The proposed amendments to Article 277 paragraphs 1-3 CC extend the scope of the offense of unlawfully revealing confidential information in criminal cases. Unlawful disclosure of information in a criminal trial, where it is prohibited by law, becomes a crime, even if these acts do not hinder or obstruct the criminal prosecution. This issue will be dealt with in more detail below in the context of the amendments to the Code of Criminal Procedure.

81. In addition, two new paragraphs (3<sup>1</sup>) and (3<sup>2</sup>), inserted following paragraph (3), are aimed at providing increased protection of the suspect/defendant's presumption of innocence and, respectively, of the right to a fair trial:

*"(3<sup>1</sup>) The action taken by the public servant who, before a final conviction decision is rendered by a court, makes a reference to a suspect or to a defendant as if the person had already been convicted shall be punishable by no less than 6 months and no more than 3 years of imprisonment. Should such a statement be made on behalf of a public authority, the penalty shall be increased by one third.*

*(3<sup>2</sup>) Violation of the right to a fair trial, to have one's case tried by an impartial and independent judge through any intervention which affects the process of random distribution of cases shall be punishable by no less than 6 months and no more than 3 years of imprisonment."*

82. Concerns have been expressed, in particular by members of the judicial profession, as to the lack of precision, clarity and predictability which would affect some of the proposed changes. For many interlocutors of the Venice Commission these changes, considered in conjunction with some of the recent amendments to the Romanian justice laws,<sup>50</sup> may also be seen as an element of pressure on magistrates.

83. Questions have been raised as to the circumstances when the disclosure becomes an offence, the prohibited terms, and the active subject of the offence: would new para 3<sup>1</sup> be applicable to any public statement or reference made by a public servant, irrespectively of the context where the statement is made? Would this provision be applicable to a public prosecutor referring, in the context of the appeal, to the fact that the accused was convicted in first instance? Also, the terms "any intervention" in new paragraph 3<sup>2</sup> have been subject of criticism for their lack of precision.<sup>51</sup>

84. According to the Romanian authorities, the proposed provisions, notably new paragraph (3<sup>1</sup>), are, such as those in Article 273 CC, part of the transposition in national law of the requirements of Directive (EU) 2016/343.<sup>52</sup> Reportedly, the amendments are also meant to address cases of undue disclosure, in the public space, of information related to pending criminal cases, notable corruption cases involving high public officials, as well as alleged violation of the presumption of innocence in such and other cases.

85. Yet, the provisions of Directive (EU) 2016/343 have been drafted in a more precise way, both as regards the potential offenders, the statements, as well as the circumstances where the presumption of innocence of suspects and accused may be put at risk.

86. Under the Directive, the measures which are necessary to prevent and sanction undue public reference to guilt "*shall be without prejudice to acts of the prosecution which aim to prove the guilt of the suspect or accused person, and to preliminary decisions of a procedural nature, which are taken by judicial or other competent authorities and which are based on suspicion or incriminating evidence*" (Article 4.1) and "*shall not prevent public authorities from publicly disseminating information on the criminal proceedings where strictly necessary for reasons relating to the criminal investigation or to the public interest.*" (Article 4.3). Moreover, as it results from the Directive's Preamble, when taking such measures, States should have due regard to the national provisions regarding immunity and the national law protecting the freedom of press and other media.

87. One should also note that no provision in the Directive requires criminal liability and criminal sanctions in relation to "Public references to guilt". Article 4 only requires that appropriate measures be available in case of breach of the obligation not to refer to the suspect or accused as being guilty, while Article 10 provides that effective remedies should be in place for suspects and accused in such cases. Disciplinary liability would seem more appropriate and usual than criminal sanctions in such cases and the punishment by imprisonment up to 3 years seems excessive, the alternative of a fine not being provided.

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<sup>50</sup> Law no. 303/2004 on the status of judges and prosecutors, Law no. 304/2004 on the judicial organisation and Law no. 317/2004 on the Superior Council of Magistracy. For example, Article 96 of Law 303 on magistrates' financial liability; the new section for investigating magistrates in Law 304; the ban on providing public information for magistrates in Law 303.

<sup>51</sup> Potential difficulties have also been signalled as to the future application of new paragraph 3<sup>2</sup> of Article 277 CC, since no reference is made to possible exceptions from the random distribution of cases, such as those resulting from Article 598 CPC, on "challenges against enforcement". Similarly, issues of consistency have been raised between new paragraph 3<sup>2</sup> of Article 277 CC and a proposed new paragraph (2) to be inserted under Article 8 CPC, which refers to the random "assignment of all cases to judges *and prosecutors*".

<sup>52</sup> Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings

88. It is recommended to reconsider the proposed amendments of and additions to Article 277 CC and deal with violations of the presumption of innocence rather in the context of disciplinary proceedings.

#### **g. Giving bribes (Article 290 CC)**

89. Under the current form of Article 290(3), a bribe giver will not be held responsible for offering a bribe if he/she reports the crime “prior to the criminal investigation bodies be notified”. This is a widespread approach across the world, in line with Article 37 of the UNCAC,<sup>53</sup> based on the idea to encourage such offenders to cooperate with investigative authorities in order to detect bribe taking practices and to bring to justice bribe takers. However, under the amendments it is proposed to add a sentence to Article 290(3) whereby the bribe giver will be forgiven if he/she reports the crime “no later than 1 year since the action was committed.”

90. Knowing that, in practice, denunciations of bribery are mostly recorded at a later stage, this amendment will obviously discourage bribe givers from co-operating with law enforcement organs and make it much harder to uncover (and consequently to prosecute and to prove) corruption offenses.

91. According to the Romanian authorities, the amendment intends to avoid encouraging criminal culture, in the absence of any time limit, and responds to a recommendation of GRECO.

92. It is true that GRECO has pointed out that a cause of immunity that operates automatically, with no real judicial control and without a deadline leaves room for abuse, if proper safeguards are not in place. It has therefore recommended that the Romanian authorities “*analyse and accordingly revise the automatic - and mandatorily total - exemption from punishment granted to perpetrators of active bribery and trading in influence in cases of effective regret*”.<sup>54</sup> These considerations indeed justify some limits, for example in some cases complete exoneration from punishment could be replaced by a reduction of the penalty. A rigid one-year deadline also appears too short.

93. It is recommended to reconsider the proposed “one year” deadline with a view to introducing more nuanced limitations, based on a thorough impact analysis and taking into account related risks of abuse, in such a way as to ensure a balance between the need to effectively prosecute crimes and the state’s duty to hold accountable all persons who have committed crime.

#### **h. Influence trading (Article 291 CC)**

94. Paragraph (1) of Article 291 is proposed to be amended in such a way that it should no longer be enough for a conviction to prove that the accused has promised to exert influence on a public servant to make him/her perform or not to perform some action, but in addition, the prosecution will have a duty to prove that the accused actually took steps to influence the public servant. To the extent that such conduct is not criminalized by other criminal provisions, such as those on fraud, this approach is in conflict with Article 12 of the Criminal Convention on Corruption (for which it is irrelevant “*whether or not the influence is exerted or whether or not the supposed influence leads to the intended result*”), and with Article 18 of the UNCAC.

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<sup>53</sup> Article 37(3): “*Each State Party shall consider providing for the possibility, in accordance with fundamental principles of its domestic law, of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention*”.

<sup>54</sup> GRECO, *Third Evaluation Round, Evaluation Report on Romania*, (Theme I), 3 December 2010, paragraph 115.VI

95. The amendment also provides, as a constitutive element of the offence, that the deed needs to be committed strictly in order to obtain a *material*<sup>55</sup> benefit (“money or other *material* benefits”), and not just money or “other benefits”, as under the current wording of Article 291.

96. In practice, however, non-material benefits (such as, for example, getting an eligible seat on a party’s candidacy list) appear to be the more frequent and usual form of corruption. It seems evident that such a restrictive approach to the offence of influence trading is not likely to respond to the need to effectively protect important social values, which are not of material nature. Moreover, this approach, which does not respond to any decision of the Constitutional Court, is in contradiction with Article 12 of the Criminal Convention on Corruption, and with Article 18 of the UNCAC, which refer, respectively, to “any undue benefits”, and to “undue advantage”. Having regard to the obligations assumed by Romania by ratifying these instruments, the criminalization of corruption offenses must comply with the express requirements established by their provisions.

97. It is recommended to revise the new definition of the offence, in order to bring it in line with the requirements resulting from UNCAC and the Criminal Convention on Corruption.

#### **i. Buying of influence (article 292 CC)**

98. As in Article 290 a one year limitation for reporting the offence without being punished, is introduced in relation to the offence of buying influence in paragraph 2 of Article 292 CC. The comments made above on Article 290 apply *mutatis mutandis*.

#### **j. Embezzlement (Article 295 CC)**

99. The offence of embezzlement, defined in the current Article 295 CC as “*acceptance, use or traffic of money, valuables or any other assets managed or administrated by a public servant, on their or on another person’s behalf*”, could until now be investigated on *ex officio* basis. A new paragraph (3) to be added to Article 295 provides that criminal proceedings in cases of embezzlement should be initiated based on a criminal complaint and that reconciliation should result in the removal of criminal liability. The amended text, when read in conjunction with the Criminal Procedure Code,<sup>56</sup> now requires that criminal proceedings for embezzlement have to be initiated by the individual or legal entity that has suffered the damage. Thus, *ex officio* investigations will no longer be possible for this offence.

100. Usually public servants manage public money, valuables or other assets - something that belongs to the public at large. It is therefore in the interest of the public at large to bring the offender to justice and not just in the interest of the public body to which the asset belongs. There is therefore no justification to require a criminal complaint by this specific body. As a matter of principle, the general public may not be put in a position that, when it comes to such a serious offence, it will have to depend on the choice of a certain ‘victim’ to file or not to file a complaint or reconcile or not to reconcile with the offender. Leaving these steps to the discretion of the “victim” could result in the substantial impunity of the offence of embezzlement.

101. Moreover, there will not infrequently be cases, where the offender is the head of the institution and the only individual capable of making a complaint on its behalf. Such individuals would likely go unpunished. Arguably, they could be removed via the organisation’s own disciplinary structures, after which a complaint could be made by his/her replacement. In reality, however, it may be difficult to remove such an individual where investigations would be limited to the organisation’s own internal procedures, and in the absence of police powers of search and seizure in respect of the individual’s personal financial data.

<sup>55</sup> The word “material” is missing in the English translation in CDL-REF(2018)045.

<sup>56</sup> Art. 295(1) CPC states: “A criminal investigation shall only start on the basis of receiving a prior complaint by the victim, in the case of offenses for which the law mandates it.”

102. The exclusion of *ex officio* investigations should therefore be removed.

**k. Abuse of office (Article 297 CC)**

103. The proposed amendment to Article 297 CC comprehensively rewrites paragraph 1, thereby significantly restricting the scope of as well as the penalties for the offence. A further amendment adds a new paragraph (3), aimed at excluding from the scope of paragraph (1) and paragraph (2),<sup>57</sup> the process of drafting, issuance and approval of acts adopted by the Parliament or the Government. In addition, related Article 13<sup>2</sup> of Law no. 78/2000 (regarding prevention, detection and sanctioning of corruption acts)<sup>58</sup> is repealed.

104. The amendment to paragraph 1 provides that

- not any violation of professional duties but only the violation of duties specifically regulated through laws, government ordinances or emergency ordinances falls under this article;
- the action/inaction by which the public servant violates the law must have the purpose of obtaining undue a material<sup>59</sup> benefit for himself/herself, a family member or a relative (up to the second degree), but not for any third party;
- the conduct causes a certain and effective damage (the current form requires only a damage), higher than a specific threshold (established as “the equivalent of the national minimum gross wage”) or a damage to the rights and interests of natural/legal persons;
- the maximum penalty is reduced from 7 years to 5 years, with the possibility to apply a fine, as an alternative sanction;
- the mandatory ban on the holding of public office for those guilty of this offence is abolished.

105. The first amendment on the definition of the duties the violation of which constitutes the offence provides for more precision in the definition of the offence and responds to a judgment of the CCR (Decision No 405/2016), where CCR ruled that the provisions of paragraph 1 were constitutional only to the extent that the term “faultily” (in the sentence “fails to implement an act or implements it faultily”) is understood as “by violating the law”. It was the duty of the legislative power to implement this judgment and this part of the amendment is therefore welcome.

106. The same cannot be said of the amendment limiting the advantage sought by the violation of the duty to undue proceeds for the official and his family. It appears legitimate, in principle, to require that the public servant acts to obtain an undue advantage for somebody but this should not be limited to family members. In this respect the Constitutional Court explained that the existence of a relation of kinship/friendship between the civil servant and the person who has acquired the advantage is without relevance for the offence, the determining condition being that an undue advantage be obtained by a person (the civil servant or a third party).<sup>60</sup>

107. In a more recent judgment of 26 September 2018, in relation to a proposed amendment to Law 78/2000 on the prevention, detection and sanction of corruption, the CCR ruled that, by altering the normative content of an offence assimilated to corruption in order to condition it by the fact of obtaining undue advantage only for him/herself, and only of material nature, the text infringes Article 1 paragraph (3) of the Constitution on the rule of law. The constitutionality of this part of the amendment is therefore doubtful. It is also difficult to identify any legitimate aim which would be pursued by this amendment. A civil servant deliberately violating his

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<sup>57</sup> Paragraph (2) of Article 297 CC, sanctioning discriminatory acts by public servants, remains unchanged.

<sup>58</sup> Law No. 78/2000 on the prevention, detection and sanction of corruption, Article 13<sup>2</sup>: “*in the case of abuse of office or abuse of the position offences, if the public servant obtained an undue advantage for himself/herself or another, the special limits of the penalty shall be increased by one third.*”

<sup>59</sup> The word ‘material’ does not appear in the English translation in CDL-REF(2018)045.

<sup>60</sup> CCR, Decision No 405/2016, paragraphs 65, 66, 89. See also CCR, Decision nr. 392/2017

professional obligations often will do so to provide an undue advantage to his friends or people who might further his future career. There is no reason why such behaviour should not be punishable. Usually, the offence of abuse of office is dependent on the receipt or intention of receiving a benefit. If the requirement is narrowed so that there must be a material benefit, only for the official or a family member, this will indeed exclude from the offence obvious circumstances of corruption where an office is abused to achieve an advantage for third parties. For cases of abuse of office involving economic interests, it may be appropriate to require that personal gain be sought. The intended material benefit triggering the crime should, however, extend beyond the individual and his/her family members, and include benefits to individuals and organisations in which the official has an interest - for example, a political party<sup>61</sup>.

108. Moreover, a proposed amendment to Article 16 of the Criminal Code on the definition of guilt risks making convictions even more difficult. A new sentence has been added to subparagraph (a): “*Whenever the criminal law stipulates that, in order to be criminalized, an action must be committed for a certain purpose, that offence should have been committed with direct intent, and this should result without any doubt from the specific circumstances of the case*”. It therefore appears that, if the purpose of obtaining undue benefit cannot be proven beyond reasonable doubt, the act no longer constitutes a crime of abuse of office, even if there has been material damage or if the legitimate rights or interests of (natural or legal) persons have been damaged.<sup>62</sup>

109. It also seems questionable to require “an effective and ascertainable material damage” higher than the equivalent national minimum gross wage. While it seems justifiable to exempt from punishment situations where the damage caused was minimal,<sup>63</sup> the requirement of an “effective and ascertainable material damage” is questionable. The precise consequences of such offences are often difficult to determine. Many among those working in the field see the current amendments as a *de facto* decriminalisation, which will seriously impair the effectiveness of efforts trying to eradicate situations in which public officials abuse the position of their office.<sup>64</sup> The prosecution would have to prove like for any other element of crime, ‘beyond any doubt’ (as prescribed by amended Article 103(2) CPC), that the civil servant

<sup>61</sup> See Venice Commission, Report on the relationship between political and *criminal ministerial responsibility* (CDL-AD(2013)001), paragraph 102.

<sup>62</sup> In this connection, it is noted that, through a further amendment, Article 298 CC professional negligence is repealed. While it may be disputed whether mere negligence should come within the scope of the criminal law, it is noted that, according to information provided by the Public Prosecutor’s Office, between 2014 and 2017, 233 people were indicted for negligence, i.e. for illegal acts affecting rights or legitimate interests of natural or legal persons, involving a total damage amounting to over 1 million euros. The abrogation of Article 298 CC was not required by the Constitutional Court (See in this respect the analysis of the Court in its Decision no 405/2016: the Court time pointed out, with reference to the offence of professional negligence, as defined in Article 298 CC [culpable breach of the professional duty...] that it was the legislator’s option to criminalize the commission of the abuse of service in both direct and indirect intent, without thereby infringing the constitutional provisions.

<sup>63</sup> See CCR, Decision No 405/2016. In its analysis of the existing definition of the abuse of office by the Romanian legislator, the CCR, with reference to the Report of the Venice Commission on the relationship between political and *criminal ministerial responsibility* (CDL-AD(2013)001), stressed the importance of the application of the principle *ultima ratio* in criminal matters. In particular, the Court referred to the position of the Venice Commission that national criminal provisions on “abuse of office”, “abuse of power” and similar expressions should be interpreted narrowly and be invoked only in cases where the deed is of a serious nature. In this connection, the Court noted that the Romanian legislator had not established a value threshold for the damage nor a degree of intensity for the injury. It should be noted that the report by the Commission deals only with ministerial responsibility and refers to the seriousness of the offence and not to the amount of damage. In a subsequent decision (Decision nr. 392/2017), the Court, while reiterating the above comments, also pointed out that “*the legislator has the obligation to regulate the value threshold of the damage and the intensity of the damage to the legitimate right or interest resulting from the commission of the offense of abuse in service*”. For the Court, the absence of such thresholds is likely to lead to situations of incoherence and instability, contrary to the principle of legal certainty with its requirements of clarity and predictability (paragraph 56).

<sup>64</sup> See the press release of the Prosecutor’s Office attached to the High Court of Cassation and Justice of 3 July 2018 ([http://www.mpublic.ro/en/content/c\\_03-07-2018-17-07](http://www.mpublic.ro/en/content/c_03-07-2018-17-07)) and the press release of DNA of 6 July 2018 (<http://www.pna.ro/faces/comunicat.xhtml?id=8898>).

concerned was conscious of the effective and ascertainable material damage. This may be very difficult.

110. No justification for the new requirements may be found in Romania's obligations under the relevant international instruments. The definition of the "abuse of functions", under Article 19 of the UNCAC, is formulated in much less restrictive terms than that in the proposed amendment to Article 297: *"Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the abuse of functions or position, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity."* Both, the limitation of beneficiaries and the mandatory consequence of an "effective and ascertainable material damage", as new elements of the crime in the proposed definition, are in conflict with Article 19.

111. The amendment to the notion of 'public servant, as discussed above, will also reduce to a great extent the scope of the offence and will leave unpunished a considerable number of cases of abusive conduct by persons authorized to execute public service.

112. As noted above, the amendment to Article 297 reduces the maximum penalty from seven to five years, and provides a fine as an alternative penalty. One may wonder what legitimate aim was pursued by reducing the maximum sanction specifically for this corruption offence. If this was done for the sake of 'liberalisation', it remains unclear why similar measures were not taken with respect to other corruption crimes, such as, taking and giving bribes and trading in and buying of influence (see Articles 289-292 of the Criminal Code).

113. It is worth mentioning, in this connection, that by the amendment of Article 309 CC, the abuse of office is also excluded from the list of offences for which the penalty is increased by one half if the offence has extremely severe consequences. Incidentally, the amendment of Article 309 not only excludes without any reason the abuse of power from the list, but reduces from one half to one third the aggravating circumstance for the other corruption offenses.

114. The diminution of the maximum penalty also needs to be considered in connection with the amendments to Article 154 (1) CC, which will result, for corruption offences that are currently punishable with the maximum penalty of seven years, in a limitation term for criminal liability from 8 to 6 years. For the abuse of office, the limitation term for criminal liability will even be reduced to five years (see Article 154(d)). Since abuse of office cases are often complex and difficult to discover, this will often lead to the closure of the criminal case or the decision to stop the trial. According to information provided to the Venice Commission,<sup>65</sup> criminal liability for deeds committed before 2011 will be removed, irrespectively whether the cases are under criminal investigation or trial.

115. Another problematic change is that the new text of the offence now also repeals a mandatory ban on holding public office following conviction, which in practice means that that the public official will stay in office after a conviction for abuse of office (see in this connection comments under "Ancillary sanctions"). By contrast, it seems obvious that it is desirable to remove public officials, who have abused their office, from their positions.

116. The proposed changes to Article 297 appear indeed to create, without a convincing justification, the premises for a *de facto* decriminalisation of many facts amounting to the offence of abuse of office; as stressed by most interlocutors of the Venice Commission in Romania, this will make it much harder/quite impossible to prosecute and convict people for this

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<sup>65</sup> Information provided by the Forum of Romanian Judges

offence.<sup>66</sup> This is in contradiction both with Romania's international obligations under the anti-corruption instruments and the country's own efforts in this direction, as well as with the requirements of the rule of law, and CCR case-law.<sup>67</sup>

117. In view of the above observations, the proposed amendment to Article 297 paragraph 1 CC should be revised in the light of the comments made above and Romania's obligations under the anti-corruption international instruments.

## **2. Amendments to the Criminal Procedure Code (CPC)**

### **a. Communication on on-going criminal investigations (Article 4 CPC)**

118. As already noted before, the official explanation is that the amendments to the CPC are due to the need, like for a number of provisions of the CC, to bring the Romanian legislation in line with, *inter alia*, Directive 2016/343/EU on the presumption of innocence.

119. Another justification for the amendments in Article 4 CPC lies, according to the special Parliamentary Committee, in the need to address concerns raised by "*a constant practice of the Prosecutors' Offices, which brutally violated the provisions of the Directive, namely to issue press releases from the beginning of the criminal investigation, in which were detailed the facts and the name and function of the person investigated. Often, these people learnt from the press that they were investigated before they were summoned in the Prosecutor's Office.*" This measure was also necessary in order to counter high-profile cases of "*exposure of the people placed in custody to the press, especially people holding important dignitaries in the state. Subsequently, some were acquitted or the case returned to the Prosecutor's Office, but their public image remained related to the picture of themselves in handcuffs.*"

120. Article 4 was thus amended (by adding six new paragraphs (3) to (8)) so that: no communications or information can be issued by public entities in relation to on-going criminal investigations or trials unless the communication is itself necessary for the purpose of the investigation, or justified by a public interest provided by law; persons within public authorities may not refer to the suspects or the accused persons as being guilty unless a final decision ordering conviction; suspects shall not be presented publicly wearing handcuffs or any other means of physical restraint and shall not be affected by any other means which might induce the public perception that they are guilty. Moreover, where information is publicly communicated by the judicial bodies on the initiation of criminal investigation and/or other procedural measures (such as pre-trial measures or indictment) of a person, the same bodies will also be obliged to publish, in the same conditions, the decisions to close the case, drop criminal charges / terminate criminal proceedings, to return the case to the prosecutor's office.

121. All the six new paragraphs were designed to ensure greater protection for the defendant's right to the presumption of innocence. This has to be welcomed in principle. However, some of the new provisions may be excessive and detrimental to the right of the public to be informed about and protected from criminality.

122. In particular, the first sentence of paragraph (3) categorically bans any disclosure by the public authorities of any information "on the facts and the persons" against whom criminal proceedings are underway. However, paragraph (4) sets an exception whereby

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<sup>66</sup> According to the official statistics provided to the Venice Commission, between 2014 and 2017, 2099 people were indicted (for a total damage amount of 4,017,356,809 lei).

See <https://www.agerpres.ro/english/2018/07/03/supreme-court-says-changes-to-abuse-of-office-in-criminal-code-exceed-issues-analysed-by-constitutional-judges--139010>

<sup>67</sup> See CCR Decision no. 224/2017, paragraph 34. See also, above quoted Rule of Law Checklist.



information on the on-going criminal proceedings may be communicated to the public only when this is justified by “public interest” or “when this is necessary and in the interest of uncovering and investigating the truth in the case”.

123. In the landmark case of *Allenet de Ribemont v. France* the ECtHR noted that “[f]reedom of expression, guaranteed by Article 10 (art. 10) of the Convention, includes the freedom to receive and impart information. Article 6 para. 2 (art. 6-2) cannot therefore prevent the authorities from informing the public about criminal investigations in progress, but it requires that they do so with all the discretion and circumspection necessary if the presumption of innocence is to be respected.” (*Allenet de Ribemont v. France*, no. 15175/89, 10 February 1995, § 38). The ruling further specifies that “a distinction must be made between decisions or statements that reflect the opinion that the person concerned is guilty and those which merely describe a state of suspicion. The former violate the presumption of innocence, while the latter have on several occasions been found to be in conformity with the spirit of Article 6 of the Convention.”

124. In short, a distinction should be made between alleging the guilt of a suspect on the one hand, and providing factual information to the public on the other hand. The proposed new paragraphs (3) and (4) of Article 4 CPC now prohibit both categories of statement, whereas international standards clearly only prohibit the first category. In view of the conditions, under Article 10 § 2 ECHR, to allow restrictions on the freedom of expression, including the right to ‘receive information’, it is difficult to conclude, with all due consideration for the explanations provided by the Romanian authorities, that these provisions meet the “necessary in a democratic society” standard in the sense of the ECtHR case law.

125. The EU Directive 2016/343 specifies in a detailed manner, in Recitals (18) and (19), the acceptable exceptions on the obligation imposed upon public authorities not to refer to suspects or accused persons as being guilty, including when they provide information to the media; in addition, the Directive points to the importance of the proportionality and reasonability requirements in making exceptions to the above obligation, but also to the necessary balance between the due respect of the presumption of innocence of suspects and accused, and national law protecting the freedom of press and other media.<sup>68</sup>

126. By contrast, the proposed wording in Article 4 CPC (especially new paragraph (3)) appears as too general and not sufficiently clear to prevent a much more rigid and restrictive enforcement of the obligation foreseen by the EU Directive. For example, it is not clear whether the authors of the prohibited communication/statements need to be public authorities or whether the prohibition applies to all persons. Nor is it clear whether it is prohibited to “provide information” only to the public, or whether the prohibition also concerns the exchange of information, between judicial bodies, in the framework of the judicial procedure.

127. The new paragraph (6) - the rule that persons suspected of having committed an offence shall not be presented publicly wearing handcuffs or any other means of physical restraint and shall not be affected by any other means which might induce the public perception that they are guilty - is not fully in line with Article 5 (2) of the EU Directive and related Recital (20). Unlike the Directive, paragraph (6) does not provide for any exceptions to the above rule. Such exceptions may relate either to security reasons (i.e. to prevent suspects or accused from harming themselves or others or from damaging any property), or be aimed at preventing suspects or accused from entering in contact with third persons,

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<sup>68</sup> The recommendations made by the Consultative Council of European Prosecutors to the Committee of Ministers of the Council of Europe are also of relevance in this respect. See Opinion No. 10 (2015) on the role of prosecutors in criminal investigations (paras 52 and 55) and Opinion No. 12 (2017) on the role of prosecutors in relation to the rights of victims and witnesses in criminal proceedings of 30 November 2017 (recommendation 4).

such as witnesses or victims. Moreover, the sentence “any other means which might induce the public perception” lacks precision.

128. It is recommended to revisit new paragraphs (3) and (6) in line with the EU Directive 2016/343, in order to provide the necessary legal clarity and to ensure both the defendant’s right to be presumed innocent and the public’s right to be informed about on-going criminal proceedings (including those which involve high-profile politicians charged with corruption offences). The Preamble to the Directive provides useful guidance in this respect.

#### **b. Starting a criminal investigation (Article 305 CPC)**

129. New Article 305(1<sup>1</sup>) introduces a maximum period of one year from the beginning of an *in rem* criminal investigation during which the criminal investigation *in personam* must commence or the case has to be closed.

130. To justify the proposed time limit, the authors of the draft refer to the need to put a stop to a practice allegedly common at the level of the prosecutor’s offices, which is claimed to be in breach with the suspect’s right of defence and presumption of innocence and with the equality of arms: the investigation is conducted by gathering all evidence for the indictment, in order to prove the guilt of the suspect, without starting the criminal investigation *in personam*, and this, although the person suspected for having committed the offence is known.

131. It is possible for criminal procedure codes to include time restrictions on the duration of a criminal investigation (Article 6 ECHR requires “a fair and public hearing within a reasonable time [...]”). However, such time limits should not be rigid as every criminal investigation will come across unexpected difficulties or developments which require extra time. It is normal for time limits related to criminal investigation to be open to a possibility of extension through approval by a higher prosecutorial authority or a judicial authority.

132. A one year time limit for investigating alleged crimes, regardless of the nature of the offence and the degree of complexity of the case, appears to be too short a period of time, especially with regard to large and complex cases involving serious crimes.<sup>69</sup> In the modern era, when criminals across the world can take advantage of the achievements of technological progress in the field of communications, transparency of state borders and visa-free movement from country to country, and other benefits of the modern world, it would be naïve to think that one year is a more-or-less reasonable and adequate period of time for establishing the names and personalities of offenders, especially in cases of organized crime and with international ramifications. For the prosecution it will be particularly difficult to comply with the new time limit since it will have to respect the higher standard of proof introduced by the current changes (see comments below) and be confronted with the lack of sufficient human and other resources.<sup>70</sup>

133. In the absence of any “fall-back” option (for example by granting an extension of time by a higher prosecutorial authority or a judicial authority), a perverse consequence of the amendment could be that investigations into the most serious forms of crime become the least effective. A situation could even arise that prosecutors no longer pursue investigations into these complicated cases and focus primarily on investigations which they are convinced to be able to bring to a close within a year. Such a situation would be utterly undesirable from a societal perspective.

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<sup>69</sup> According to figures provided by DIICOT and DNA, 4700 and, respectively, 2300 files would have to be shelved as a result of this amendment.

<sup>70</sup> See CDL-PI(2018)007.

134. In sum, this new time bar may lead to a big number of criminal cases being closed, including those involving extremely serious crimes (murders, organised crime, assaults, rapes, terrorist acts, and other violent crimes), let alone corruption offences.<sup>71</sup> This seems to be at odds with the obligation for the state to ensure that its criminal system is effective in the fight against serious forms of crime, that criminal law constitutes a strong deterrent to commit such offences, and that perpetrators of such offences do not enjoy impunity.

135. The time limit introduced by new Article 305(1<sup>1</sup>) appears as too short and too rigid and should be reconsidered with a view to establishing a more realistic time limit, coupled with a mechanism allowing its extension, according to the nature and complexity of the case.

### **c. Thresholds for investigations and sentences**

136. A number of provisions of the CPC have been amended in order to introduce a new threshold for the investigation. In addition, rules on the evidence required for a conviction were also modified.

137. Ordinarily, the evidentiary threshold will differ throughout the various stages of the criminal procedure. A relatively low threshold will apply at the early stages of an investigation which allows the prosecutor to 'build a case'. The threshold for opening a criminal file will be low. Generally speaking, the more intrusive the investigatory methods become, the higher the evidentiary threshold and level of authorization should be. Search warrants, special investigative and surveillance techniques, arrest for questioning or orders seeking records or data, have to be assessed according to different thresholds against the purpose and nature of the step and of the offence, and the level of interference which it gives rise to. Some such steps may be justified if they are *reasonably necessary* for the conduct of the investigation. The steps which are focused on a particular suspect will require *some link to the offence*. In Article 5(1) ECHR the test for arrest to face trial is one of "reasonable suspicion."<sup>72</sup>

138. At the other end of the spectrum is the evidentiary threshold needed to secure a conviction. Under the ECHR, the standard of proof for conviction must be "beyond any reasonable doubt" or an equivalent formula which is high, but not impossible. A gap in the prosecution evidence may lead to a plausible doubt about the prosecution case and require an acquittal.

139. The amendments involve a change to the level of proof required at the investigation stage from "reasonable presumption or suspicion" to variations on the test of "well-grounded indications" (in Romanian: "indicii temeinice"; in French: "indices bien fondés") or "evidence or well-grounded indications".

140. If the amendments are promulgated, the standard "evidence or well-grounded indications" or its variations will thus be required to carry out a broad range of procedural steps, including but not limited to: Initiation of criminal proceedings based on belief that a person committed an offence (Article 15); Preparation of relevant fact-finding reports by relevant bodies (Article 61, paragraphs (1) and (2)); Treating a person as a suspect (Article 77); Granting a status of threatened witness (Article 125); Implementing controlled delivery in

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<sup>71</sup> See in this connection Article 29 of the UNCAC; see Recommendation Rec(2000)19 on the Role of public prosecution in the criminal justice system adopted by the Committee of Ministers on 6 October 2000, esp. pp. 14 and 26 which states that prosecutors should be "*in a position to prosecute without obstruction public officials for offences committed by them, particularly corruption, unlawful use of power, grave violations of human rights and other crimes recognised by international law*". Obstruction means *any* hindrance placed in the path of prosecution. This recommendation stems from the underlying rationale of the document, i.e. that it is prosecutors "*who are primarily responsible for the overall effectiveness of the criminal justice system*".

<sup>72</sup> Article 5 ECtHR: "[...] c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so."

cases of entry, transit or exit of illicit goods (Article 138 (12)); Ordering and implementing electronic surveillance for the national security and other serious offences (Article 139, paragraphs (1) and (2)); Ordering and implementing withholding, surrender and search of postal deliveries (Article 147, paragraphs (1) and (2)); Authorising the deployment of undercover investigators when some qualified offences as indicated are committed (Article 148, paragraphs (1) and (1)(a)); Ordering financial institutions to provide information about financial data (Article 153(1)); Ordering an immediate preservation of computer data (Article 154(1)); home search warrants and implementing search and seizure (Article 158, paragraphs (1), (2) and (11), Article 159 (13)); Implementing bodily search (Article 165(2)); Ordering a person to surrender objects, documents or computer data (Article 170(1)); Ordering or replacement of preventive measures (Article 202(1), 215(7), 217(9)); Ordering pre-trial arrest (Article 223(1)).

141. The exact meaning and scope of the new concepts remains unclear in the absence of a more circumstantiated explanation in the Explanatory memorandum to the legislative amendments,<sup>73</sup> or domestic case-law interpreting the newly introduced notion. During the visit to Bucharest, it appeared that there were different understandings (if not confusion) among the interlocutors met, of the new concepts or formulae proposed and what their effect would be, which shows that there is a high risk that the lack of clarity surrounding the newly introduced formulae will create legal uncertainty in legal practice.

142. Although it is difficult, at this stage, to predict with high degree of precision the implications that these changes may have or whether the changed formula is of great significance in reality, it is to be anticipated that the new standard, will make the law enforcement's job unnecessarily more complicated, which could be particularly problematic in the early stages of investigations. This would be at odds with the obligation for the state to ensure that its criminal system is effective in the fight against serious forms of crime.

143. The amended text of Article 99 (2) appears to require mandatory acquittal where there is "any doubt" as to the guilt of the accused. This is stricter than the traditional wording "beyond reasonable doubt" used by the ECtHR and might suggest acquittal even where doubts are unreasonable. The same test now applies for conviction in Art. 103 (2), which shall be ordered only when the court is convinced that the charge was proven "beyond any doubt", the word *reasonable* having been removed.<sup>74</sup>

144. The Venice Commission recommends revisiting the proposed new evidentiary requirements on the basis of a careful evaluation of their potential impact on the efficiency of criminal proceedings.

#### **d. Inability to use certain forms of evidence**

145. Some of the amendments to the CPC relate to the use of certain forms of evidence during the criminal procedure. Two categories of amendments can be discerned in this regard:

- (1) amendments which require a new/extended (judicial) warrant before the evidence is admitted to the criminal file (for ex. Article 143 on wiretapping and Article 168 on search of a computer system; the same holds true, to a great extent, for Article 153 on obtaining financial transaction data);
- (2) amendments which exclude the use of certain types of evidence (for ex. Article 139).

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<sup>73</sup> The Explanatory Note only states in this respect: "taking into account that the CPC uses the terms "suspicion", "reasonable suspicion", "reasonable presupposition", in order to ensure accessibility and predictability, it is proposed to replace these terms in all texts throughout the CPC with the terms 'clear evidence, beyond any doubt'".

<sup>74</sup> The English translation in CDL-REF(2018)045 is wrong in this respect.

*Amendments which require a new/extended (judicial) mandate*

146. Under the first category, new paragraph 4<sup>1</sup> of Article 143 eliminates the possibility for the criminal investigation bodies of using recorded communications which have been legally obtained as evidence for other offences. According to new paragraph 15<sup>1</sup> added to Article 168, data obtained during a computer search may not be used for broader investigative purposes (in other criminal cases or as evidence for other acts than those for which the search has been authorized). To use such evidence for other offences or in other cases, “*the warrant may be extended to also include those offences*” (Article 143), or “*a computer search warrant may also be requested in connection to those acts or persons*” (Article 168). Additionally, it is now foreseen that, after the final decision is reached in the case, the recorded conversations/data obtained must be deleted or, as applicable, destroyed (“*unless a warrant for wiretapping is also obtained for the remaining conversations*” (Article 143).

147. In principle there are no objections against the introduction of the requirement for a new or extended warrant. On numerous occasions, the ECtHR has found a violation of the ECHR because the judicial warrant was drafted in a very general manner.<sup>75</sup> On the basis of ECtHR case-law, one may thus conclude that, as such, the requirement to ask for a supplement of the warrant/a new warrant is in line with the standards developed by the European Court. In Romania, there are credible allegations of an excessive use of wiretapping, including in the framework of protocols of co-operation between the intelligence service and judicial and prosecutorial institutions,<sup>76</sup> which justify adopting more restrictive provisions on its use.

148. While the introduction of this new or extended warrant can therefore not be questioned in principle, the rules applicable to this new instrument have to be clear and precise to avoid unintended negative consequences for criminal investigations. As it stands, the notion of “supplementing” the warrant (the scope of the warrant) is unclear. No indication is provided as to whether the extended warrant (or the new warrant) would extend to the past (a retroactive judicial approval of the interception of communications/data obtained relating to crimes not described in the original order)<sup>77</sup> or would only be applicable for the future. During the exchanges with the delegation of the Venice Commission, some interlocutors have expressed their view to the delegation that the extended warrant would never extend to the past and would only be applicable for the future. This would mean that, if wiretapping of a conversation was authorized for a different purpose, a reference to a serious crime such as murder could not be used for purposes of criminal prosecution (see also Article 142 (5) CPP and Article 5 CPP). This is clearly not in the interest of society as a whole.

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<sup>75</sup> ECtHR 9 December 2004, *Van Rossem v. Belgium*, appl. no. 41872/98, para. 45; ECtHR 24 July 2008, *André and others v. France*, appl. no. 18603/03, para. 45; or ECtHR 22 December 2008, *Aleksanyan v. Russia*, appl. no. 46468/06, para. 217

<sup>76</sup> See Venice Commission, Romania - Preliminary Opinion [...], CDL-PI(2018)007.

<sup>77</sup> See in this respect the “plain view doctrine” developed by the US Supreme Court, suggesting that “[o]bjects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence.” (*Harris v. United States*, 390 U.S. 234, 236 (1968); see also *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Texas v. Brown*, 460 U.S. 730 (1982)).

See also US Code § 2517(5): “When an investigative or law enforcement officer, while engaged in intercepting wire, oral, or electronic communications in the manner authorized herein, intercepts wire, oral, or electronic communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable”, and related case-law of US courts having upheld the constitutionality of above-quoted provision of § 2517(5) (*United States v. Skarloff*, 323 F. Supp. 296, 307 (S.D. Fla. 1971), *aff'd*, 506 F.2d 837 (5th Cir.), *cert. denied*, 423 U.S. 847 (1975); *United States v. Escandar*, 319 F. Supp. 295, 300-01 (S.D. Fla. 1970).

149. Romanian interlocutors of the Commission have pointed to a lack of clarity of the provisions in other respects. For example, the amended provision fails to specify whether a new warrant should be asked in the framework of the same case, or it will be necessary to draw up a new case. In addition, no indication is provided as to the procedure by which the warrant may be extended: who may request the extension/the new mandate; which is the court competent to decide; which is the period in which the application may be filed.<sup>78</sup>

150. An amendment to Article 153 (new paragraph 1<sup>1</sup>) provides that, financial data obtained from a credit institution may only be used against the persons indicated in the request and not as evidence against other persons. In this article, however no reference is made to the possibility of obtaining a new or extended approval from the judge, as it is the case in Articles 143 and 168 CPC.

*Amendments which exclude the use of certain types of evidence*

151. The amended Article 139 (3) CPC establishes that only those recordings of an individual made by the individual can be used against that individual (whereas recordings of third parties about the individual cannot). This replaces the previous, more flexible rule that other recordings may be used unless prohibited by law. The new rule may be too rigid and the consequences of this change should be evaluated carefully.

152. While the Venice Commission supports the intention to better protect individuals against intrusions into their privacy, it recommends to review the new rules to provide sufficient clarity for their application and to ensure that they do not have unintended consequences, such as when a suspect may have committed more than one offence.<sup>79</sup>

**e. Defendant's rights (Articles 83, 92, 99 (2), 145, 305, 307 CPC)**

*The right to be informed of/participate in all prosecution acts*

153. As a consequence of an amendment to Article 83 CPC, a right is conveyed to the suspect or defendant "*to be notified on the date and hour of the prosecution act by the prosecution body*". Article 92 is amended to the effect that "*[t]he suspect or the defendant may participate to any criminal prosecution act or to any hearing, based on his/her request*" (current provisions only allow the lawyer of the suspect or defendant to participate). Under the new Article 307, failure to comply with the requirements of Article 83 will entail the "absolute nullity" of all prosecution acts, in accordance with Article 281 (e).<sup>80</sup>

154. The assertion, often made during the exchanges held in Romania, that the effect of these new provisions may seriously impair the effectiveness of the criminal investigation seems to be well-founded. In case of *in personam* investigations, this requirement *de facto* means that the public prosecutor will have to inform the suspect from the outset when

<sup>78</sup> The US Code instructs that "such application shall be made as soon as practicable". The US courts have interpreted this provision quite loosely. For example, in *United States v. De Palma* (461 F. Supp. 800 (S.D.N.Y. 1978), the court ruled that the plain view interceptions were admissible even though the investigators did not apply for § 2517(5) amendment until six months after terminating surveillance under the original order.

<sup>79</sup> According to DNA, for example, if it is discovered that a person investigated for a murder had his phone wiretapped in another case, by another judicial body, at the time the victim was murdered, under the amended rules, these recordings cannot be used to determine whether the perpetrator was located in place where the murder was committed. (DNA, Press release, published on 22 June 2018).

See also US case-law, where one court has held: "[e]vidence of crimes other than those authorized in a wiretap warrant are intercepted "incidentally" when they are the by-product of a bona fide investigation of crimes specified in a valid warrant. Congress did not intend that a suspect be insulated from evidence of one of his illegal activities gathered during the course of a bona fide investigation of another of his illegal, activities merely because law enforcement agents are aware of his diversified criminal portfolio." (*US v. McKinnon*, F.2d 19 (1st Cir. 1983)).

<sup>80</sup> According to Article 281 (e), the violation of the provisions making obligatory the presence of the suspect/accused, is a ground for absolute nullity.

investigatory acts aimed at collecting evidence are used in his/her respect. If a suspect is given prior notice, for example, of a search it seems more than likely that this will enable the suspect to destroy evidence. The new requirement appears particularly problematic in case there are several suspects.

155. Similar considerations apply with regard to the right of the suspect to participate in hearings, including witnesses' hearings, during the prosecution phase. Such a right might have a discouraging effect on witnesses to come forward. This might be especially true for victims of rape or sexual abuse.

156. The Commission acknowledges that the presence of the accused at prosecution acts is often required under Article 6(3)(d) ECHR. The case-law of the ECtHR provides useful guidance in this respect.

157. The European Court has indeed developed case law which favours the exercise of the rights of the defence, taking into account, however, the status of the accused (whether detained or not) and the progress of the proceedings. In the case of *Lisica v Croatia* for example, the Court stated:

*"The Court stresses that it might be that in certain circumstances, such as where the identity of perpetrators is unknown or where any delay in securing the evidence might cause it to perish, the police or other competent authorities will have to carry out searches or other acts aimed at securing evidence without the presence of the defendants. However in the present case the defendants had been identified as potential perpetrators and arrested [...] Furthermore, nothing in the case-file suggests that the evidence in question was of a perishable nature. Therefore, there was no good reason to carry out the searches in question without the presence, or even knowledge, of the applicants or their counsel or at least in the presence of some neutral witnesses."*<sup>81</sup>

158. In the same way, the European Court has clearly stated that the rights of the defence "as a rule require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of proceedings".<sup>82</sup> (emphasis added)

159. The Court does however not call for the unconditional approach taken by the Romanian legislator in new Article 83 CPC and new Article 92 CPC. The Court in fact indicates that *a search without the presence or knowledge of the suspect would not always be considered problematic*. Also, the Court does not exclude situations where the rights of the witnesses may require that criminal proceedings be conducted in such a way that those interests are not unjustifiably imperilled. In making the assessment, under Article 6 (1) ECHR, of the overall fairness of the criminal proceedings, the Court itself "will look at the proceedings as a whole having regard to the rights of the defence but also to the interests of the public and the victims that crime is properly prosecuted (see *Gäfgen v. Germany* [GC], no. 22978/05, § 175, ECHR 2010) and, where necessary, to the rights of witnesses (see, among many authorities, *Doorson*, cited above, § 70)".<sup>83</sup>

160. It would be usual, indeed, to have restrictions on attendance at searches in order to maintain the integrity of the search itself. Further, it would be usual that there might be

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<sup>81</sup> ECtHR, *Lisica v Croatia*, application no. 20100/06, 25 February 2010, para. 58

<sup>82</sup> ECtHR [GC] 15 December 2011, *Al-Khawaja and Tahery v. United Kingdom*, applications. nos. 26766/05 and 22228/06, para. 118

<sup>83</sup> *Idem*

restrictions on the involvement of the suspect if there were grounds to believe that the suspect might intimidate witnesses or third parties<sup>84</sup>.

161. One may add in this respect that, although Directive 2013/48/EU of 22 October 2013 on the right of access to a lawyer in criminal proceedings<sup>85</sup> has encouraged states to allow the suspect/accused to be assisted by his/her lawyer during investigative measures or evidence-gathering measures, it subjected this to the condition that those acts are provided for under national law and that the suspect or accused person be required or permitted to attend the act concerned (§ 26 and Article 3 (c) (3) of the Directive). The proposed changes to the Romanian CPC go much further by allowing the suspect to participate in all investigative actions, including those against other persons.

162. In view of the observations made in the preceding paragraphs, the proposed changes to Article 83 CPC and Article 92 CPC should be reconsidered, in order to better reconcile the rights of the defence with the interests of the victims and witnesses, as well as the interest of the public that crime be properly prosecuted and sanctioned.

### ***Access to the evidentiary material***

163. *Additional amendments give the suspect broad access to the case-file as well as the evidence collected by the public authorities (amended Article 305 and 307 CPC).*

164. The ECtHR does not require that the lawyer and his client have access at all times to incriminating and exculpatory evidence: "*The Court considers that Article 6 of the Convention cannot be interpreted as guaranteeing unlimited access to the criminal case file before the first interrogation by the investigating judge where the domestic authorities have sufficient reasons relating to the protection of the interests of justice not to impede the effectiveness of the investigations.*"<sup>86</sup> This clearly shows that the right of access to the case file is not absolute but has to be balanced with the interests of justice.

165. The EU Directive 2012/13 of 22 May 2012 on the right to information in criminal proceedings<sup>87</sup> has indeed enhanced the access of the suspect and his/her lawyer to the case-file already at the investigation stage. The Directive nevertheless only provides that access to all evidence shall be given "in due time" and "at the latest upon submission of the merits of the accusation to the court" (see Articles 6 and 7). Moreover, it admits that access to the evidentiary material, whether in favour or against the suspect or accused person, may be refused, in accordance with national law, "*where such access may lead to a serious threat to the life or fundamental rights of another person or where refusal of such access is strictly necessary to safeguard an important public interest.*" Hence, it cannot be inferred from the European directive an "absolute" right for the suspect/accused to access at any time all the evidence collected by the public authorities.

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<sup>84</sup> ECtHR, 26 March 1996, *Doorson v. the Netherlands*, Application no. 20524/9, para. 70: "*It is true that Article 6 (art. 6) does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 (art. 8) of the Convention. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organize their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify.*"

<sup>85</sup> Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

<sup>86</sup> ECtHR, *AT v. Luxembourg*, Application No. 30460/13, 9 Apr. 2015 (Final 14/09/2015), § 81

<sup>87</sup> Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, see recital 32 and Article 7(4).



166. It is recommended that the new provisions concerning the access of the suspect and his/her lawyer to the case-file be reconsidered, to be brought fully in line with the European approach to this issue, as reflected in the ECtHR case-law.

*Reduced penalty following denouncement*

167. The amendment in new paragraph (1<sup>1</sup>) of Article 290 CPC introduces a one-year time-limit for reporting a crime in order to have the limits for the penalty reduced, according to the relevant legislative provisions.<sup>88</sup> One of the explanations provided by the Romanian authorities is that the amendment aims at putting an end to alleged cases, in recent years, of late crime reporting, sometimes false reporting and/or made under the pressure of prosecutors. This amendment, which goes much further than the amendments to Articles 290 and 292 of the Criminal Code commented upon above since it does not only exclude that the persons goes completely unpunished but also excludes a mere mitigation of the penalties, after the one-year deadline, should be reconsidered (See comments made in relation to the amendments to articles 290 and 292 CC).

**f. Confiscation measures**

168. The amendment in Art. 249 (4) introduces, as a requirement for ordering special and extended confiscation, that there be “*evidence or well-grounded indications*” that assets are the proceeds of crime. As pointed out in relation the amendment proposed to Article 112<sup>1</sup> of the Criminal Code, such very high standard of evidence is not required by paragraph 1 of Article 5 of Directive 2014/42/EU, and has as a consequence that it will make it very difficult to enforce the confiscation of the proceeds of criminal offences, as an “effective and dissuasive” measure to combat criminality. The comments made in relation to the Amendment of Article 112<sup>1</sup> CC are applicable also to the amendment in Art. 249 (4) CPC.

**g. Signing of judgments**

169. The amendment in Article 406 (2) CPC reads: “*The decision shall be drafted by one of the judges who participated in the adjudication of the case and shall be signed by all the members of the panel of judges who participated in the presentation of evidence and in the trial on the merits of the case and by the Registrar.*”

170. While this may appear formalistic, it is indeed necessary for every criminal legal system to have provisions in place to cover the circumstances where a trial and deliberation is completed and a decision made but the panel or judges or some of them are not available to sign the judgment. The Explanatory memorandum to the Draft amendments in this respect refers to a recent decision of the Constitutional Court,<sup>89</sup> referring *inter alia* to related ECtHR case-law.<sup>90</sup> The European Court indeed found that the applicants’ right to a fair trial had been violated because of the failure of the judge (in a single judge panel) who conducted their trial to provide written grounds for the verdict and because of the absence of any appropriate measures to compensate for that deficiency, be it by involving another judge at an early stage of the procedure, or by providing verbal reasoning. What appears essential for the Court is that the judgment should not be signed by persons *not having participated* in the deliberations.

171. From a practical perspective, any difficulty which could arise from this new paragraph is in principle resolved by the not amended paragraph 4 of Article 406, providing a solution

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<sup>88</sup> See Art. 19 of Law no. 682/2002 on the protection of witnesses; see also OUG (Government emergency ordinance) no. 43 of 4 April 2002 (as updated), article 19.

<sup>89</sup> CCR, Decision no. 33/2018, see paragraphs 175-179.

<sup>90</sup> *Cerovšek and Božičnik v. Slovenia*. Applications nos. 68939/12 and 68949/12, 7 March 2017; see also *Cutean v. Romania*, Application no.53150/12, 2 December 2014.

for the cases of absence of one of the participant judges in the adjudication of the case: *“(4) When any of the members of the judicial panel cannot sign the ruling, it shall be signed by the president of the judicial panel in the former’s place. When the president of the judicial panel cannot sign the ruling either, it shall be signed by the president of the court. When the clerk cannot sign the ruling, it shall be signed by the chief clerk. In all the cases, it shall be indicated in the ruling what caused them to be unable to sign it”.*

172. However, it should be noted that this solution does not appear consistent with the amendment introduced in Article 453 (1), new subparagraph (g), by which *“failure to draft and/or sign the conviction decision by the judge who participated in the adjudication of the case”* is introduced as a new ground for revision of final judicial decisions. During the exchanges held by the rapporteurs in Romania, concerns have been expressed that this amendment, coupled with the provisions of Article II of the *Final and transitional provisions* would entail a real risk of potentially opening the door to requests for the re-trial of already finally concluded cases, notwithstanding paragraph 4 of Article 406.

173. It is recommended to reconsider the amendment to Art. 453 in order to provide a legislative solution which is respectful of the principle of consistency and legal certainty, in line with the principles resulting from the ECtHR case-law. (See also comments under “Final and transitional provisions”).

#### **h. Final and transitional provisions**

174. According to Article II of the Final and transitional provisions, all proposed amendments to the CPC will be applicable to pending cases, as well as to the final judicial decisions rendered before the entry into force of the amending law. Moreover, *“[t]he judgments issued before the coming into force of this Law may be appealed using the avenues for appeal provided for by this Law and will be also reviewed from the perspective of the reasons regulated by this Law”* and *“[t]he deadlines for appealing judgments issued before the coming into force of this Law and for the reasons provided by this Law start from the time of the Law’s coming into force.”*

175. The precise meaning of these provisions is not clear and they were interpreted in different ways during the visit of the rapporteurs to Romania. Regarding pending cases, the provision could be interpreted as providing for the application of the new rules only to procedural acts taking place as from the entry into force of the law but this is not clearly reflected in the text. The text could also be interpreted as providing that all procedural steps taken before the entry into force of the law would have to be assessed according to the amended provisions of the CPC, which were not in force at the time when the case at issue was originally dealt with. This should be clarified in favour of the first interpretation.

176. The scope of paragraphs 2 and 3 is also not very clear. In its submission to the Constitutional Court, the High Court of Cassation and Justice contests the constitutionality of these provisions since they would allow for extraordinary legal remedies against final criminal judgments rendered prior to the entry into force of the law. According to the representatives of the High Court whom the rapporteurs met, this would concern a very high number of cases. This could have serious negative consequences for legal certainty and for the functioning of the Romanian criminal justice system.

177. As to the “reasons provided by this Law”, it is noted that the CCR has recently ruled, in its Decision no. 377/2017,<sup>91</sup> that introducing new grounds for revision, with the potential

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<sup>91</sup> CCR, Decision no. 377/2017 on the plea of unconstitutionality of the provisions of the Law for the approval of Government Emergency Ordinance no. 95/2016 for the extension of certain deadlines and for laying down the necessary measures for the preparation of the implementation of certain provisions of Law no. 134/2010 on the Civil Procedure Code, see paragraphs 81-90.

effect of calling into question a significant number of judgments which have acquired the force of *res judicata*, was in breach of the principles of the non-retroactivity of the law and of legal certainty. By doing this, an extraordinary means of appeal would be transformed into a regular remedy, a “disguised appeal”, allowing for a new judicial review of final judgments. The Court stressed, with reference to Article 15 (2) of the Constitution, that the legislator can submit final judgments only to remedies which existed on the date when the judgment was rendered. Therefore, once the judgment is final, the removal or addition of a new ground of appeal cannot have any effect on the judgment already rendered. For the Court, such a legislative solution would be in breach of both the principle of legal certainty (Article 1 (5) of the Constitution) and of the requirements of the rule of law as an underlying principle of Romania's democracy (Article 1 (3) of the Constitution). This reasoning of the Constitutional Court should be taken into account for the drafting and interpretation of the transitional provisions.

178. In view of the uncertainties deriving from the proposed text of Article II, it is recommended to reconsider this article and revise it, while ensuring that the transitional solutions proposed are fully respectful of the requirements of legal clarity and certainty and in particular of the principle of *res iudicata*.

## **VI. Conclusion**

179. It was necessary and appropriate for the Romanian parliament to undertake a reform of the criminal codes in order to implement Constitutional Court decisions and relevant EU Directives, as well as to address past shortcomings noted in the application of existing provisions of criminal law.

180. The manner in which the reform was carried out was, however, in no way adequate for a comprehensive reform of two of the most important and sensitive codes. The amendments under review were adopted in a legislative process which was excessively fast and lacking transparency, despite the fact that there were more than 300 amendments, many of them bringing quite radical change and affecting profoundly the criminal policy of the state. During the procedure of their adoption, there were frequent changes in the texts, making a meaningful consultation of experts and practitioners and a meaningful discussion within society nearly impossible.

181. Legal practitioners, including the High Court of Cassation and Justice and the heads of the prosecution service warned that the entry into force of the amendments could have drastic negative consequences for the functioning of the Romanian criminal justice system. These warnings were not heeded. A more comprehensive process of discussion, based on dialogue with legal practitioners and society at large, and assessing in detail the impact of the numerous amendments, would have been not only advisable but even necessary.

182. The fact that this subject has proven to be very divisive for Romanian society, should have been an additional reason to hold more effective consultations. This divisive nature of the amendments under review is not only along political lines. Also, institutions are clashing (the President of the Republic, the High Court of Cassation and the Prosecutor General for example versus the Parliament). In such a situation there is a need for all institutions to avoid excessive rhetoric and to take more time in order to search for broader support of the legislative package. Neither the public nor the opposition were sufficiently informed about the process. In fact there has been insufficient dialogue with civil society, professional organisations, opposition parties and some institutional players.

183. The haste with which these amendments were passed had a negative impact on the quality of the legislation. The Commission noted during its visit that among interlocutors there exists much uncertainty about the rationale behind particular amendments, the exact substance of some of the amendments passed, and especially the impact which certain amendments will

have in practice. In addition, the new codes will contain – if all amendments enter into force – intrinsic contradictions that cause legal uncertainty for many years to come.

184. Some of the proposed amendments are in conflict with the international obligations of the country, especially regarding the fight against corruption, or go far beyond the requirements resulting from the case law of the Constitutional Court or the country's international obligations. The Commission is concerned that, taken separately, but especially in view of their cumulative effect, many amendments will seriously impair the effectiveness of the Romanian criminal justice system in the fight against various forms of crime, including corruption-related offences, violent crimes and organised criminality.

**185. In the light of the above considerations, it is recommended that the Romanian authorities conduct an overall re-assessment of the amendments to the criminal and criminal procedure codes, through a comprehensive and effective consultation process, in order to come up with a solid and coherent legislative proposal, benefiting from broad support within the Romanian society, and taking fully into account the applicable standards. The findings of the Constitutional Court in respect of the amendments to the two Codes will provide further guidance in this process.**

186. **The Commission in particular recommends to the Romanian authorities:**

***As far as the Criminal Procedure Code is concerned***

- to thoroughly review the amending law as a whole, taking into account the specific comments made in this opinion, so as to ensure that the reform will not have a negative impact on the functioning of the criminal justice system. While the whole set of amendments should be thoroughly reviewed, in particular the rules on communication on on-going criminal investigations (Article 4), starting a criminal investigation (Article 305), evidentiary thresholds and inability to use certain forms of evidence (Articles 139, 143, 153, 168), and the right to be informed of and participate in all prosecution acts (Articles 83 and 92) should be amended in substance, and the final and transitional provisions reconsidered.

***As far as the Criminal Code is concerned, in addition to some other amendments to be made in the light of the comments made in this opinion,***

- to reconsider and amend, in the light of the comments made in this opinion, the provisions regulating corruption-related offences, in particular bribery (Article 290), influence trading and buying (Articles 291 and 292), embezzlement (Article 295) and abuse of service (Article 297) ;
- to reconsider and amend, in the light of the comments made in this opinion, some other provisions with a more general impact, such as those on the statute of limitations (Articles 154-155), false testimony (Article 273) and compromising the interests of justice (Article 277 CC);
- to reconsider and amend the provisions on extended confiscation measures (Art. 112<sup>1</sup>) and the definition of public servant (Art. 175), ancillary penalties (Article 65), in order to bring them in line with the country's international obligations.